VOLUME I-PARTS 1 TO 51

REVOLUTIONARY FEDERAL ACQUISITION REGULATION OVERHAUL

GENERAL SERVICES ADMINISTRATION

DEPARTMENT OF DEFENSE

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Effective: July 1, 2026

TITLE 48-FEDERAL ACQUISITION REGULATIONS SYSTEM

Chapter1

FEDERAL ACQUISITION REGULATION

Volume I

FOREWORD

The FAR is the primary regulation for use by all executive agencies in their acquisition of supplies and services with appropriated funds. It became effective on April 1, 1984, and is issued within applicable laws under the joint authorities of the Administrator of General Services, the Secretary of Defense, and the Administrator for the National Aeronautics and Space Administration, under the broad policy guidelines of the Administrator, Office of Federal Procurement Policy, Office of Management and Budget.

The FAR precludes agency acquisition regulations that unnecessarily repeat, paraphrase, or otherwise restate the FAR, limits agency acquisition regulations to those necessary to implement FAR policies and procedures within an agency, and provides for coordination, simplicity, and uniformity in the Federal acquisition process. It also provides for agency and public participation in developing the FAR and agency acquisition regulation.

On April 20th, 2026, the Federal Acquisition Regulatory Council has updated the Revolutionary FAR Overhaul (RFO) to conform with the changes to support the implementation of Executive Order (E.O.) 14398, Addressing DEI Discrimination by Federal Contractors, dated March 26, 2026.

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FEDERAL ACQUISITION REGULATION

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1.000 Scope of part.

This part describes the framework and guiding principles for the Federal Acquisition Regulations System (the System).

Subpart 1.1 - Framework

1.101 Framework.

(a) The System is a collection of acquisition regulations and guidance, and consists of the following:

(1) The Federal Acquisition Regulation (FAR), which is a single acquisition regulation for all acquisitions (see 2.101), and all executive agencies. The FAR is located at 48 CFR chapter 1.

(2) Agency acquisition regulations that implement or supplement the FAR (see 48 CFR chapters 2 through 99); and

(3) Acquisition guides, which show best practices (add link to location).

(b) The System does not include internal guidance supplementing agency acquisition regulations described in paragraph (a)(2) of this section.

1.102 Guiding principles for the System.

(a) The System will-

(1) Meet an agency's mission efficiently and effectively first;

(2) Ensure the most effective use of taxpayer dollars in ways that recognize the value of time, encourage innovation, promote merit, satisfy the customer, and balance these interests and objectives;

(3) Maximize buying commercial products or commercial services rather than requiring Government-unique solutions;

(4) Award contracts to contractors who demonstrate a superior ability to perform;

(5) Promote competition and fair opportunity;

(6) Conduct business with integrity, fairness, and openness; and

(7) Delegate the authority to make decisions and the accountability for the decisions to the lowest level within the System, consistent with law. The contracting officer must have the authority, to the maximum extent practicable and consistent with law, to determine how and when to apply rules, regulations, and policies on a specific contract.

(b) (1) Acquisition team members in the System include Government acquisition representatives from the technical, supply, sourcing, small business and procurement areas; the customers they support; and the contractors who deliver the products and services.

(2) The role of each acquisition team member in the System is to exercise personal initiative and sound business judgment to meet the agency's mission and manage risk.

(3) To continually promote innovation, the FAR encourages acquisition team members to pursue new approaches, and document successes and lessons learned.

(4) In this spirit, acquisition team members may assume that if a specific strategy, practice, policy, or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, then they are allowed to use the strategy, practice, policy, or procedure.

(5) Acquisition team members should work together as a team and be empowered to make decisions within their area of responsibility.

(6) Acquisition team members can propose deviations from FAR regulations if the deviation would promote economy, efficiency, or innovation (see subpart 1.3).

(c) To achieve efficient operations, the System must focus on "risk management." Attempting to eliminate all risk is prohibitive in terms of cost to the taxpayer.

1.103 Authority.

(a) The System has been developed according to the requirements of 41 U.S.C. chapter 13, Acquisition Councils.

(b) The Federal Acquisition Regulatory Council, or FAR Council, consists of the Administrator for Federal Procurement Policy, the Secretary of Defense, the Administrator of General Services, and the Administrator of National Aeronautics and Space. The FAR is prepared and jointly issued by the FAR Council under their several statutory authorities.

1.104 Publication and code arrangement.

(a) Changes to the FAR are published in the daily issue of the Federal Register. A cumulative version of the FAR is published–

(1) In the Code of Federal Regulations (CFR), in an annually updated version, at https://www.govinfo.gov/app/collection/cfr, and as a daily updated version at ecfr.gov; and

(2) In an enhanced daily updated version available at https://www.acquisition.gov/browse/index/far.

(b) Each numbered unit or segment (*e.g.*, part, subpart, section, etc.) of an agency acquisition regulation that is codified in the CFR must begin with the chapter number. However, the chapter number assigned to the FAR will not be included in the numbered units or segments of the FAR.

(c) Using the FAR coverage at (d) as a typical illustration, reference to the part would be "FAR part 9" outside the FAR and "part 9" within the FAR. Reference to the section would be "FAR 9.106" outside the FAR and "9.106" within the FAR.

(d) If required by 41 U.S.C. 1707, proposed revisions must be published in the Federal Register for public comment.

(e) The General Services Administration is responsible for establishing and operating the FAR Regulatory Secretariat to publish and distribute the FAR through the CFR system.

1.105 OMB approval under the Paperwork Reduction Act.

The list of information collections and recordkeeping requirements contained in this regulation have been approved by the OMB. They can be found at www.acquisition.gov/FAR-PRA.

1.106 Certifications.

Unless allowed under 41 U.S.C. 1304, the FAR must not require a certification from an offeror or contractor.

1.107 FAR conventions.

(a) *Words and terms*. (1) Definitions in part 2 apply to the entire regulation unless specifically defined in another part, subpart, section, provision, or clause. Words or terms defined in a specific part, subpart, section, provision, or clause have that meaning when used in that part, subpart, section, provision, or clause.

(2) Undefined words retain their common dictionary meaning.

(b) *Delegation of authority.* Each authority is delegable unless specifically stated otherwise.

(c) *Dollar thresholds*. (1) Unless otherwise specified, a specific dollar threshold is the final anticipated dollar value of the action, including the dollar value of all options.

(2) The final anticipated dollar value must be the highest final priced alternative to the Government, including the dollar value of all options, if the action establishes—

(i) A maximum quantity of supplies or services to be acquired;

(ii) A ceiling price; or

(iii) The final price to be based on future events.

(d) *Applying FAR changes to solicitations and contracts*. Unless otherwise specified—

(1) FAR changes apply to solicitations issued on or after the effective date of the change;

(2) Contracting officers may, at their discretion, include the FAR changes in solicitations issued before the effective date, provided award of the resulting contract(s) occurs on or after the effective date; and

(3) Contracting officers may, at their discretion, include the changes in any existing contract with appropriate consideration.

(e) *Citations*. When the FAR cites a statute, Executive order, Office of Management and Budget circular, Office of Federal Procurement Policy policy letter, or relevant portion of the Code of Federal Regulations, the citation includes all applicable amendments, unless otherwise stated.

(f) *Required action*. When a sentence directs action, the contracting officer is responsible for the action, unless another party is expressly cited.

1.108 Statutory acquisition–related dollar thresholds-adjustment for inflation.

The FAR adjusts statutory acquisition-related dollar thresholds for inflation every 5 years. The statute at 41 U.S.C. 1908 establishes the calculation used to escalate the thresholds. The statute also identifies certain thresholds that must not be escalated. A matrix of the most recent calculations is available at http://www.regulations.gov (search FAR Case 2024-001, open the docket folder, and go to the supporting documents file).

1.109 Regulatory sunset.

All FAR sections that are not required by statute must expire 4 years after the effective date of the sections, unless renewed by the Federal Acquisition Regulatory Council.

1.110 Positive law codification.

Titles 40 and 41 of the United States Code were revised and reorganized, as a result of positive law codifications. A table identifying the original "popular name" of the public laws in those titles, and how they are referred to in the FAR, is available at www.acquisition.gov/renamingpubliclaws.

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Subpart 1.2 - Agency Acquisition Regulations

1.201 Policy.

(a) (1) An agency head may issue agency acquisition regulations that are necessary to implement the FAR, or to supplement the FAR to satisfy a specific agency need, according to 41 U.S.C. 1303(a)(2).

(2) Agency acquisition regulations must not—

(i) Unnecessarily repeat, paraphrase, or otherwise restate material contained in the FAR or higher-level agency acquisition regulations; or

(ii) Conflict or be inconsistent with the FAR, except as required by law or as provided in subpart 1.3.

(b) (1) If required by 41 U.S.C. 1707, agencies must publish their acquisition regulations for comment in the Federal Register. However, publication is not required for issuances that merely implement or supplement higher level issuances that have previously undergone the public comment process, unless such implementation or supplementation results in an additional significant cost or administrative impact on contractors or offerors or effect beyond the internal operating procedures of the issuing organization.

(2) Agencies must also comply with other applicable statutes, (*e.g.*, the Paperwork Reduction Act (44 U.S.C. 3501, *et seq*.) and the Regulatory Flexibility Act (5 U.S.C. 601, *et seq*.)).

(c) An agency head may authorize internal agency guidance at any organizational level (*e.g.*, designations and delegations of authority, assignments of responsibilities, work-flow procedures, and internal reporting requirements). Internal agency guidance does not need to be published in the Federal Register for comment, unless the agency guidance has a significant effect beyond the internal operating procedures of the agency or creates an additional significant cost or administrative impact on contractors or offerors.

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Subpart 1.3 - Deviations from the FAR

1.300 Scope of subpart.

This subpart prescribes the policies and procedures for authorizing deviations from the FAR. Exceptions regarding the use of forms prescribed by the FAR are covered in part 53.

1.301 Definition.

Deviation means one or any combination of the following:

(a) Issuing or using a policy, procedure, solicitation provision (see definition in 2.101), contract clause (see definition in 2.101), method, or practice of conducting acquisition actions of any kind at any stage of the acquisition process that is inconsistent with the FAR.

(b) Leaving out any solicitation provision or contract clause when its prescription requires including it.

(c) Using any solicitation provision or contract clause with modified or alternate language that is not authorized by the FAR (see definition of “modification” in (a) and definition of "alternate" in 2.101).

(d) Using a solicitation provision or contract clause prescribed by the FAR on a substantially as follows or substantially the same as basis (see definitions in 2.101 and (a)), if such use is inconsistent with the intent, principle, or substance of the prescription or related coverage on the subject matter in the FAR.

(e) Authorizing lesser or greater limitations on the use of any solicitation provision, contract clause, policy, or procedure required by the FAR.

(f) Issuing policies or procedures that govern the contracting process or otherwise control contracting relationships that are not incorporated into agency acquisition regulations according to 1.201(a).

1.302 Policy.

(a) Unless not allowed by law, Executive order, or regulation, agencies may deviate from the FAR as specified in this subpart when necessary to meet an agency’s specific needs (e.g., to encourage developing and testing new techniques and methods of acquisition).

(b) Refer to 31.101 for instructions on deviating from part 31, Contract Cost Principles and Procedures.

(c) Agencies are not authorized to deviate from 30.201-3 and 30.201-4, or the requirements of the Cost Accounting Standards Board (CASB) rules and regulations (48 CFR chapter 99). Refer to 30.201-5 for instructions on deviating from the Cost Accounting Standards.

1.303 Individual deviations.

Individual deviations affect only one contract action. The agency head may authorize individual deviations. The contracting officer must document the justification and agency approval in the contract file.

1.304 Class deviations.

(a) Class deviations affect more than one contract action. A deviation for any solicitation that will result in multiple contract awards will need to be done as a class deviation. When an agency knows that it will require a class deviation on a permanent basis, it may develop and propose a FAR revision.

(b) Agency heads may authorize class deviations from the FAR. Agency-specific class deviations must be approved by the FAR Council, except where required to implement agency-specific executive or statutory direction. Agencies requesting approval must send the proposed class deviation to the FAR Secretariat at GSARegSec@gsa.gov.

(c) The FAR Council will review and provide a decision to the requesting agency within 5 business days, unless the request is urgent. Urgent requests will be decided within 24 hours of receipt of the request. Agencies may proceed if they do not receive responses within these time frames.

(d) Agencies must email a copy of each agency-approved class deviation to the FAR Secretariat at GSARegSec@gsa.gov.

(e) The Administrator for Federal Procurement Policy may require the FAR Council to issue deviation guidance to promote uniformity .

1.305 Deviations pertaining to treaties and executive agreements.

(a) Deviations from the FAR that are necessary to comply with a treaty to which the United States is a party are authorized, unless the deviation would be inconsistent with FAR coverage based on a law enacted after the treaty’s execution.

(b) Deviations from the FAR that are necessary to comply with an executive agreement (*i.e.*, a Government-to-Government agreement, including an agreement with international organizations, to which the United States is a party) are authorized unless the deviation would be inconsistent with FAR coverage based on law.

Subpart 1.4 - Career Development, Contracting Authority, and Responsibilities

1.401 Contracting Functions.

The agency head may establish contracting activities and delegate contracting functions to the contracting activities. Per 41 U.S.C. 3102(b), agency heads may mutually agree to—

(a) Delegate contracting functions and responsibilities from one agency to another; and

(b) Create joint or combined offices to exercise acquisition functions and responsibilities.

1.402 Contracting officers.

1.402-1 Authority.

(a) Only contracting officers may sign, administer, or terminate contracts on behalf of the Government. Contracting officers may bind the Government based on the authority delegated to them. The appointing authority must provide the contracting officer with clear instructions in writing about what they can and cannot do.

(b) Contracting officers have wide latitude to exercise business judgment.

1.402-2 Responsibilities.

Contracting officers are responsible for—

(a) Before signing a contract-

(1) Ensuring it meets all requirements of law, Executive orders, regulations, and all other applicable procedures, including clearances and approvals; and

(2) Ensuring funds are available for obligation;

(b) Ensuring compliance with the contract terms;

(c) Ensuring offerors and contractors receive impartial, fair, and equitable treatment; and

(d) Requesting and considering the advice of specialists in audit, law, engineering, information security, transportation, and other fields, as appropriate.

1.403 Selecting, appointing, and terminating the appointment for contracting officers.

1.403-1 General.

(a) 41 U.S.C. 1702(b)(3)(G) requires agency heads to establish and maintain a procurement career management program, which includes a system to select, appoint, and terminate contracting officers' appointments.

(b) Agency heads or their designees may select and appoint contracting officers and terminate their appointments.

(c) These selections and appointments must be consistent with Office of Federal Procurement Policy (OFPP) standards for skill-based training in performing contracting and purchasing duties as published in OFPP Policy Letter No. 05-01, Developing and Managing the Acquisition Workforce, April 15, 2005, and OFPP Memo dated January 19, 2023, Federal Acquisition Certification in Contracting (FAC-C) Modernization.

1.403-2 Appointment.

(a) (1) Contracting officers must be appointed in writing, using a Standard Form (SF) 1402, Certificate of Appointment. The certificate must state any limitations placed on the contracting officer's scope of authority, other than limitations contained in applicable law or regulation.

(2) Appointing officials must keep copies of all current appointments.

(b) (1) Agency heads should delegate micro-purchase authority to individuals who are employees of an executive agency or members of the Armed Forces of the United States who will use the supplies or services being purchased.

(2) Agency heads must appoint these individuals in writing but are not required to use an SF 1402.

1.403-3 Termination.

(a) Agency heads must terminate a contracting officer appointment by letter, unless the Certificate of Appointment contains other provisions for automatic termination.

(b) Terminations may occur for reasons such as reassignment, termination of employment, or unsatisfactory performance. Agency heads cannot terminate a contracting officer appointment retroactively.

1.404 Contracting officer's representative.

(a) *Designation*. (1) The contracting officer's representative (COR) must be nominated either by the requiring activity or according to agency procedures. The contracting officer designates and authorizes a COR, in writing and according to agency procedures. See 7.104(e), which directs the COR designation as early as possible.

(2) The COR designation must-

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

(ii) Specify the period covered by the designation;

(iii) State the authority cannot be delegated further; and

(iv) State that the COR may be personally liable for unauthorized acts.

(3) (i) Contracting officers may not delegate to a COR responsibilities that are delegated to a contract administration office under 42.202. Contracting officers may assign the COR other duties described at 42.302.

(ii) The contracting officer must communicate the COR's duties clearly and in writing.

(4) The contracting officer must send copies of the COR's designation to the contractor and the contract administration office.

(b) *Types of contracts and orders*. The contracting officer must assign a COR to all contracts and orders other than firm fixed-price contracts and orders. For firm fixed-price contracts and orders, the contracting officer may assign a COR.

(c) *COR Qualifications*. The COR-

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

(2) Must be certified and must maintain certification. The certification must align with the current Office of Management and Budget memorandum on the Federal Acquisition Certification for Contracting Officer Representatives (FAC-COR) guidance, or for DoD, according to DoD policy guidance; and

(3) Must be qualified by training and experience.

(d) *Lack of authority.* A COR has no authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract. The COR must not direct the contractor or its subcontractors to operate in conflict with the contract terms and conditions.

(e) *Responsibilities*.

(1) A COR assists in the technical monitoring or administration of a contract.

(2) The COR must maintain a file for each assigned contract. The file must include, at a minimum—

(i) A copy of the contracting officer's letter of designation and other documents describing the COR's duties and responsibilities; and

(ii) Documentation of COR actions taken according to the delegation of authority.

1.405 Ratification of unauthorized commitments.

(a) *Definitions.*

As used in this section-

Ratification means the act of approving an unauthorized commitment by an official who has the authority to do so.

Unauthorized commitment means an agreement that is not binding solely because the Government representative who made it lacked the authority to enter into that agreement on behalf of the Government.

(b) *Policy.* (1) Agencies should take actions to avoid the need for ratifications.

(2) (i) The head of the contracting activity may ratify an unauthorized commitment, subject to the criteria in paragraph (c).

(ii) Agencies may delegate the authority to ratify an unauthorized commitment. Agencies cannot delegate this authority below the level of the chief of the contracting office.

(3) Unauthorized commitments which involve claims subject to resolution under 41 U.S.C. chapter 71, Contract Disputes, should be processed under subpart 33.2, Disputes and Appeals.

(c) *Criteria.* Agencies may use the authority in paragraph (b)(2) of this section only when—

(1) The Government accepted supplies or services from the contractor, or the Government received a benefit from performance of the unauthorized commitment;

(2) The ratifying official has the authority to enter into a contractual commitment

(3) The resulting contract would otherwise have been proper if made by an authorized contracting officer;

(4) The contracting officer reviewing the unauthorized commitment determines the price to be fair and reasonable;

(5) The contracting officer recommends payment and legal counsel concurs with the recommendation; and

(6) Funds are available and were available at the time the unauthorized commitment was made.

(d) *Nonratifiable commitments.* Actions that do not meet the criteria in paragraph (c) of this section may be subject to resolution according to 31 U.S.C. 3702, or as authorized by subpart 50.1.

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Subpart 1.5 - Determinations and Findings

1.500 Scope of subpart.

This subpart prescribes general policies and procedures for using determinations and findings (D&Fs).

1.501 Definition.

Determination and findings (D&F) means a special form of written approval by an authorized official that is required by statute or regulation before taking certain contract actions.

The *determination* is a conclusion or decision supported by the *findings.* The findings are statements of fact or reasons essential to support the determination, and must cover each requirement of the statute or regulation.

1.502 General.

(a) (1) Ordinarily a D&F applies to an individual contract action. Unless otherwise prohibited, agencies may execute class D&Fs for classes of contract actions (see 1.503). The approval granted by a D&F is restricted to the proposed contract action(s) reasonably described in that D&F. D&Fs may provide for a reasonable degree of flexibility.

(2) Unless the D&F states otherwise, reasonable variations in estimated quantities or prices are permitted.

(b) When an option is anticipated, the D&F shall state the approximate quantity to be awarded at first and the extent of the increase the option permits.

1.503 Class determinations and findings.

(a) A class D&F provides authority for a class of contract actions. A class may consist of contract actions for the same or related supplies, services, or other contract actions that require essentially identical justification.

(b) (1) The findings in a class D&F must fully support the proposed action either for the class as a whole or for each action. A class D&F must be for a specified period, with the expiration date stated in the document.

(2) When a solicitation has been furnished to prospective offerors before the expiration date, the authority under the D&F will continue until award of the contract(s) resulting from that solicitation.

(c) The contracting officer must ensure that individual actions taken under the authority of a class D&F are within the scope of the D&F.

1.504 Content.

At a minimum, each D&F must include the following information:

(a) Identification of the agency and the contracting activity and specific identification of the document as a *Determination and Findings*.

(b) Nature and/or description of the action being approved.

(c) Citation to the appropriate statute and/or regulation upon which the D&F is based.

(d) Findings that detail the particular circumstances, facts, or reasoning essential to support the determination. Necessary supporting documentation shall come from appropriate requirements and technical personnel.

(e) A determination based on the findings that the proposed action is justified under the applicable statute or regulation.

(f) For class D&Fs, an expiration date.

(g) The signature of the official authorized to sign the D&F (see 1.506) and the date signed.

1.505 Replacement and modification.

(a) If a D&F is replaced by another D&F, that action will not invalidate any action taken under the original D&F before the date of its replacement.

The contracting officer is not required to cancel the solicitation if the modified D&F supports the contract action.

1.506 Signatory authority.

When a D&F is required, the appropriate official according to agency regulations must sign it. Authority to sign or delegate signature authority for the various D&Fs is shown in the applicable FAR part.

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PART 2 - DEFINITIONS OF WORDS AND TERMS

Sec.

2.000 Scope of part.

Subpart 2.1 - Definitions

2.101 Definitions.

Subpart 2.2 - Definitions Clause

2.201 Contract clause.

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2.000 Scope of part.

(a) This part-

(1) Defines words and terms that are frequently used in the FAR;

(2) Provides cross-references to other definitions in the FAR of the same word or term; and

(3) Provides for the incorporation of these definitions in solicitations and contracts by reference.

(b) Other parts, subparts, and sections of this regulation (48 CFR chapter 1) may define other words or terms and those definitions only apply to the part, subpart, or section where the word or term is defined.

Subpart 2.1 - Definitions

2.101 Definitions.

A word or a term, defined in this section, has the same meaning throughout this chapter (the Federal Acquisition Regulation (FAR)) unless the context in which the word or term is used clearly requires a different meaning or another FAR part, subpart, or section provides a different definition for the particular part or portion of the part. If a word or term that is defined in this section is defined differently in another part, subpart, or section of this chapter, the definition in this section includes a cross-reference to the other definitions and that part, subpart, or section applies to the word or term when used in that part, subpart, or section.

Acquisition means the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.

Acquisition planning means the process by which the efforts of all personnel responsible for an acquisition are coordinated and integrated through a comprehensive plan for fulfilling the agency need in a timely manner and at a reasonable cost. It includes developing the overall strategy for managing the acquisition.

Activity Address Code (AAC) means a distinct six-position code consisting of a combination of alpha and/or numeric characters assigned to identify specific agency offices, units, activities, or organizations by the General Services Administration for civilian agencies and by the Department of Defense for defense agencies.

Adequate evidence means information sufficient to support the reasonable belief that a particular act or omission has occurred.

Advisory and assistance services means those services provided under contract by nongovernmental sources to support or improve: organizational policy development; decision-making; management and administration; program and/or project management and administration; or R&D activities. It can also mean the furnishing of professional advice or assistance rendered to improve the effectiveness of Federal management processes or procedures (including those of an engineering and technical nature). In rendering the foregoing services, outputs may take the form of information, advice, opinions, alternatives, analyses, evaluations, recommendations, training and the day-to-day aid of support personnel needed for the successful performance of ongoing Federal operations. All advisory and assistance services are classified in one of the following definitional subdivisions:

(1) Management and professional support services, *i.e.,* contractual services that provide assistance, advice or training for the efficient and effective management and operation of organizations, activities (including management and support services for R&D activities), or systems. These services are normally closely related to the basic responsibilities and mission of the agency originating the requirement for the acquisition of services by contract. Included are efforts that support or contribute to improved organization of program management, logistics management, project monitoring and reporting, data collection, budgeting, accounting, performance auditing, and administrative technical support for conferences and training programs.

(2) Studies, analyses and evaluations, *i.e.,* contracted services that provide organized, analytical assessments/ evaluations in support of policy development, decision-making, management, or administration. Included are studies in support of R&D activities. Also included are acquisitions of models, methodologies, and related software supporting studies, analyses or evaluations.

(3) Engineering and technical services, *i.e.,* contractual services used to support the program office during the acquisition cycle by providing such services as systems engineering and technical direction (see 9.505-1(b)) to ensure the effective operation and maintenance of a weapon system or major system as defined in OMB Circular No.A-109 or to

provide direct support of a weapon system that is essential to research, development, production, operation or maintenance of the system.

Affiliates means associated business concerns or individuals if, directly or indirectly either one controls or can control the other; or third party controls or can control both, except as follows:

(1) For use in subpart 9.4, see the definition at 9.403.

(2) For use of affiliates in size determinations, see the definition of "small business concern" in this section.

Agency head or "head of the agency" means the Secretary, Attorney General, Administrator, Governor, Chairperson, or other chief official of an executive agency, unless otherwise indicated, including any deputy or assistant chief official of an executive agency.

Alternate means a substantive variation of a basic provision or clause prescribed for use in a defined circumstance. It adds wording to, deletes wording from, or substitutes specified wording for a portion of the basic provision or clause. The alternate version of a provision or clause is the basic provision or clause as changed by the addition, deletion, or substitution (see 52.105(a)).

Architect-engineer services, as defined in 40 U.S.C. 1102, means—

(1) Professional services of an architectural or engineering nature, as defined by State law, if applicable, that are required to be performed or approved by a person licensed, registered, or certified to provide those services;

(2) Professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and

(3) Those other professional services of an architectural or engineering nature, or incidental services, that members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.

Assignment of claims means the transfer or making over by the contractor to a bank, trust company, or other financing institution, as security for a loan to the contractor, of its right to be paid by the Government for contract performance.

Assisted acquisition means a type of interagency acquisition where a servicing agency performs acquisition activities on a requesting agency's behalf, such as awarding and administering a contract, task order, or delivery order.

Basic research means that research directed toward increasing knowledge in science. The primary aim of basic research is a fuller knowledge or understanding of the subject under study, rather than any practical application of that knowledge.

Best value means the expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement.

Bid sample means a product sample required to be submitted by an offeror to show characteristics of the offered products that cannot adequately be described by specifications, purchase descriptions, or the solicitation (*e.g.,* balance, facility of use, or pattern).

Biobased product means a product determined by the U.S. Department of Agriculture to be a commercial product or industrial product (other than food or feed) that is composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials, or that is an intermediate ingredient or feedstock. The term includes, with respect to forestry materials, forest products that meet biobased content requirements, notwithstanding the market share the product holds, the age of the product, or whether the market for the product is new or emerging. (7 U.S.C. 8101) (7 CFR 4270.2).

Broad agency announcement means a general announcement of an agency's research interest including criteria for selecting proposals and soliciting the participation of all offerors capable of satisfying the Government's needs (see 6.102(d)(2)).

Building or work means construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The terms include, without limitation, buildings, structures, and improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing, and landscaping. The manufacture or furnishing of materials, articles, supplies, or equipment (whether or not a Federal or State agency acquires title to such materials, articles, supplies, or equipment during the course of the manufacture or furnishing, or owns the materials from which they are manufactured or furnished) is not "building" or "work" within the meaning of this definition unless conducted in connection with and at the site of such building or work as is described in the foregoing

sentence, or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project.

Bundling—

(1) Means a subset of consolidation that combines two or more requirements for supplies or services, previously provided or performed under separate smaller contracts (see paragraph (2) of this definition), into a solicitation for a single contract, a multiple-award contract, or a task or delivery order that is likely to be unsuitable for award to a small business concern (even if it is suitable for award to a small business with a Small Business Teaming Arrangement) due to—

(i) The diversity, size, or specialized nature of the elements of the performance specified;

(ii) The aggregate dollar value of the anticipated award;

(iii) The geographical dispersion of the contract performance sites; or

(iv) Any combination of the factors described in paragraphs (1)(i), (ii), and (iii) of this definition.

(2) "Separate smaller contract" as used in this definition, means a contract that has been performed by one or more small business concerns or that was suitable for award to one or more small business concerns.

Business unit means any segment of an organization, or an entire business organization that is not divided into segments.

Certified cost or pricing data means "cost or pricing data" that were required to be submitted in accordance with FAR 15.403-4 and 15.403-5 and have been certified, or is required to be certified, in accordance with 15.406-2. This certification states that, to the best of the person's knowledge and belief, the cost or pricing data is accurate, complete, and current as of a date certain before contract award. Cost or pricing data is required to be certified in certain procurements (10 U.S.C. chapter 271 and 41 U.S.C. chapter 35).

Change-of-name agreement means a legal instrument executed by the contractor and the Government that recognizes the legal change of name of the contractor without disturbing the original contractual rights and obligations of the parties.

Change order means a written order, signed by the contracting officer, directing the contractor to make a change that the Changes clause authorizes the contracting officer to order without the contractor's consent.

Chief Acquisition Officer means an executive level acquisition official responsible for agency performance of acquisition activities and acquisition programs created pursuant to 41 U.S.C. 1702.

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.

Claim means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. However, a written demand or written assertion by the contractor seeking the payment of money exceeding $100,000 is not a claim under 41 U.S.C. chapter 71, Contract Disputes, until certified as required by the statute. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

Classified acquisition means an acquisition in which offerors must have access to classified information to properly submit an offer or quotation, to understand the performance requirements, or to perform the contract.

Classified contract means any contract in which the contractor or its employees must have access to classified information during contract performance. A contract may be a classified contract even though the contract document itself is unclassified.

Classified information means any knowledge that can be communicated or any documentary material, regardless of its physical form or characteristics, that—

(1) (i) Is owned by, is produced by or for, or is under the control of the United States Government; or

(ii) Has been classified by the Department of Energy as privately generated restricted data following the procedures in 10 CFR 1045.21; and

(2) Must be protected against unauthorized disclosure according to Executive Order12958, Classified National Security Information, April 7,1995, or classified in accordance with the Atomic Energy Act of 1954.

Cognizant Federal agency means the Federal agency that, on behalf of all Federal agencies, is responsible for establishing final indirect cost rates and forward pricing rates, if applicable, and administering cost accounting standards for all contracts in a business unit.

Combatant commander means the commander of a unified or specified combatant command established in accordance with 10 U.S.C. 161.

Commercial and Government Entity (CAGE) code means—

(1) An identifier assigned to entities located in the United States or its outlying areas by the Defense Logistics Agency (DLA) Commercial and Government Entity (CAGE) Branch to identify a commercial or government entity by unique location; or

(2) An identifier assigned by a member of the North Atlantic Treaty Organization (NATO) or by the NATO Support and Procurement Agency (NSPA) to entities located outside the United States and its outlying areas that the DLA Commercial and Government Entity (CAGE) Branch records and maintains in the CAGE master file. This type of code is known as a NATO CAGE (NCAGE) code.

Commercial component means any component that is a commercial product.

Commercial computer software means any computer software that is a commercial product or commercial service.

Commercial product means—

(1) A product, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes (i.e., purposes that are not unique to a government), and—

(i) Has been sold, leased, or licensed to the general public; or

(ii) Has been offered for sale, lease, or license to the general public;

(2) A product that evolved from a product described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

(3) A product that would satisfy a criterion expressed in paragraph (1) or (2) of this definition, except for—

(i) Modifications of a type customarily available in the commercial marketplace; or

(ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. A minor modification does not significantly alter the function or essential physical characteristics of an item or component or change the purpose of a process.

(4) Any combination of products meeting the requirements of paragraph (1), (2), or (3) of this definition that are of a type customarily combined and sold in combination to the general public;

(5) A product, or combination of products, referred to in paragraphs (1) through (4) of this definition, even though the product, or combination of products, is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or

(6) A nondevelopmental item developed exclusively at private expense and sold in substantial quantities, on a competitive basis to multiple State and local governments or to multiple foreign governments.

Commercial service means—

(1) Installation services, maintenance services, repair services, training services, and other services if—

(i) Such services are procured for support of a commercial product, as defined in this section regardless of whether such services are provided by the same source or at the same time as the commercial product; and

(ii) The source of such services provides similar services at the same time to the general public under terms and conditions similar to those offered to the Government;

(2) Services, including construction, of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. For purposes of these services—

(i) Catalog price means a price included in a catalog, price list, schedule, or other form that the manufacturer or vendor regularly maintains, customers can inspect, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and

(ii) Market prices means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors; or

(3) A service referred to in paragraph (1) or (2) of this definition, even though the service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

Commercially available off-the-shelf item or COTS item —

(1) Means any item of supply that is—

(i) A commercial product (as defined in paragraph (1) of the definition of "commercial product" in this section);

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

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

(2) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

Common item means material that is common to the applicable Government contract and the contractor's other work, except that for use in the clause at 52.246-26, see the definition in paragraph (a) of that clause.

Component means any item supplied to the Government as part of an end item or of another component, except that for use in—

(1) Part 25, see the definition in 25.003;

(2) 52.225-1 and 52.225-3, see the definition in 52.225-1(a) and 52.225-3(a);

(3) 52.225-9 and 52.225-11, see the definition in 52.225-9(a) and 52.225-11(a); and

(4) 52.225-21 and 52.225-23, see the definition in 52.225-21(a) and 52.225-23(a).

Computer database or "database" means a collection of recorded information in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

Computer software —

(1) Means (i) Computer programs that comprise a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations; and

(ii) Recorded information comprising source code listings, design details, algorithms, processes, flow charts, formulas, and related material that would enable the computer program to be produced, created, or compiled.

(2) Does not include computer databases or computer software documentation.

Computer software documentation means owner’s manuals, user’s manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

Consent to subcontract means the contracting officer’s written consent for the prime contractor to enter into a particular subcontract.

Consolidation or consolidated requirement—

(1) Means a solicitation for a single contract, a multiple-award contract, a task order, or a delivery order to satisfy-

(i) Two or more requirements of the Federal agency for supplies or services that have been provided to or performed for the Federal agency under two or more separate contracts, each of which was lower in cost than the total cost of the contract for which offers are solicited; or

(ii) Requirements of the Federal agency for construction projects to be performed at two or more discrete sites.

(2) "Separate contract" as used in this definition, means a contract that has been performed by any business, including small and other than small business concerns.

Construction means construction, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other real property. For purposes of this definition, the terms "buildings, structures, or other real property" include, but are not limited to, improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, cemeteries, pumping stations, railways, airport facilities, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, and channels. Construction does not include the manufacture, production, furnishing, construction, alteration, repair, processing, or assembling of vessels, aircraft, or other kinds of personal property (except that for use in subpart 22.5, see the definition at 22.502).

Contiguous United States (CONUS) means the 48 contiguous States and the District of Columbia.

Contingency operation (10 U.S.C. 101(a)(13)) means a military operation that-

(1) Is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(2) Results in the call or order to, or retention on, active duty of members of the uniformed services under sections 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of title 10 of the United States Code, Chapter 13 of title 10 of the United States Code, and section 3713 of title 14 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress.

Continued portion of the contract means the portion of a contract that the contractor must continue to perform following a partial termination.

Contract means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written

acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C.6301, *et seq*. For discussion of various types of contracts, see part 16.

Contract administration office means an office that performs-

(1) Assigned postaward functions related to the administration of contracts; and

(2) Assigned preaward functions.

Contract clause or "clause" means a term or condition used in contracts or in both solicitations and contracts, and applying after contract award or both before and after award.

Contract modification means any written change in the terms of a contract (see 43.103).

Contracting means purchasing, renting, leasing, or otherwise obtaining supplies or services from nonfederal sources. Contracting includes description (but not determination) of supplies and services required, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration. It does not include making grants or cooperative agreements.

Contracting activity means an element of an agency designated by the agency head and delegated broad authority regarding acquisition functions.

Contracting office means an office that awards or executes a contract for supplies or services and performs postaward functions not assigned to a contract administration office (except for use in part 48, see also 48.001).

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. "Administrative contracting officer (ACO)" refers to a contracting officer who is administering contracts. "Termination contracting officer (TCO)" refers to a contracting officer who is settling terminated contracts. A single contracting officer may be responsible for duties in any or all of these areas. Reference in this regulation (48 CFR chapter 1) to administrative contracting officer or termination contracting officer does not-

(1) Require that a duty be performed at a particular office or activity; or

(2) Restrict in any way a contracting officer in the performance of any duty properly assigned.

Contracting officer's representative (COR) means an individual, including a contracting officer's technical representative (COTR), designated and authorized in writing by the contracting officer to perform specific technical or administrative functions.

Conviction means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of nolo contendere. For use in subpart 9.4, see the definition at 9.403. For use in subpart 26.5, see the definition at 26.503.

Cost or pricing data (10 U.S.C. 3701(1) and 41 U.S.C. chapter 35) means all facts that, as of the date of price agreement, or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price, prudent buyers and sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are factual, not judgmental; and are verifiable. While they do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. They also include, but are not limited to, such factors as-

(1) Vendor quotations;

(2) Nonrecurring costs;

(3) Information on changes in production methods and in production or purchasing volume;

(4) Data supporting projections of business prospects and objectives and related operations costs;

(5) Unit-cost trends such as those associated with labor efficiency;

(6) Make-or-buy decisions;

(7) Estimated resources to attain business goals; and

(8) Information on management decisions that could have a significant bearing on costs.

Cost realism means that the costs in an offeror's proposal-

(1) Are realistic for the work to be performed;

(2) Reflect a clear understanding of the requirements; and

(3) Are consistent with the various elements of the offeror's technical proposal.

Cost sharing means an explicit arrangement under which the contractor bears some of the burden of reasonable, allocable, and allowable contract cost.

Customs territory of the United States means the 50 States, the District of Columbia, and Puerto Rico.

Covered territory business, as defined at 15 U.S.C. 632(ff) and 13 CFR 125.1, means a small business concern that has its principal office located in the United States Virgin Islands, American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands.

Data other than certified cost or pricing data means pricing data, cost data, and judgmental information necessary for the contracting officer to determine a fair and reasonable price or to determine cost realism. Such data may include the identical types of data as certified cost or pricing data, consistent with Table 15-2 of 15.408, but without the certification. The data may also include, for example, sales data and any information reasonably required to explain the offeror's estimating process, including, but not limited to–

(1) The judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data; and

(2) The nature and amount of any contingencies included in the proposed price.

Day means, unless otherwise specified, a calendar day.

Debarment means action taken by a suspending and debarring official under 9.406 to exclude a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period; a contractor that is "debarred" is excluded.

Delivery order means an order for supplies placed against an established contract or with Government sources.

Depreciation means a charge to current operations that distributes the cost of a tangible capital asset, less estimated residual value, over the estimated useful life of the asset in a systematic and logical manner. It does not involve a process of valuation. Useful life refers to the prospective period of economic usefulness in a particular contractor's operations as distinguished from physical life; it is evidenced by the actual or estimated retirement and replacement practice of the contractor.

Descriptive literature means information provided by an offeror, such as cuts, illustrations, drawings, and brochures, that shows a product's characteristics or construction of a product or explains its operation. The term includes only that information needed to evaluate the acceptability of the product and excludes other information for operating or maintaining the product.

Design-to-cost means a concept that establishes cost elements as management goals to achieve the best balance between life-cycle cost, acceptable performance, and schedule. Under this concept, cost is a design constraint during the design and development phases and a management discipline throughout the acquisition and operation of the system or equipment.

Designated operational area means a geographic area designated by the combatant commander or subordinate joint force commander for the conduct or support of specified military operations.

Direct acquisition means a type of interagency acquisition where a requesting agency places an order directly against a servicing agency's indefinite-delivery contract. The servicing agency manages the indefinite-delivery contract but does not participate in the placement or administration of an order.

Direct cost means any cost that is identified specifically with a particular final cost objective. Direct costs are not limited to items that are incorporated in the end product as material or labor. Costs identified specifically with a contract are direct costs of that contract. All costs identified specifically with other final cost objectives of the contractor are direct costs of those cost objectives.

Disaster Response Registry means a voluntary registry of contractors who are willing to perform debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities established in accordance with 6 U.S.C. 796, Registry of Disaster Response Contractors. The Registry contains information on contractors who are willing to perform disaster or emergency relief activities within the United States and its outlying areas. The Registry is accessed via the Internet at https://www.sam.gov, Search Records, Advanced Search, Disaster Response Registry Search. (See 26.205.)

Drug-free workplace means the site(s) for the performance of work done by the contractor in connection with a specific contract where employees of the contractor are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

Earned value management system means a project management tool that effectively integrates the project scope of work with cost, schedule and performance elements for optimum project planning and control. The qualities and operating characteristics of an earned value management system are described in Electronic Industries Alliance Standard 748 (EIA-748), Earned Value Management Systems. (See OMB Circular A-11, part 7.)

Economically disadvantaged women-owned small business (EDWOSB) concern- (see definition of "Women-Owned Small Business (WOSB) Program" in this section).

Effective date of termination means the date on which the notice of termination requires the contractor to stop performance under the contract. If the contractor receives the termination notice after the date fixed for termination, then the effective date of termination means the date the contractor receives the notice.

Electronic commerce means electronic techniques for accomplishing business transactions including electronic mail or messaging, World Wide Web technology, electronic bulletin boards, purchase cards, electronic funds transfer, and electronic data interchange.

Electronic data interchange (EDI) means a technique for electronically transferring and storing formatted information between computers utilizing established and published formats and codes, as authorized by the applicable Federal Information Processing Standards.

Electronic Funds Transfer (EFT) means any transfer of funds, other than a transaction originated by cash, check, or similar paper instrument, that is initiated through an electronic terminal, telephone, computer, or magnetic tape, for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit an account. The term includes Automated Clearing House transfers, Fedwire transfers, and transfers made at automatic teller machines and point-of-sale terminals. For purposes of compliance with 31 U.S.C.3332 and implementing regulations at 31 CFR part 208, the term "electronic funds transfer" includes a Governmentwide commercial purchase card transaction.

Electronic Funds Transfer (EFT) indicator means a four-character suffix to the unique entity identifier. The suffix is assigned at the discretion of the commercial, nonprofit, or Government entity to establish additional System for Award Management records for identifying alternative EFT accounts (see subpart 32.11) for the same entity.

Emergency, as used in 6.208, 13.201, 13.500, 18.001, 18.202, 18.203, and subpart 26.2, means any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States (42 U.S.C. 5122).

End product means supplies delivered under a line item of a Government contract, except for use in part 25 and the associated clauses at 52.225-1, 52.225-3, and 52.225-5, see the definitions in 25.003, 52.225-1(a), 52.225-3(a), and 52.225-5(a).

Excess personal property means any personal property under the control of a Federal agency that the agency head determines is not required for its needs or for the discharge of its responsibilities.

Executive agency means an executive department, a military department, or any independent establishment within the meaning of 5 U.S.C.101, 102, and 104(1), respectively, and any wholly owned Government corporation within the meaning of 31 U.S.C. 9101.

Facilities capital cost of money means "cost of money as an element of the cost of facilities capital" as used at 48 CFR 9904.414-Cost Accounting Standard-Cost of Money as an Element of the Cost of Facilities Capital.

Federal agency means any executive agency or any independent establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, the Architect of the Capitol, and any activities under the Architect's direction).

Federally-controlled facilities means—

(1) Federally-owned buildings or leased space, whether for single or multi-tenant occupancy, and its grounds and approaches, all or any portion of which is under the jurisdiction, custody or control of a department or agency;

(2) Federally-controlled commercial space shared with non-government tenants. For example, if a department or agency leased the 10th floor of a commercial building, the Directive applies to the 10th floor only;

(3) Government-owned, contractor-operated facilities, including laboratories engaged in national defense research and production activities; and

(4) Facilities under a management and operating contract, such as for the operation, maintenance, or support of a Government-owned or Government-controlled research, development, special production, or testing establishment.

Federally-controlled information system means an information system (44 U.S.C. 3502(8) used or operated by a Federal agency, or a contractor or other organization on behalf of the agency (44 U.S.C. 3544(a)(1)(A)).

Federally Funded Research and Development Centers (FFRDC's) means activities that are sponsored under a broad charter by a Government agency (or agencies) for the purpose of performing, analyzing, integrating, supporting, and/or managing basic or applied research and/or development, and that receive 70 percent or more of their financial support from the Government; and-

(1) A long-term relationship is contemplated;

(2) Most or all of the facilities are owned or funded by the Government; and

(3) The FFRDC has access to Government and supplier data, employees, and facilities beyond that common in a normal contractual relationship.

Final indirect cost rate means the indirect cost rate established and agreed upon by the Government and the contractor as not subject to change. It is usually established after the close of the contractor's fiscal year (unless the parties decide upon a different period) to which it applies. For cost-reimbursement research and development contracts with educational institutions, it may be predetermined; that is, established for a future period on the basis of cost experience with similar contracts, together with supporting data.

First article means a preproduction model, initial production sample, test sample, first lot, pilot lot, or pilot models.

First article testing means testing and evaluating the first article for conformance with specified contract requirements before or in the initial stage of production.

F.o.b. means free on board. This term is used in conjunction with a physical point to determine-

(1) The responsibility and basis for payment of freight charges; and

(2) Unless otherwise agreed, the point where title for goods passes to the buyer or consignee.

F.o.b. destination means free on board at destination; *i.e.,* the seller or consignor delivers the goods on seller's or consignor's conveyance at destination. Unless the contract provides otherwise, the seller or consignor is responsible for the cost of shipping and risk of loss. For use in the clause at 52.247-34, see the definition at 52.247-34(a).

F.o.b. origin means free on board at origin; *i.e.,* the seller or consignor places the goods on the conveyance. Unless the contract provides otherwise, the buyer or consignee is responsible for the cost of shipping and risk of loss. For use in the clause at 52.247-29, see the definition at 52.247-29(a).

F.o.b.... (For other types of F.o.b., see 47.303).

Forward pricing rate agreement means a written agreement negotiated between a contractor and the Government to make certain rates available during a specified period for use in pricing contracts or modifications. These rates represent reasonable projections of specific costs that are not easily estimated for, identified with, or generated by a specific contract, contract end item, or task. These projections may include rates for such things as labor, indirect costs, material obsolescence and usage, spare parts provisioning, and material handling.

Forward pricing rate recommendation means a rate set unilaterally by the administrative contracting officer for use by the Government in negotiations or other contract actions when forward pricing rate agreement negotiations have not been completed or when the contractor will not agree to a forward pricing rate agreement.

Freight means supplies, goods, and transportable property.

Full and open competition, when used with respect to a contract action, means that all responsible sources are permitted to compete.

General and administrative (G&A) expense means any management, financial, and other expense which is incurred by or allocated to a business unit and which is for the general management and administration of the business unit as a whole. G&A expense does not include those management expenses whose beneficial or causal relationship to cost objectives can be more directly measured by a base other than a cost input base representing the total activity of a business unit during a cost accounting period.

Governmentwide acquisition contract (GWAC) means a task-order or delivery-order contract for information technology established by one agency for Governmentwide use that is operated-

(1) By an executive agent designated by the Office of Management and Budget pursuant to 40 U.S.C. 11302(e); or

(2) Under a delegation of procurement authority issued by the General Services Administration (GSA) prior to August 7,1996, under authority granted GSA by former section 40 U.S.C. 759, repealed by Pub. L. 104-106. The Economy Act does not apply to orders under a Governmentwide acquisition contract.

Governmentwide commercial purchase card means a purchase card, similar in nature to a commercial credit card, issued to authorized agency personnel to use to acquire and to pay for supplies and services.

Governmentwide point of entry (GPE) means the single point where Government business opportunities, including synopses of proposed contract actions, solicitations, and associated information, can be accessed electronically by the public. The GPE is located at https://www.sam.gov.

Head of the agency (see "agency head").

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

Historically black college or university means an institution determined by the Secretary of Education to meet the requirements of 34 CFR 608.2.

HUBZone means a historically underutilized business zone that is an area located within one or more qualified census tracts, qualified nonmetropolitan counties, lands within the external boundaries of an Indian reservation, qualified base

closure areas, redesignated areas, governor-designated covered areas, or qualified disaster areas, as defined in 13 CFR 126.103.

HUBZone contract means a contract awarded to a Small Business Administration certified "HUBZone small business concern" through any of the following procurement methods:

(1) A sole-source award to a HUBZone small business concern.

(2) Set-aside awards based on competition restricted to HUBZone small business concerns.

(3) Awards to HUBZone small business concerns through full and open competition after a price evaluation preference in favor of HUBZone small business concerns.

(4) Awards based on a reserve for HUBZone small business concerns in a solicitation for a multiple-award contract.

HUBZone small business concern means a small business concern that meets the requirements described in 13 CFR 126.200, is certified by the Small Business Administration (SBA) and designated by SBA as a HUBZone small business concern in the Dynamic Small Business Search (DSBS) (13 CFR 126.103). SBA's designation also appears in SAM.

Humanitarian or peacekeeping operation means a military operation in support of the provision of humanitarian or foreign disaster assistance or in support of a peacekeeping operation under chapter VI or VII of the Charter of the United Nations. The term does not include routine training, force rotation, or stationing ((10 U.S.C. 3015(2) and 41 U.S.C. 153(2)).

In writing, "writing," or "written" means any worded or numbered expression that can be read, reproduced, and later communicated, and includes electronically transmitted and stored information.

Indirect cost means any cost not directly identified with a single final cost objective, but identified with two or more final cost objectives or with at least one intermediate cost objective.

Indirect cost rate means the percentage or dollar factor that expresses the ratio of indirect expense incurred in a given period to direct labor cost, manufacturing cost, or another appropriate base for the same period (see also "final indirect cost rate").

Ineligible means excluded from Government contracting (and subcontracting, if appropriate) pursuant to statutory, Executive order, or regulatory authority other than this regulation (48 CFR chapter 1) and its implementing and supplementing regulations; for example, pursuant to–

(1) 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction), and its related statutes and implementing regulations;

(2) 41 U.S.C. chapter 67, Service Contract Labor Standards;

(3) The Equal Employment Opportunity Acts and Executive orders;

(4) 41 U.S.C. chapter 65, Contracts for Material, Supplies, Articles, and Equipment Exceeding $10,000;

(5) 41 U.S.C. chapter 83, Buy American; or

(6) The Environmental Protection Acts and Executive orders.

Information and communication technology (ICT) means information technology and other equipment, systems, technologies, or processes, for which the principal function is the creation, manipulation, storage, display, receipt, or transmission of electronic data and information, as well as any associated content. Examples of ICT include but are not limited to the following: Computers and peripheral equipment; information kiosks and transaction machines; telecommunications equipment; customer premises equipment; multifunction office machines; software; applications; websites; videos; and electronic documents.

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 nonrepudiation and authenticity;

(2) Confidentiality, which means preserving authorized restrictions on access and disclosure, including means for protecting personal privacy and proprietary information; and

(3) Availability, which means ensuring timely and reliable access to, and use of, information.

Information technology means any equipment, or interconnected system(s) or subsystem(s) of equipment, that is used in the automatic acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the agency.

(1) For purposes of this definition, equipment is used by an agency if the equipment is used by the agency directly or is used by a contractor under a contract with the agency that requires-

(i) Its use; or

(ii) To a significant extent, its use in the performance of a service or the furnishing of a product.

(2) The term "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.

(3) The term "information technology" does not include any equipment that-

(i) Is acquired by a contractor incidental to a contract; or

(ii) Contains imbedded information technology that is used as an integral part of the product, but the principal function of which is not the acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. For example, HVAC (heating, ventilation, and air conditioning) equipment, such as thermostats or temperature control devices, and medical equipment where information technology is integral to its operation, are not information technology.

Inherently governmental function means, as a matter of policy, a function that is so intimately related to the public interest as to mandate performance by Government employees. This definition is a policy determination, not a legal determination. An inherently governmental function includes activities that require either the exercise of discretion in applying Government authority, or the making of value judgments in making decisions for the Government. Governmental functions normally fall into two categories: the act of governing, *i.e.,* the discretionary exercise of Government authority, and monetary transactions and entitlements.

(1) An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to-

(i) Bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;

(ii) Determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;

(iii) Significantly affect the life, liberty, or property of private persons;

(iv) Commission, appoint, direct, or control officers or employees of the United States; or

(v) Exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of Federal funds.

(2) Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials. They also do not include functions that are primarily ministerial and internal in nature, such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services.

Inspection means examining and testing supplies or services (including, when appropriate, raw materials, components, and intermediate assemblies) to determine whether they conform to contract requirements.

Insurance means a contract that provides that for a stipulated consideration, one party undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event.

Interagency acquisition means a procedure by which an agency needing supplies or services (the requesting agency) obtains them from another agency (the servicing agency), by an assisted acquisition or a direct acquisition. The term includes —

(1) Acquisitions under the Economy Act (31 U.S.C. 1535); and

(2) Non-Economy Act acquisitions completed under other statutory authorities, (*e.g.*, General Services Administration Federal Supply Schedules in subpart 8.4 and Governmentwide acquisition contracts (GWACs)).

Invoice means a contractor’s bill or written request for payment under the contract for supplies delivered or services performed (see also "proper invoice").

Irrevocable letter of credit means a written commitment by a federally insured financial institution to pay all or part of a stated amount of money, until the expiration date of the letter, upon the Government’s (the beneficiary) presentation of a written demand for payment. Neither the financial institution nor the offeror/contractor can revoke or condition the letter of credit.

Labor surplus area means a geographical area identified by the Department of Labor in accordance with 20 CFR part 654, subpart A, as an area of concentrated unemployment or underemployment or an area of labor surplus.

Labor surplus area concern means a concern that together with its first-tier subcontractors will perform substantially in labor surplus areas. Performance is substantially in labor surplus areas if the costs incurred under the contract on account of

manufacturing, production, or performance of appropriate services in labor surplus areas exceed 50 percent of the contract price.

Latent defect means a defect that exists at the time of acceptance but cannot be discovered by a reasonable inspection.

Line item means the basic structural element in a procurement instrument that describes and organizes the required product or service for pricing, delivery, inspection, acceptance, invoicing, and payment. The use of the term "line item" includes "subline item," as applicable.

Line item number means either a numeric or alphanumeric format to identify a line item.

Major disaster, as used in 6.208, 13.201, 13.500, 18.001, 18.202, 18.203, and subpart 26.2, means any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or regardless of cause, any fire, flood, or explosion, in any part of the United States, which, in the determination of the President, causes damage of sufficient severity and magnitude to warrant major disaster assistance under the Stafford Act to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby (42 U.S.C. 5122).

Major system means that combination of elements that will function together to produce the capabilities required to fulfill a mission need. The elements may include hardware, equipment, software, or any combination thereof, but exclude construction or other improvements to real property. A system is a major system if-

(1) The Department of Defense is responsible for the system and the total expenditures for research, development, test, and evaluation for the system are estimated to be more than $185 million based on Fiscal Year 2014 constant dollars or the eventual total expenditure for the acquisition exceeds $835 million based on Fiscal Year 2014 constant dollars (or any update of these thresholds based on a more recent fiscal year, as specified in the DoD Instruction 5000.02, "Operation of the Defense Acquisition System");

(2) A civilian agency is responsible for the system and total expenditures for the system are estimated to exceed $3 million or the dollar threshold for a "major system" established by the agency pursuant to Office of Management and Budget Circular A-109, entitled "Major System Acquisitions," whichever is greater; or

(3) The system is designated a "major system" by the head of the agency responsible for the system (10 U.S.C. 3041 and 41 U.S.C. 109).

Make-or-buy program means that part of a contractor’s written plan for a contract identifying those major items to be produced or work efforts to be performed in the prime contractor’s facilities and those to be subcontracted.

Manufactured end product means any end product in product and service codes (PSC) 1000-9999, except-

(1) PSC 5510, Lumber and Related Basic Wood Materials;

(2) Product or service group (PSG) 87, Agricultural Supplies;

(3) PSG 88, Live Animals;

(4) PSG 89, Subsistence;

(5) PSC 9410, Crude Grades of Plant Materials;

(6) PSC 9430, Miscellaneous Crude Animal Products, Inedible;

(7) PSC 9440, Miscellaneous Crude Agricultural and Forestry Products;

(8) PSC 9610, Ores;

(9) PSC 9620, Minerals, Natural and Synthetic; and

(10) PSC 9630, Additive Metal Materials.

Market research means collecting and analyzing information about capabilities within the market to satisfy agency needs.

Master solicitation means a document containing special clauses and provisions that have been identified as essential for the acquisition of a specific type of supply or service that is acquired repetitively.

May denotes the permissive. However, the words "no person may..." mean that no person is required, authorized, or permitted to do the act described.

Micro-purchase means an acquisition of supplies or services, the aggregate amount of which does not exceed the micro-purchase threshold when using the procedures in subpart 12.4.

Micro-purchase threshold means $15,000, except it means-

(1) For acquisitions of construction subject to 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction), $2,000;

(2) For acquisitions of services subject to 41 U.S.C. chapter 67, Service Contract Labor Standards, $2,500;

(3) For acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation; to facilitate defense against or recovery from cyber, nuclear, biological, chemical or radiological attack; to support a request from the Secretary of State or the Administrator of the United States Agency for International

Development to facilitate provision of international disaster assistance pursuant to 22 U.S.C. 2292 *et seq.;* or to support response to an emergency or major disaster (42 U.S.C. 5122), as described in 13.201(g)(1), except for construction subject to 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction) (41 U.S.C. 1903)—

(i) $25,000 in the case of any contract to be awarded and performed, or purchase to be made, inside the United States; and

(ii) $40,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States; and

(4) For acquisitions of supplies or services from institutions of higher education (20 U.S.C. 1001(a)) or related or affiliated nonprofit entities, or from nonprofit research organizations or independent research institutes—

(i) $15,000; or

(ii) A higher threshold, as determined appropriate by the head of the agency and consistent with clean audit findings under 31 U.S.C. chapter 75, Requirements for Single Audits; an internal institutional risk assessment; or State law.

Minority Institution means an institution of higher education meeting the requirements of Section 365(3) of the Higher Education Act of 1965 (20 U.S.C. 1067k), including a Hispanic-serving institution of higher education, as defined in Section 502(a) of the Act (20 U.S.C. 1101a).

Multi-agency contract (MAC) means a task-order or delivery-order contract established by one agency for use by Government agencies to obtain supplies and services, consistent with the Economy Act (see 17.502-2). Multi-agency contracts include contracts for information technology established pursuant to 40 U.S.C. 11314(a)(2).

Multiple-award contract means a contract that is—

(1) A Multiple Award Schedule contract issued by GSA (*e.g.*, GSA Schedule Contract) or agencies granted Multiple Award Schedule contract authority by GSA (*e.g.*, Department of Veterans Affairs) as described in FAR part 38;

(2) A multiple-award task-order or delivery-order contract issued in accordance with FAR subpart 16.5, including Governmentwide acquisition contracts; or

(3) Any other indefinite-delivery, indefinite-quantity contract entered into with two or more sources pursuant to the same solicitation.

Must (see "shall").

National defense means any activity related to programs for military or atomic energy production or construction, military assistance to any foreign nation, stockpiling, or space, except that for use in subpart 11.6, see the definition in 11.601.

Neutral person means an impartial third party, who serves as a mediator, fact finder, or arbitrator, or otherwise functions to assist the parties to resolve the issues in controversy. A neutral person may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties. A neutral person must have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless the interest is fully disclosed in writing to all parties and all parties agree that the neutral person may serve (5 U.S.C. 583).

Nondevelopmental item means —

(1) Any previously developed item of supply that is in use by a Federal agency, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;

(2) Any item described in paragraph (1) of this definition that requires only minor modification or modifications of a type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency; or

(3) Any item of supply being produced that does not meet the requirements in paragraphs (1) or (2) solely because the item is not yet in use.

Novation agreement means a legal instrument-

(1) Executed by the-

(i) Contractor (transferor);

(ii) Successor in interest (transferee); and

(iii) Government; and

(2) By which, among other things, the transferor guarantees performance of the contract, the transferee assumes all obligations under the contract, and the Government recognizes the transfer of the contract and related assets.

Offer means a response to a solicitation that, if accepted, would bind the offeror to perform the resulting contract.

(1) It includes responses to invitations for bids (sealed bidding) called “bids” or “sealed bids” and responses to requests for proposals (negotiation) called “proposals.”

(2) It does not include responses to requests for quotations or “quotations.”

Offeror means an entity that makes an offer or bid.

Office of Small and Disadvantaged Business Utilization means the Office of Small Business Programs when referring to the Department of Defense.

OMB Uniform Guidance at 2 CFR part 200 is the abbreviated title for Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR part 200), which supersedes OMB Circulars A-21, A-87, A-89, A-102, A-110, A-122, and A-133, and the guidance in Circular A-50 on Audit Followup.

Option means a unilateral right in a contract by which, for a specified time, the Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract.

Organizational conflict of interest means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

Outlying areas means-

(1) Commonwealths

(i) Puerto Rico.

(ii) The Northern Mariana Islands;

(2) *Territories*.

(i) American Samoa.

(ii) Guam.

(iii) U.S. Virgin Islands; and

(3) *Minor outlying islands*.

(i) Baker Island.

(ii) Howland Island.

(iii) Jarvis Island.

(iv) Johnston Atoll.

(v) Kingman Reef.

(vi) Midway Islands.

(vii) Navassa Island.

(viii) Palmyra Atoll.

(ix) Wake Atoll.

Overtime means time worked by a contractor's employee in excess of the employee's normal workweek.

Overtime premium means the difference between the contractor's regular rate of pay to an employee for the shift involved and the higher rate paid for overtime. It does not include shift premium, *i.e.,* the difference between the contractor's regular rate of pay to an employee and the higher rate paid for extra-pay-shift work.

Partial termination means the termination of a part, but not all, of the work that has not been completed and accepted under a contract.

Past performance means an offeror's or contractor's performance on active and physically completed contracts (see 4.804-4).

Performance-based acquisition (PBA) means an acquisition structured around the results to be achieved as opposed to the manner by which the work is to be performed.

Performance Work Statement (PWS) means a statement of work for performance-based acquisitions that describes the required results in clear, specific and objective terms with measurable outcomes.

Personal property means property of any kind or interest in it except real property, records of the Federal Government, and naval vessels of the following categories:

(1) Battleships;

(2) Cruisers;

(3) Aircraft carriers;

(4) Destroyers; and

(5) Submarines.

Personal services contract means a contract that, by its express terms or as administered, makes the contractor personnel appear to be, in effect, Government employees (see 37.104).

Plant clearance officer means an authorized representative of the contracting officer, appointed in accordance with agency procedures, responsible for screening, redistributing, and disposing of contractor inventory from a contractor's plant or work site. The term "Contractor's plant" includes, but is not limited to, Government-owned contractor-operated plants, Federal installations, and Federal and non-Federal industrial operations, as may be required under the scope of the contract.

Power of attorney means the authority given one person or corporation to act for and obligate another, as specified in the instrument creating the power; in corporate suretyship, an instrument under seal that appoints an attorney-in-fact to act in behalf of a surety company in signing bonds (see also "attorney-in-fact" at 28.001).

Preaward survey means an evaluation of a prospective contractor's capability to perform a proposed contract.

Preponderance of the evidence means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

Pricing means the process of establishing a reasonable amount or amounts to be paid for supplies or services.

Principal means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (*e.g.*, general manager; plant manager; head of a division or business segment; and similar positions).

Procurement (see "acquisition").

Procuring activity means a component of an executive agency having a significant acquisition function and designated as such by the head of the agency. Unless agency regulations specify otherwise, the term "procuring activity" is synonymous with "contracting activity."

Products has the same meaning as "supplies."

Projected average loss means the estimated long-term average loss per period for periods of comparable exposure to risk of loss.

Proper invoice means an invoice that meets the minimum standards specified in 32.905(b).

Purchase order, when issued by the Government, means an offer by the Government to buy supplies or services, including construction and research and development, upon specified terms and conditions, using simplified procedures (see 12.201-1 and part 13).

Qualification requirement means a Government requirement for testing or other quality assurance demonstration that must be completed before award of a contract.

Qualified products list (QPL) means a list of products that have been examined, tested, and have satisfied all applicable qualification requirements.

Qualifying offeror, as used in 13.106-1 and 15.304, means an offeror that is determined to be a responsible source, submits a technically acceptable proposal that conforms to the requirements of the solicitation, and the contracting officer has no reason to believe would be likely to offer other than fair and reasonable pricing (10 U.S.C. 3206(c)(4)).

Receiving report means written evidence that indicates Government acceptance of supplies delivered or services performed (see subpart 46.6). Receiving reports must meet the requirements of 32.905(c).

Recovered material 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 (42 U.S.C. 6903).

Registered in the System for Award Management (SAM) means that—

(1) The Contractor has entered all mandatory information, including the unique entity identifier and the Electronic Funds Transfer indicator (if applicable), the Commercial and Government Entity (CAGE) code, as well as data required by the Federal Funding Accountability and Transparency Act of 2006 (see subpart 4.14), into SAM;

(2) The Contractor has completed the Core, Assertions, Representations and Certifications, and Points of Contact sections of the registration in SAM;

(3) The Government has validated all mandatory data fields, to include validation of the Taxpayer Identification Number (TIN) with the Internal Revenue Service (IRS). The contractor will be required to provide consent for TIN validation to the Government as a part of the SAM registration process; and

(4) The Government has marked the record Active.

Requesting agency means the agency that has the requirement for an interagency acquisition.

Residual value means the proceeds, less removal and disposal costs, if any, realized upon disposition of a tangible capital asset. It usually is measured by the net proceeds from the sale or other disposition of the asset, or its fair value if the asset is traded in on another asset. The estimated residual value is a current forecast of the residual value.

Responsible audit agency means the agency that is responsible for performing all required contract audit services at a business unit.

Responsible prospective contractor means a contractor that meets the standards in 9.104.

Reverse auction means the process for obtaining pricing, usually supported by an electronic tool, in which offerors see competing offerors' price(s), without disclosure of the competing offerors' identity, and have the opportunity to submit lower priced offers until the close of the auction.

Scrap means personal property that has no value except its basic metallic, mineral, or organic content.

Segment means one of two or more divisions, product departments, plants, or other subdivisions of an organization reporting directly to a home office, usually identified with responsibility for profit and/or producing a product or service. The term includes-

(1) Government-owned contractor-operated (GOCO) facilities; and

(2) Joint ventures and subsidiaries (domestic and foreign) in which the organization has-

(i) A majority ownership; or

(ii) Less than a majority ownership, but over which it exercises control.

Self-insurance means the assumption or retention of the risk of loss by the contractor, whether voluntarily or involuntarily. Self-insurance includes the deductible portion of purchased insurance.

Senior procurement executive means the individual appointed pursuant to 41 U.S.C. 1702(c) who is responsible for management direction of the acquisition system of the executive agency, including implementation of the unique acquisition policies, regulations, and standards of the executive agency.

Service-disabled veteran-owned small business (SDVOSB) concern means a small business concern–

(1) (i) Not less than 51 percent of which is owned and controlled by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans; and

(ii) The management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a service-disabled veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran; or

(2) A small business concern eligible under the SDVOSB Program in accordance with 13 CFR part 128 (see subpart 19.14).

(3) *Service-disabled veteran*, as used in this definition, means a veteran as defined in 38 U.S.C. 101(2), with a disability that is service-connected, as defined in 38 U.S.C. 101(16), and who is registered in the Beneficiary Identification and Records Locator Subsystem, or successor system that is maintained by the Department of Veterans Affairs' Veterans Benefits Administration, as a service-disabled veteran.

Service-disabled veteran-owned small business (SDVOSB) concern eligible under the SDVOSB Program means an SDVOSB concern that—

(1) Effective January 1, 2024, is designated in the System for Award Management (SAM) as certified by the Small Business Administration (SBA) in accordance with 13 CFR 128.300; or

(2) Has represented that it is an SDVOSB concern in SAM and submitted a complete application for certification to SBA on or before December 31, 2023.

Service-disabled veteran-owned small business (SDVOSB) Program means a program that authorizes contracting officers to limit competition, including award on a sole-source basis, to SDVOSB concerns eligible under the SDVOSB Program.

Servicing agency means the agency that will conduct an assisted acquisition on behalf of the requesting agency.

Shall denotes the imperative.

Shipment means freight transported or to be transported.

Shop drawings means drawings submitted by the construction contractor or a subcontractor at any tier or required under a construction contract, showing in detail either or both of the following:

(1) The proposed fabrication and assembly of structural elements.

(2) The installation (*i.e.,* form, fit, and attachment details) of materials or equipment.

Should means an expected course of action or policy that is to be followed unless inappropriate for a particular circumstance.

Signature or "signed" means the discrete, verifiable symbol of an individual that, when affixed to a writing with the knowledge and consent of the individual, indicates a present intention to authenticate the writing. This includes electronic symbols.

Simplified acquisition procedures means the methods prescribed in part 13 for making purchases of supplies or services.

Simplified acquisition threshold means $350,000, except for—

(1) Acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation; to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; to support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance pursuant to 22 U.S.C. 2292 *et seq.;* or to support response to an emergency or major disaster (42 U.S.C. 5122), (41 U.S.C. 1903), the term means—

(i) $1 million for any contract to be awarded and performed, or purchase to be made, inside the United States; and

(ii) $2 million for any contract to be awarded and performed, or purchase to be made, outside the United States; and

(2) Acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a humanitarian or peacekeeping operation (10 U.S.C. 3015), the term means $650,000 for any contract to be awarded and performed, or purchase to be made, outside the United States.

Single, Governmentwide point of entry, means the one point of entry to be designated by the Administrator of OFPP that will allow the private sector to electronically access procurement opportunities Governmentwide.

Small business concern—

(1) Means a concern, including its affiliates, that is independently owned and operated, not dominant in its field of operation, and qualified as a small business under the criteria and size standards in 13 CFR part 121 (see 19.102).

(2) *Affiliates*, as used in this definition, means business concerns, one of whom directly or indirectly controls or has the power to control the others, or a third party or parties control or have the power to control the others. In determining whether affiliation exists, consideration is given to all appropriate factors including common ownership, common management, and contractual relationships. SBA determines affiliation based on the factors set forth at 13 CFR 121.103.

Small business subcontractor means a concern that does not exceed the size standard for the North American Industry Classification Systems code that the prime contractor determines best describes the product or service being acquired by the subcontract.

Small Business Teaming Arrangement—

(1) Means an arrangement where–

(i) Two or more small business concerns have formed a joint venture; or

(ii) A small business offeror agrees with one or more other small business concerns to have them act as its subcontractors under a specified Government contract. A Small Business Teaming Arrangement between the offeror and its small business subcontractor(s) exists through a written agreement between the parties that–

(A) Is specifically referred to as a "Small Business Teaming Arrangement"; and

(B) Sets forth the different responsibilities, roles, and percentages (or other allocations) of work as it relates to the acquisition;

(2) (i) For civilian agencies, may include two business concerns in a mentor-protégé relationship when both the mentor and the protégé are small or the protégé is small and the concerns have received an exception to affiliation pursuant to 13 CFR 121.103(h)(3)(ii) or (iii).

(ii) For DoD, may include two business concerns in a mentor-protégé relationship in the DoD Mentor-Protégé Program (see 10 U.S.C. 4902) when both the mentor and the protégé are small. There is no exception to joint venture size affiliation for offers received from teaming arrangements under the DoD Mentor-Protégé Program; and

(3) See 13 CFR 121.103(b)(9) regarding the exception to affiliation for offers received from Small Business Teaming Arrangements in the case of a solicitation of offers for a bundled contract with a reserve.

Small disadvantaged business concern consistent with 13 CFR 124.1001, means a small business concern under the size standard applicable to the acquisition, that:

(1) Is at least 51 percent unconditionally and directly owned (as defined at 13 CFR 124.105) by—

(i) One or more socially disadvantaged (as defined at 13 CFR 124.103) and economically disadvantaged (as defined at 13 CFR 124.104) individuals who are citizens of the United States; and

(ii) Each individual claiming economic disadvantage has a net worth not exceeding the threshold at 13 CFR 124.104(c)(2) after taking into account the applicable exclusions set forth at 13 CFR 124.104(c)(2); and

(2) The management and daily business operations of which are controlled (as defined at 13 CFR 124.106) by individuals who meet the criteria in paragraphs (1)(i) and (ii) of this definition.

Sole source acquisition means a contract for the purchase of supplies or services that is entered into or proposed to be entered into by an agency after soliciting and negotiating with only one source.

Solicitation means any request to submit offers or quotations to the Government. Solicitations under sealed bid procedures are called "invitations for bids." Solicitations under negotiated procedures are called "requests for proposals." Solicitations under simplified acquisition procedures may require submission of either a quotation or an offer.

Solicitation provision or provision means a term or condition used only in solicitations and applying only before contract award.

Source selection information means any of the following information that is prepared for use by an agency for the purpose of evaluating a bid or proposal to enter into an agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

(1) Bid prices submitted in response to an agency invitation for bids, or lists of those bid prices before bid opening.

(2) Proposed costs or prices submitted in response to an agency solicitation, or lists of those proposed costs or prices.

(3) Source selection plans.

(4) Technical evaluation plans.

(5) Technical evaluations of proposals.

(6) Cost or price evaluations of proposals.

(7) Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract.

(8) Rankings of bids, proposals, or competitors.

(9) Reports and evaluations of source selection panels, boards, or advisory councils.

(10) Other information marked as "Source Selection Information-See FAR 2.101 and 3.104" based on a case-by-case determination by the head of the agency or the contracting officer, that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.

Special competency means a special or unique capability, including qualitative aspects, developed incidental to the primary functions of the Federally Funded Research and Development Centers to meet some special need.

Special test equipment means either single or multipurpose integrated test units engineered, designed, fabricated, or modified to accomplish special purpose testing in performing a contract. It consists of items or assemblies of equipment including foundations and similar improvements necessary for installing special test equipment, and standard or general purpose items or components that are interconnected and interdependent so as to become a new functional entity for special testing purposes. Special test equipment does not include material, special tooling, real property, and equipment items used for general testing purposes or property that with relatively minor expense can be made suitable for general purpose use.

Special tooling means jigs, dies, fixtures, molds, patterns, taps, gauges, and all components of these items including foundations and similar improvements necessary for installing special tooling, and which are of such a specialized nature that without substantial modification or alteration their use is limited to the development or production of particular supplies or parts thereof or to the performance of particular services. Special tooling does not include material, special test equipment, real property, equipment, machine tools, or similar capital items.

State and local taxes means taxes levied by the States, the District of Columbia, outlying areas of the United States, or their political subdivisions.

Statement of Objectives (SOO) means a Government-prepared document incorporated into the solicitation that states the overall performance objectives. It is used in solicitations when the Government intends to provide the maximum flexibility to each offeror to propose an innovative approach.

Subline item means a subset of a line item.

Substantial evidence means information sufficient to support the reasonable belief that a particular act or omission has occurred.

Substantially as follows or "substantially the same as," when used in the prescription and introductory text of a provision or clause, means that authorization is granted to prepare and utilize a variation of that provision or clause to accommodate requirements that are peculiar to an individual acquisition; provided that the variation includes the salient features of the FAR provision or clause, and is not inconsistent with the intent, principle, and substance of the FAR provision or clause or related coverage of the subject matter.

Supplemental agreement means a contract modification that is accomplished by the mutual action of the parties.

Supplies means all property except land or interest in land. It includes (but is not limited to) public works, buildings, and facilities; ships, floating equipment, and vessels of every character, type, and description, together with parts and accessories; aircraft and aircraft parts, accessories, and equipment; machine tools; and the alteration or installation of any of the foregoing.

Supporting a diplomatic or consular mission means performing outside the United States under a contract administered by Federal agency personnel who are subject to the direction of a Chief of Mission.

Surety means an individual or corporation legally liable for the debt, default, or failure of a principal to satisfy a contractual obligation. The types of sureties referred to are as follows:

(1) An individual surety is one person, as distinguished from a business entity, who is liable for the entire penal amount of the bond.

(2) A corporate surety is licensed under various insurance laws and, under its charter, has legal power to act as surety for others.

(3) A cosurety is one of two or more sureties that are jointly liable for the penal sum of the bond. A limit of liability for each surety may be stated.

Surplus property means excess personal property not required by any Federal agency as determined by the Administrator of the General Services Administration (GSA). (See 41 CFR 102-36.40).

Suspending and debarring official means—

(1) An agency head; or

(2) A designee authorized by the agency head to impose a suspension and/or a debarment.

Suspension means action taken by a suspending and debarring official under 9.407 to disqualify a contractor temporarily from Government contracting and Government-approved subcontracting; a contractor that is "suspended" is disqualified.

System for Award Management (SAM) means the primary Government repository for prospective Federal awardee and Federal awardee information and the centralized Government system for certain contracting, grants, and other assistance-related processes. It includes—

(1) Data collected from prospective Federal awardees required for the conduct of business with the Government;

(2) Prospective contractor-submitted annual representations and certifications in accordance with FAR subpart 4.12; and

(3) Identification of those parties excluded from receiving Federal contracts, certain subcontracts, and certain types of Federal financial and non-financial assistance and benefits.

Task order means an order for services placed against an established contract or with Government sources.

Taxpayer Identification Number (TIN) means the number required by the IRS to be used by the offeror in reporting income tax and other returns. The TIN may be either a Social Security Number or an Employer Identification Number.

Technical data means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). This term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. The term includes recorded information of a scientific or technical nature that is included in computer databases (see 41 U.S.C. 116).

Terminated portion of the contract means the portion of a contract that the contractor is not to perform following a partial termination. For construction contracts that have been completely terminated for convenience, it means the entire contract, notwithstanding the completion of, and payment for, individual items of work before termination.

Termination for convenience means the exercise of the Government's right to completely or partially terminate performance of work under a contract when it is in the Government's interest.

Termination for default means the exercise of the Government's right to completely or partially terminate a contract because of the contractor's actual or anticipated failure to perform its contractual obligations.

Termination inventory means any property purchased, supplied, manufactured, furnished, or otherwise acquired for the performance of a contract subsequently terminated and properly allocable to the terminated portion of the contract. It includes Government-furnished property. It does not include any facilities, material, special test equipment, or special tooling that are subject to a separate contract or to a special contract requirement governing their use or disposition.

Unallowable cost means any cost that, under the provisions of any pertinent law, regulation, or contract, cannot be included in prices, cost-reimbursements, or settlements under a Government contract to which it is allocable.

Unique and innovative concept, when used relative to an unsolicited research proposal, means that-

(1) In the opinion and to the knowledge of the Government evaluator, the meritorious proposal-

(i) Is the product of original thinking submitted confidentially by one source;

(ii) Contains new, novel, or changed concepts, approaches, or methods;

(iii) Was not submitted previously by another; and

(iv) Is not otherwise available within the Federal Government.

(2) In this context, the term does not mean that the source has the sole capability of performing the research.

Unique entity identifier means a number or other identifier used to identify a specific commercial, nonprofit, or Government entity. See www.sam.gov for the designated entity for establishing unique entity identifiers.

United States, when used in a geographic sense, means the 50 States and the District of Columbia, except as follows:

(1) For use in subpart 3.10, see the definition at 3.1001.

(2) For use in subpart 22.8, see the definition at 22.801.

(3) For use in subpart 22.10, see the definition at 22.1001.

(4) For use in subpart 22.13, see the definition at 22.1301.

(5) For use in subpart 22.16, see the definition at 22.1601.

(6) For use in subpart 22.17, see the definition at 22.1702.

(7) For use in subpart 22.18, see the definition at 22.1801.

(8) For use in subpart 22.19, see the definition at 22.1901.

(9) [Reserved]

(10) For use in part 25, see the definition at 25.003.

(11) For use in part 27, see the definition at 27.001.

(12) For use in subpart 47.4, see the definition at 47.401.

Unsolicited proposal means a written proposal for a new or innovative idea that is submitted to an agency on the initiative of the offeror for the purpose of obtaining a contract with the Government, and that is not in response to a request for proposals, Broad Agency Announcement, Small Business Innovation Research topic, Small Business Technology Transfer Research topic, Program Research and Development Announcement, or any other Government-initiated solicitation or program.

Value engineering means an analysis of the functions of a program, project, system, product, item of equipment, building, facility, service, or supply of an executive agency, performed by qualified agency or contractor personnel, directed at improving performance, reliability, quality, safety, and life-cycle costs (41 U.S.C. 1711). For use in the clause at 52.248-2, see the definition at 52.248-2(b).

Value engineering change proposal (VECP)—

(1) Means a proposal that–

(i) Requires a change to the instant contract to implement; and

(ii) Results in reducing the overall projected cost to the agency without impairing essential functions or characteristics, provided, that it does not involve a change–

(A) In deliverable end item quantities only;

(B) In research and development (R&D) items or R&D test quantities that are due solely to results of previous testing under the instant contract; or

(C) To the contract type only.

(2) For use in the clauses at-

(i) 52.248-2, see the definition at 52.248-2(b); and

(ii) 52.248-3, see the definition at 52.248-3(b).

Veteran-owned small business concern means a small business concern—

(1) Not less than 51 percent of which is owned and controlled by one or more veterans (as defined at 38 U.S.C. 101(2)) or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more veterans; and

(2) The management and daily business operations of which are controlled by one or more veterans.

Virgin material means—

(1) Previously unused raw material, including previously unused copper, aluminum, lead, zinc, iron, other metal or metal ore; or

(2) Any undeveloped resource that is, or with new technology will become, a source of raw materials.

Voluntary consensus standards means common and repeated use of rules, conditions, guidelines or characteristics for products, or related processes and production methods and related management systems. Voluntary Consensus Standards are developed or adopted by domestic and international voluntary consensus standard making bodies (*e.g.*, International Organization for Standardization (ISO) and ASTM-International). See OMB Circular A-119.

Warranty means a promise or affirmation given by a contractor to the Government regarding the nature, usefulness, or condition of the supplies or performance of services furnished under the contract.

Women-owned small business concern means—

(1) A small business concern–

(i) That is at least 51 percent owned by one or more women; or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and

(ii) Whose management and daily business operations are controlled by one or more women; or

(2) A small business concern eligible under the Women-Owned Small Business Program in accordance with 13 CFR part 127 (see subpart 19.15).

Women-Owned Small Business (WOSB) Program.

(1) "Women-Owned Small Business (WOSB) Program" means a program that authorizes contracting officers to limit competition, including award on a sole-source basis, to—

(i) Economically disadvantaged women-owned small business (EDWOSB) concerns eligible under the WOSB Program for Federal contracts assigned a North American Industry Classification Systems (NAICS) code in an industry

in which the Small Business Administration (SBA) has determined that WOSB concerns are underrepresented in Federal procurement; and

(ii) WOSB concerns eligible under the WOSB Program for Federal contracts assigned a NAICS code in an industry in which SBA has determined that WOSB concerns are substantially underrepresented in Federal procurement.

(2) "Economically disadvantaged women-owned small business (EDWOSB) concern" means a small business concern that is at least 51 percent directly and unconditionally owned by, and the management and daily business operations of which are controlled by, one or more women who are citizens of the United States and who are economically disadvantaged in accordance with 13 CFR part 127, and the concern is certified by SBA or an approved third-party certifier in accordance with 13 CFR 127.300 . It automatically qualifies as a women-owned small business (WOSB) concern eligible under the WOSB Program.

(3) "Women-owned small business (WOSB)" concern eligible under the WOSB Program means a small business concern that is at least 51 percent directly and unconditionally owned by, and the management and daily business operations of which are controlled by, one or more women who are citizens of the United States, and the concern is certified by SBA or an approved third-party certifier in accordance with 13 CFR 127.300.

Writing or written (see "in writing").

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Subpart 2.2 - Definitions Clause

2.201 Contract clause.

Insert the clause at 52.202-1, Definitions, in solicitations and contracts that exceed the simplified acquisition threshold.

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PART 3 - IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Sec.

3.000 Scope of part.

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3.101-2 Solicitation and acceptance of gratuities by Government personnel.
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3.901 Definitions.
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3.904-1 Procedures for filing complaints.
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3.905 Remedies and enforcement of orders.
3.905-1 Remedies.
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3.908 [Reserved]
3.909 Prohibition on providing funds to an entity that requires certain internal confidentiality agreements or statements.
3.909-1 Prohibition.
3.909-2 Representation by the offeror.
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Subpart 3.10 - Contractor Code of Business Ethics and Conduct

3.1000 Scope of subpart.
3.1001 Definitions.
3.1002 Policy.
3.1003 Requirements.
3.1004 Contract clauses.

Subpart 3.11 - Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions

3.1100 Scope of subpart.
3.1101 Definitions.
3.1102 Policy.
3.1103 Procedures.
3.1104 Mitigation or waiver.
3.1105 Violations.
3.1106 Contract clause.

3.000 Scope of part.

This part prescribes policies and procedures for avoiding improper business practices and personal conflicts of interest and for dealing with their apparent or actual occurrence.

Subpart 3.1 - Safeguards

3.101 Standards of conduct.

3.101-1 General.

Government business must be conducted in a manner above reproach. Except as authorized by statute or regulation, business must be conducted with complete impartiality and without preferential treatment for anyone. Transactions involving public funds require the highest degree of public trust and impeccable standards of conduct. The general rule is to avoid any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships. Many Federal laws restrict Government personnel actions. Beyond these restrictions, official conduct must meet a standard where personnel would have no reluctance to fully disclose their actions to the public.

3.101-2 Solicitation and acceptance of gratuities by Government personnel.

(a) As a rule, and as required by Executive Order 12731, no Government employee may solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who-

(1) Has or is seeking to obtain Government business with the employee's agency;

(2) Conducts activities that are regulated by the employee's agency; or

(3) Has interests that may be substantially affected by the performance or nonperformance of the employee's official duties.

(b) Certain limited exceptions are authorized in agency regulations.

3.101-3 Agency regulations.

(a) Agencies must prescribe *Standards of Conduct* as required by 5 CFR part 735. These agency standards contain—

(1) Agency-authorized exceptions to 3.101-2; and

(2) Disciplinary measures for persons violating the standards of conduct.

(b) Requirements for employee financial disclosure and restrictions on private employment for former Government employees are contained in Office of Personnel Management and agency regulations implementing Public Law 95-521, which amended 18 U.S.C. 207.

3.102 [Reserved]

3.103 Independent pricing.

3.103-1 Solicitation provision.

The contracting officer must include the provision at 52.203-2, Certificate of Independent Price Determination, in solicitations for firm-fixed-price contracts or fixed-price contracts with economic price adjustment, unless-

(a) The purchase uses simplified acquisition procedures from part 13;

(b) The solicitation only requests technical proposals under two-step sealed bidding; or

(c) The solicitation is for utility services with rates established by law or regulation.

3.103-2 Evaluating the certification.

(a) *Evaluation guidelines*. (1) The following activities are not considered "disclosure" as used in paragraph (a)(2) of the Certificate of Independent Price Determination (the certificate):

(i) A firm has published price lists, rates, or tariffs for items the Government is buying.

(ii) A firm has told potential customers about upcoming new or revised price lists for items the Government is buying.

(iii) A firm has sold the same items to commercial customers at the same prices offered to the Government.

(iv) A firm participates in a reverse auction (explained in part 17).

(2) For paragraph (b)(2) of the certificate, an individual may use a blanket authorization to act as an agent for the person(s) responsible for determining the offered prices if-

(i) The proposed contract is clearly within the scope of the authorization; and

(ii) The person giving the authorization is responsible for determining the offered prices at the time the certification is made for that offer.

(3) For joint offers from multiple companies, each company's certification applies only to its own activities.

(b) *Rejecting potentially collusive offers*. (1) If an offeror removes or modifies paragraph (a)(1), (a)(3), or (b) of the certificate, the contracting officer must reject their bid or proposal.

(2) If an offeror deleted or modified paragraph (a)(2) of the certificate-

(i) The offeror must furnish with its offer a signed explanation about how prices were disclosed;

(ii) The chief of the contracting office must review both the changed certificate and explanation;

(iii) The chief must determine in writing if the disclosure was made for the purpose or had the effect of limiting competition;

(iv) If the determination finds the disclosure was made for the purpose or had the effect of limiting competition, the bid must be rejected; and

(v) If the determination finds no competition issues, the bid may be considered for award.

(3) When rejecting offers under paragraphs (b)(1) or (b)(2), or when suspecting false certification, the contracting officer must report the situation to the Attorney General in accordance with 3.303.

(4) The determination in paragraph (2) does not prevent prosecution of criminal or civil actions involving the transactions to which the certificate relates.

3.104 Procurement integrity.

3.104-1 Definitions.

As used in this section—

Agency ethics official means the designated agency ethics official described in 5 CFR 2638.201 or other designated person, including–

(1) Deputy ethics officials described in 5 CFR 2638.204, to whom authority under 3.104-6 has been delegated by the designated agency ethics official; and

(2) Alternate designated agency ethics officials described in 5 CFR 2638.202(b).

Compensation means wages, salaries, honoraria, commissions, professional fees, and any other form of payment, provided directly or indirectly for services rendered. Compensation is indirectly provided if it is paid to an entity other than the individual, specifically in exchange for services provided by the individual.

Contractor bid or proposal information means any of the following information submitted to a Federal agency as part of or in connection with a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

(1) Cost or pricing data (as defined by 10 U.S.C. 3701(1) with respect to procurements subject to that section, and 41 U.S.C. 3501(a)(1), with respect to procurements subject to that section.

(2) Indirect costs and direct labor rates.

(3) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation.

(4) Information marked by the contractor as "contractor bid or proposal information" in accordance with applicable law or regulation.

(5) Information marked in accordance with 52.215-1(e).

Decision to award a subcontract or modification of subcontract means a decision to designate award to a particular source.

Federal agency procurement means the acquisition (by using competitive procedures and awarding a contract) of goods or services (including construction) from non-Federal sources by a Federal agency using appropriated funds. For broad agency announcements and small business innovation research programs, each proposal received by an agency counts as a separate procurement for purposes of 41 U.S.C. chapter 21.

In excess of $10,000,000 means–

(1) The value, or estimated value, at the time of award, of the contract, including all options;

(2) The total estimated value at the time of award of all orders under an indefinite-delivery, indefinite-quantity, or requirements contract;

(3) Any multiple award schedule contract, unless the contracting officer documents a lower estimate;

(4) The value of a delivery order, task order, or an order under a Basic Ordering Agreement;

(5) The amount paid or to be paid in settlement of a claim; or

(6) The estimated monetary value of negotiated overhead or other rates when applied to the Government portion of the applicable allocation base.

Official means–

(1) An officer, as defined in 5 U.S.C.2104;

(2) An employee, as defined in 5 U.S.C.2105;

(3) A member of the uniformed services, as defined in 5 U.S.C.2101(3); or

(4) A special Government employee, as defined in 18 U.S.C.202.

Participating personally and substantially in a Federal agency procurement means–

(1) Active and significant involvement of an official in any of the following activities directly related to that procurement:

(i) Drafting, reviewing, or approving the specification or statement of work for the procurement.:

(ii) Preparing or developing the solicitation.

(iii) Evaluating bids or proposals, or selecting a source.

(iv) Negotiating price or terms and conditions of the contract.

(v) Reviewing and approving the award of the contract.

(2) "Participating personally" means participating directly and includes the direct and active supervision of a subordinate's participation in the matter.

(3) "Participating substantially" means that the official's involvement is of significance to the matter. Substantial participation requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. Participation may be substantial even though it is not determinative of the outcome of a particular matter. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. However, the review of procurement documents solely to determine compliance with regulatory, administrative, or budgetary procedures, does not constitute substantial participation in a procurement.

(4) Generally, an official will not be considered to have participated personally and substantially in a procurement solely by participating in the following activities:

(i) Agency-level boards, panels, or other advisory committees that review program milestones or evaluate and recommend alternative technologies or approaches for broad agency-level missions or objectives.

(ii) General technical, engineering, or scientific work with broad application not directly tied to a specific procurement, even if that work later becomes part of a procurement.

(iii) Clerical functions supporting a particular procurement.

(iv) For OMB Circular A-76 procurements, participation in management studies, preparation of in-house cost estimates, preparation of "most efficient organization" analyses, or providing data or technical support for others to develop performance standards, statements of work, or specifications.

Source selection evaluation board means any board, team, council, or other group that evaluates bids or proposals.

3.104-2 General.

(a) This section implements 41 U.S.C. chapter 21, Restrictions on Obtaining and Disclosing Certain Information. The senior procurement executive of the agency must approve any agency changes to 3.104. This includes specific definitions identifying individuals who occupy positions specified in 3.104-3(d)(1)(ii), and any required clauses. A law may establish a higher level of approval for that agency.

(b) Agency officials need to remember that other statutes and regulations also address similar prohibited conduct, for example—

(1) The offer or acceptance of a bribe or gratuity is prohibited by 18 U.S.C. 201 and 10 U.S.C. 4651. The 5 U.S.C. 7353 and 5 CFR part 2635 prohibit accepting certain gifts;

(2) Contact with an offeror during an acquisition may constitute "seeking employment" (see subpart F of 5 CFR part 2636 and 3.104-3(c)(2)). Government employees cannot participate personally and substantially in any matter that would affect the financial interests of a person with whom they are seeking employment, as prohibited by 18 U.S.C. 208 and 5 CFR

part 2635. An employee negotiating or seeking employment with an offeror or who has an arrangement concerning future employment with an offeror must follow the disqualification requirements in 5 CFR 2635.604 and 2635.606. The prohibition in 18 U.S.C. 208 may require employee disqualification from participation in the acquisition even if their duties are not considered "participating personally and substantially" as defined in 3.104-1;

(3) Post-employment restrictions under 18 U.S.C. 207 and 5 CFR parts 2637 and 2641 prohibit certain activities by former Government employees. This includes representing a contractor before the Government regarding any contract or other particular matter involving specific parties where the former employee participated personally and substantially while employed by the Government. Additional restrictions apply to certain senior Government employees and for matters under an employee's official responsibility;

(4) Parts 14 and 15 restrict the release of procurement information and other contractor information that must be protected under 18 U.S.C. 1905;

(5) The Privacy Act (5 U.S.C. 552a), the Trade Secrets Act (18 U.S.C. 1905), and other laws may prohibit releasing information both before and after award (see 3.104-4); and

(6) Using nonpublic information for an employee's private interest or another's benefit and engaging in financial transactions using nonpublic information are prohibited by 5 CFR 2635.703.

3.104-3 Statutory and related prohibitions, restrictions, and requirements.

(a) *Prohibition on disclosing procurement information (41 U.S.C. 2102)*. (1) A person described in paragraph (a)(2) of this subsection must not knowingly disclose contractor bid or proposal information or source selection information before a Federal agency awards the procurement contract to which the information relates. This restriction applies except when disclosure is allowed by law. (See 3.104-4(a).)

(2) Paragraph (a)(1) of this subsection applies to any person who—

(i) Is a present or former official of the United States, or a person who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a Federal agency procurement; and

(ii) By virtue of that office, employment, or relationship, has or had access to contractor bid or proposal information or source selection information.

(b) *Prohibition on obtaining procurement information (41 U.S.C. 2102)*. A person must not knowingly obtain contractor bid or proposal information or source selection information before a Federal agency awards the procurement contract to which the information relates. This restriction applies except when obtaining such information is allowed by law.

(c) *Actions required when an agency official contacts or is contacted by an offeror regarding non-Federal employment (41 U.S.C. 2103)*. (1) An agency official who participates personally and substantially in a Federal agency procurement for a contract over the simplified acquisition threshold must take specific actions if they contact or are contacted by an offeror in that Federal agency procurement about possible non-Federal employment for that official. The official must—

(i) Promptly report the contact in writing to the official's supervisor and to the agency ethics official; and

(ii) Either reject the possibility of non-Federal employment or disqualify himself or herself from further personal and substantial participation in that Federal agency procurement (see 3.104-5). This disqualification remains until the agency authorizes the official to resume participation in that procurement, according to the requirements of 18 U.S.C. 208 and applicable agency regulations, because—

(A) The person is no longer an offeror in that Federal agency procurement; or

(B) All discussions with the offeror regarding possible non-Federal employment have ended without an agreement or arrangement for employment.

(2) A contact is any action included as "seeking employment" in 5 CFR 2635.603(b). Unsolicited communications from offerors regarding possible employment also count as contacts.

(3) Agencies must retain reports of employment contacts for 2 years from the date the report was submitted.

(4) Even if conduct complies with 41 U.S.C. 2103, other criminal statutes and the Standards of Ethical Conduct for Employees of the Executive Branch may prohibit it. See 3.104-2(b)(2).

(d) *Prohibition on former official's acceptance of compensation from a contractor (41 U.S.C. 2104)*. (1) A former official of a Federal agency must not accept compensation from a contractor as an employee, officer, director, or consultant for 1 year after the former official—

(i) Served, when the contractor was selected or awarded a contract, as the procuring contracting officer, the source selection authority, a member of a source selection evaluation board, or the chief of a financial or technical evaluation team in a procurement where that contractor received a contract in excess of $10,000,000;

(ii) Served as the program manager, deputy program manager, or administrative contracting officer for a contract in excess of $10,000,000 awarded to that contractor; or

(iii) Personally made for the Federal agency a decision to—

(A) Award a contract, subcontract, modification of a contract or subcontract, or a task order or delivery order in excess of $10,000,000 to that contractor;

(B) Establish overhead or other rates for that contractor's contracts valued in excess of $10,000,000;

(C) Approve issuing a contract payment or payments in excess of $10,000,000 to that contractor; or

(D) Pay or settle a claim in excess of $10,000,000 with that contractor.

(2) The 1-year prohibition begins on the date—

(i) Of contract award for positions described in paragraph (d)(1)(i) of this subsection, or the date of contractor selection if the official was not serving in the position on the date of award;

(ii) The official last served in one of the positions described in paragraph (d)(1)(ii) of this subsection; or

(iii) The official made one of the decisions described in paragraph (d)(1)(iii) of this subsection.

(3) The prohibition in paragraph (d)(1) of this subsection does not prevent a former official from accepting compensation from any division or affiliate of a contractor that does not produce the same or similar products or services than the entity responsible for the contract referred to in paragraph (d)(1).

3.104-4 Disclosure, protection, and marking of contractor bid or proposal information and source selection information.

(a) No person or entity may disclose contractor bid or proposal information or source selection information to any person other than those authorized to receive that information, in accordance with applicable agency regulations or procedures, by the agency head or contracting officer. This restriction applies except as specifically provided in this subsection.

(b) Contractor bid or proposal information and source selection information must be protected from unauthorized disclosure according to 14.401, 15.207, applicable law, and agency regulations.

(c) Individuals who are unsure if specific information is source selection information, as defined in 2.101, should consult with agency officials. Individuals preparing material that may be source selection information as described in paragraph (10) of the "source selection information" definition in 2.101 must mark the cover page and each page they believe contains source selection information with this legend: "Source Selection Information—See FAR 2.101 and 3.104." Although information in paragraphs (1) through (9) of the definition in 2.101 counts as source selection information whether or not marked, all reasonable efforts must be made to mark such material with the same legend.

(d) The contracting officer must notify the contractor in writing if the contracting officer believes proprietary information, contractor bid or proposal information, or information marked under 52.215-1(e) has been inappropriately marked. The contractor who applied the marking must be given an opportunity to justify the marking. This requirement does not apply to situations covered in paragraph (d)(3) of this subsection.

(1) If the contractor agrees the marking is not justified or does not respond within the time specified in the notice, the contracting officer may remove the marking and release the information.

(2) If, after reviewing the contractor's justification, the contracting officer determines the marking is not justified, the contracting officer must notify the contractor in writing before releasing the information.

(3) For technical data marked as proprietary by a contractor, the contracting officer must follow the procedures in part 27.

(e) This section does not restrict or prohibit—

(1) A contractor from disclosing its own bid or proposal information or the recipient from receiving that information. During reverse auctions, agencies may reveal offered price(s) to all offerors, but must not reveal any offeror's identity except for the awardee's identity after making an award resulting from the auction (see subpart 17.8);

(2) The disclosure or receipt of information, not otherwise protected, relating to a canceled Federal agency procurement before contract award, unless the Federal agency plans to resume the procurement;

(3) Individual meetings between a Federal agency official and an offeror or potential offeror for, or recipient of, a contract or subcontract under a Federal agency procurement, provided that unauthorized disclosure or receipt of contractor bid or proposal information or source selection information does not occur; or

(4) The Government's use of technical data in a manner consistent with the Government's rights in the data.

(f) This section does not authorize—

(1) Withholding any information from a proper request by Congress, any committee or subcommittee thereof, a Federal agency, the Comptroller General, or an Inspector General of a Federal agency, except as otherwise authorized by law or

regulation. Any release containing contractor bid or proposal information or source selection information must clearly identify the information as contractor bid or proposal information or source selection information related to a Federal agency procurement. The release must also notify the recipient that disclosure of the information is restricted by 41 U.S.C. chapter 21;

(2) Withholding information from, or restricting its receipt by, the Comptroller General during a protest against the award or proposed award of a Federal agency procurement contract;

(3) Releasing information after award of a contract or cancellation of a procurement if such information is contractor bid or proposal information or source selection information that relates to another procurement; or

(4) Disclosing, soliciting, or receiving bid or proposal information or source selection information after award if such actions are prohibited by law. (See 3.104-2(b)(5) and part 24.)

3.104-5 Disqualification.

(a) *Contacts through agents or other intermediaries*. Employment contacts between an employee and an offeror conducted through agents or other intermediaries may require disqualification under 3.104-3(c)(1). These contacts may also require disqualification under other statutes and regulations. (See 3.104-2(b)(2).)

(b) *Disqualification notice*. An agency official who must disqualify himself or herself under 3.104-3(c)(1)(ii) must submit the contact report required by 3.104-3(c)(1). The official must also promptly submit written notice of disqualification from further participation in the procurement to the contracting officer, the source selection authority (if different from the contracting officer), and the agency official's immediate supervisor. At a minimum, the notice must—

(1) Identify the procurement;

(2) Describe the nature of the agency official's participation in the procurement and specify the approximate dates or time period of participation; and

(3) Identify the offeror and describe its interest in the procurement.

(c) *Resumption of participation in a procurement*. (1) The official must remain disqualified until the agency, at its sole and exclusive discretion, authorizes the official to resume participation in the procurement according to 3.104-3(c)(1)(ii).

(2) After the conditions of 3.104-3(c)(1)(ii)(A) or (B) have been met, the head of the contracting activity (HCA), after consultation with the agency ethics official, may authorize the disqualified official to resume participation in the procurement, or may determine that an additional disqualification period is necessary to protect the procurement process integrity. When determining the disqualification period, the HCA must consider any factors that create an appearance that the disqualified official acted without complete impartiality. The HCA should document the reinstatement decision in writing.

(3) Government officers or employees must also comply with 18 U.S.C. 208 and 5 CFR part 2635 regarding resumed participation in procurement matters. A government officer or employee may not resume participating in a procurement matter affecting the financial interest of someone with whom they are seeking employment, unless the individual receives—

(i) A waiver pursuant to 18 U.S.C. 208(b)(1) or (b)(3); or

(ii) An authorization according to the requirements of subpart F of 5 CFR part 2635.

3.104-6 Ethics advisory opinions regarding prohibitions on a former official's acceptance of compensation from a contractor.

(a) An official or former official of a Federal agency may request advice from the appropriate agency ethics official before accepting compensation from a contractor. This applies when the individual does not know whether 41 U.S.C. 2104 (see 3.104-3(d)) prevents them from accepting such compensation.

(b) The request for an advisory opinion must be in writing, include all relevant information reasonably available to the official or former official, and be dated and signed. The request must include information about the—

(1) Procurement(s), or decision(s) on matters under 3.104-3(d)(1)(iii), involving the particular contractor. This includes contract or solicitation numbers, dates of solicitation or award, a description of the supplies or services procured or to be procured, and contract amount;

(2) Individual's participation in the procurement or decision, including the dates or time periods of that participation, and the nature of the individual's duties, responsibilities, or actions; and

(3) Contractor, including a description of the products or services produced by the division or affiliate of the contractor from whom the individual proposes to accept compensation.

(c) The agency ethics official should issue an opinion within 30 days after receiving a complete request, or as soon as practicable after that. The opinion should address whether the proposed conduct would violate 41 U.S.C. 2104.

(d) (1) If the request does not include complete information, the agency ethics official may ask the requester to provide more information. The ethics official may also request information from other persons, including the source selection authority, the contracting officer, or the requester's immediate supervisor.

(2) When issuing an opinion, the agency ethics official may rely on the accuracy of information provided by the requester or other agency sources. This applies unless the official has reason to believe the information is fraudulent, misleading, or otherwise incorrect.

(3) If the requester receives a written opinion from the agency ethics official stating they may accept compensation from a particular contractor and accepts such compensation in good faith reliance on that opinion, neither the requester nor the contractor will be found to have knowingly violated 41 U.S.C. 2104. However, if the requester or contractor has actual knowledge or reason to believe the opinion is based on fraudulent, misleading, or otherwise incorrect information, their reliance on the opinion will not be considered good faith.

3.104-7 Violations or possible violations.

(a) A contracting officer who receives information about a violation or possible violation of procurement integrity laws (41 U.S.C. 2102, 2103, or 2104) must determine if this affects the pending award or contractor selection.

(1) If the contracting officer determines there is no impact on the procurement, the contracting officer must forward the information about the violation, including documentation supporting the "no impact" determination, and send these materials to the individual designated per agency procedures.

(i) If that individual agrees with the "no impact" assessment, the contracting officer may continue with the procurement.

(ii) If that individual disagrees, that person must promptly forward all information to the HCA and advise the contracting officer to withhold award.

(2) If the contracting officer determines the violation does impact the procurement, the contracting officer must promptly forward all information to the HCA.

(b) The HCA must review all available information and, following agency procedures, take appropriate action, such as-

(1) Advise the contracting officer to continue with the procurement;

(2) Begin an investigation;

(3) Refer the information disclosed to appropriate criminal investigative agencies;

(4) Conclude that a violation occurred; or

(5) Recommend that the agency head determine that the contractor, or someone acting for the contractor, has engaged in conduct constituting an offense punishable under 41 U.S.C. 2105, for the purpose of voiding or rescinding the contract.

(c) Before concluding that an offeror, contractor, or person has violated 41 U.S.C. chapter 21, the HCA may request information from appropriate parties regarding the violation or possible violation.

(d) If the HCA concludes that 41 U.S.C. chapter 21 has been violated, the HCA may direct the contracting officer to—

(1) If a contract has not been awarded—

(i) Cancel the procurement;

(ii) Disqualify an offeror; or

(iii) Take other appropriate actions to protect Government interests.

(2) If a contract has been awarded—

(i) Apply appropriate contractual remedies, including profit recapture under the clause at 52.203-10 (Price or Fee Adjustment for Illegal or Improper Activity), or, if the contract has been rescinded, recovery of the amount expended under the contract.

(ii) Void or rescind the contract when:

(A) The contractor or someone acting for the contractor has been convicted for an offense where the conduct constitutes a violation of 41 U.S.C. 2102 for the purpose of either-

(1) Exchanging the information for anything of value; or

(2) Obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract; or

(B) The agency head has determined, based upon a preponderance of the evidence, that the contractor or someone acting for the contractor has engaged in conduct constituting an offense punishable under 41 U.S.C. 2105(a); or

(iii) Take any other appropriate actions in the best interests of the Government.

(3) Refer the matter to the agency suspending and debarring official.

(e) The HCA should recommend or direct an administrative or contractual remedy that matches the severity and effect of the violation.

(f) If the HCA determines that urgent and compelling circumstances justify an award, or award is otherwise in the interests of the Government, the HCA, in accordance with agency procedures, may authorize the contracting officer to award the contract or execute the contract modification after notifying the agency head.

(g) The HCA may delegate authority under this subsection to an individual at least one organizational level above the contracting officer and of General Officer, Flag, Senior Executive Service, or equivalent rank.

3.104-8 Criminal and civil penalties, and further administrative remedies.

Criminal penalties, civil penalties, and administrative remedies may apply to conduct that violates procurement integrity laws in 41 U.S.C. chapter 21 (see 3.104-3). For a special rule about bid protests see 41 U.S.C. 2106. For administrative remedies related to contracts, see 3.104-7.

(a) An official who knowingly fails to follow the requirements of 3.104-3 is subject to penalties and administrative action described in 41 U.S.C. 2105.

(b) An offeror who engages in employment discussion with an official subject to the restrictions of part 3, knowing that the official has not complied with part 3, is subject to the criminal, civil, or administrative penalties set forth in 41 U.S.C. 2105.

(c) An official who refuses to terminate employment discussions (see 3.104-5) may be subject to agency administrative actions under 5 CFR 2635.604(d) if the official's disqualification from participation in a particular procurement interferes substantially with the individual's ability to perform assigned duties.

3.104-9 Contract clauses.

In solicitations and contracts that exceed the simplified acquisition threshold, other than those for commercial products or commercial services, insert the clauses at—

(a) 52.203-8, Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity; and

(b) 52.203-10, Price or Fee Adjustment for Illegal or Improper Activity.

Subpart 3.2 - Contractor Gratuities to Government Personnel

3.201 Applicability.

This subpart applies to all executive agencies, except that coverage concerning exemplary damages applies only to the Department of Defense (10 U.S.C. 4651).

3.202 Contract clause.

The contracting officer must insert the clause at 52.203-3, Gratuities, in solicitations and contracts with a value exceeding the simplified acquisition threshold, except those for personal services and those between military departments or defense agencies and foreign governments that do not obligate any funds appropriated to the Department of Defense.

3.203 Reporting suspected violations of the Gratuities clause.

Agency personnel must report suspected violations of the Gratuities clause to the contracting officer or other designated official in accordance with agency procedures. The agency reporting procedures must be published as an implementation of this section and must clearly specify—

(a) What to report and how to report it; and

(b) The channels through which reports must pass, including the function and authority of each official designated to review them.

3.204 Treatment of violations.

(a) Before taking action against a contractor, the agency head or designee must determine, after notice and hearing under agency procedures, whether the contractor, its agent, or representative, under a contract containing the Gratuities clause:

(1) Offered or gave a gratuity (such as entertainment or a gift) to a Government officer, official, or employee; and

(2) Intended to use this gratuity to obtain a contract or favorable treatment under a contract (this intent typically must be inferred from circumstances).

(b) Agency procedures must give the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents. The procedures should be as informal as practicable, while maintaining principles of fundamental fairness.

(c) When the agency head or designee determines that a violation has occurred, the Government may—

(1) Terminate the contractor's right to proceed;

(2) Initiate debarment or suspension measures described in part 9; and

(3) Assess exemplary damages, if the contract uses money appropriated to the Department of Defense.

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Subpart 3.3 - Reports of Suspected Antitrust Violations

3.301 [Reserved]

3.302 Definitions.

As used in this subpart-

Identical bids means bids for the same line item that are determined to be identical as to unit price or total line item amount, with or without the application of evaluation factors (e.g., discount or transportation cost).

3.303 Reporting suspected antitrust violations.

(a) Agencies are required by 41 U.S.C. 3707 and 10 U.S.C. 3307 to report to the Attorney General any bids or proposals that evidence a violation of the antitrust laws. These reports are in addition to those required by part 9.

(b) The antitrust laws are intended to ensure that markets operate competitively. Any agreement or mutual understanding among competing firms that restrains the natural operation of market forces is suspect. Paragraph (c) of this section identifies behavior patterns that are often associated with antitrust violations. Activities meeting the descriptions in paragraph (c) are not necessarily improper, but they are sufficiently questionable to warrant notifying the appropriate authorities, in accordance with agency procedures.

(c) Practices or events that may show violations of antitrust laws include-

(1) The existence of an *industry price list* or *price agreement* to which contractors refer in formulating their offers;

(2) A sudden change from competitive bidding to identical bidding;

(3) Simultaneous price increases or follow-the-leader pricing;

(4) Rotation of bids or proposals where each competitor takes turns being the low bidder, or where certain competitors bid low only on some sizes of contracts and high on other sizes;

(5) Division of the market, so that certain competitors bid low only for contracts awarded by certain agencies, or for contracts in certain geographical areas, or on certain products, and bid high on all other jobs;

(6) Establishment by competitors of a collusive price estimating system;

(7) The filing of a joint bid by two or more competitors when at least one of the competitors has sufficient technical capability and productive capacity for contract performance;

(8) Any incidents suggesting direct collusion among competitors, such as the appearance of identical calculation or spelling errors in two or more competitive offers or the submission by one firm of offers for other firms; and

(9) Statements by current employees, former employees, or competitors that an agreement to restrain trade exists.

(d) Contracting officers must report identical bids when the agency has reason to believe the bids resulted from collusion.

(e) For offers from foreign contractors on contracts to be performed outside the United States and its outlying areas, contracting officers may refer suspected collusive offers to the relevant foreign government authorities for appropriate action.

(f) Agency reports must be addressed to the Attorney General, U.S. Department of Justice, Washington, DC 20530, Attention: Assistant Attorney General, Antitrust Division, and must include—

(1) A brief statement describing the suspected practice and the reason for the suspicion; and

(2) The name, address, and telephone number of an individual in the agency who can be contacted for further information.

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Subpart 3.4 - Contingent Fees

3.400 Scope of subpart.

This subpart prescribes policies and procedures that restrict contingent fee arrangements for soliciting or obtaining Government contracts to those permitted by 10 U.S.C. 3321(b)(1) and 41 U.S.C. 3901.

3.401 Definitions.

As used in this subpart-

Bona fide agency, means an established commercial or selling agency, maintained by a contractor for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds itself out as being able to obtain any Government contract or contracts through improper influence.

Bona fide employee, means a person, employed by a contractor and subject to the contractor's supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds out as being able to obtain any Government contract or contracts through improper influence.

Contingent fee, means any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a Government contract.

Improper influence, means any influence that induces or tends to induce a Government employee or officer to give consideration or to act regarding a Government contract on any basis other than the merits of the matter.

3.402 Statutory requirements.

Contractors' arrangements to pay contingent fees for soliciting or obtaining Government contracts have long been considered contrary to public policy because such arrangements may lead to attempted or actual improper influence. In 10 U.S.C. 3321(b) and 41 U.S.C. 3901, Congress affirmed this public policy but permitted certain exceptions. These statutes—

(a) Require every negotiated contract to include a warranty by the contractor against contingent fees;

(b) Permit, as an exception to the warranty, contingent fee arrangements between contractors and bona fide employees or bona fide agencies; and

(c) Provide that if a contractor breaches or violates this warranty, the Government may annul the contract without liability or deduct from the contract price or consideration, or otherwise recover, the full amount of the contingent fee.

3.403 Applicability.

This subpart applies to all contracts. Statutory requirements for negotiated contracts are, as a matter of policy, extended to sealed bid contracts.

3.404 Contract clause.

The contracting officer must insert the clause at 52.203-5, Covenant Against Contingent Fees, in all solicitations and contracts exceeding the simplified acquisition threshold, other than those for commercial products or commercial services (see parts 2 and 12).

3.405 Misrepresentations or violations of the Covenant Against Contingent Fees.

(a) Government personnel who suspect or have evidence of any of the following must report the matter promptly to the contracting officer or appropriate higher authority according to agency procedures:

(1) Attempted or actual exercise of improper influence;

(2) Misrepresentation of a contingent fee arrangement; or

(3) Other violations of the Covenant Against Contingent Fees.

(b) When specific evidence or other reasonable basis exists to suspect one or more violations described in paragraph (a) of this section, the chief of the contracting office must review the facts and, if appropriate, take or direct one or more of the following actions:

(1) If before award, reject the bid or proposal.

(2) If after award, enforce the Government's right to annul the contract or to recover the fee.

(3) Initiate suspension or debarment action under part 9.

(4) Refer suspected fraudulent or criminal matters to the Department of Justice, as prescribed in agency regulations.

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Subpart 3.5 - Other Improper Business Practices

3.501 Buying-in.

3.501-1 Definition.

Buying-in, as used in this section, means submitting an offer below anticipated costs, expecting to—

(1) Increase the contract amount after award (e.g., through unnecessary or excessively priced change orders); or

(2) Receive follow-on contracts at artificially high prices to recover losses incurred on the buy-in contract.

3.501-2 General.

(a) Buying-in may decrease competition or result in poor contract performance. The contracting officer must take appropriate action to ensure buying-in losses are not recovered by the contractor through the pricing of—

(1) Change orders; or

(2) Follow-on contracts subject to cost analysis.

(b) The Government should minimize the opportunity for buying-in by seeking a price commitment covering as much of the entire program concerned as is practical by using—

(1) Multiyear contracting, with a requirement in the solicitation that a price be submitted only for the total multiyear quantity; or

(2) Priced options for additional quantities that, together with the firm contract quantity, equal the program requirements (see part 17).

(c) Other safeguards are available to the contracting officer to preclude recovery of buying-in losses (e.g., amortization of nonrecurring costs (see 15.408, Table 15-2, paragraph A., column (2) under “Formats for Submission of Line Item Summaries”) and treatment of unreasonable price quotations (see part 15).

3.502 Subcontractor kickbacks.

3.502-1 Definitions.

As used in this section—

Kickback means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.

Person means a corporation, partnership, business association of any kind, trust, joint-stock company, or individual.

Prime contract means a contract or contractual action entered into by the United States for the purpose of obtaining supplies, materials, equipment, or services of any kind.

Prime Contractor means a person who has entered into a prime contract with the United States.

Prime Contractor employee, as used in this section, means any officer, partner, employee, or agent of a prime contractor.

Subcontract means a contract or contractual action entered into by a prime contractor or subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract.

Subcontractor—

(1) Means any person, other than the prime contractor, who offers to furnish or furnishes any supplies, materials, equipment, or services of any kind under a prime contract or a subcontract entered into in connection with such prime contract; and

(2) Includes any person who offers to furnish or furnishes general supplies to the prime contractor or a higher tier subcontractor.

3.502-2 Subcontractor kickbacks.

The Anti-Kickback Act of 1986 (now codified at 41 U.S.C. chapter 87, Kickbacks,) was passed to deter subcontractors from making payments and contractors from accepting payments for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or a subcontract relating to a prime contract. The Kickbacks statute—

(a) Prohibits any person from—

(1) Providing, attempting to provide, or offering to provide any kickback;

(2) Soliciting, accepting, or attempting to accept any kickbacks; or

(3) Including, directly or indirectly, the amount of any kickback in the contract price charged by a subcontractor to a prime contractor or a higher tier subcontractor or in the contract price charged by a prime contractor to the United States.

(b) Imposes criminal penalties on any person who knowingly and willfully engages in the prohibited conduct addressed in paragraph (a) of this section.

(c) Provides for the recovery of civil penalties by the United States from any person who knowingly engages in such prohibited conduct and from any person whose employee, subcontractor, or subcontractor employee provides, accepts, or charges a kickback.

(d) Provides that—

(1) The contracting officer may offset the amount of a kickback against monies owed by the United States to the prime contractor under the prime contract to which such kickback relates;

(2) The contracting officer may direct a prime contractor to withhold from any sums owed to a subcontractor under a subcontract of the prime contract the amount of any kickback which was or may be offset against the prime contractor under paragraph (d)(1) of this section; and

(3) An offset under paragraph (d)(1) or a direction under paragraph (d)(2) of this section is a claim by the Government for the purposes of 41 U.S.C. chapter 71, Contract Disputes.

(e) Authorizes contracting officers to order that sums withheld under paragraph (d)(2) of this section be paid to the contracting agency, or if the sum has already been offset against the prime contractor, that it be retained by the prime contractor.

(f) Requires the prime contractor to notify the contracting officer when the withholding under paragraph (d)(2) of this section has been accomplished unless the amount withheld has been paid to the Government.

(g) Requires a prime contractor or subcontractor to report in writing to the inspector general of the contracting agency, the head of the contracting agency if the agency does not have an inspector general, or the Attorney General any possible violation of the Kickbacks statute when the prime contractor or subcontractor has reasonable grounds to believe such violation may have occurred.

(h) Provides that, for the purpose of determining whether there has been a violation of the Kickbacks statute on any prime contract, the Government Accountability Office and the inspector general of the contracting agency, or a representative of such contracting agency designated by the head of such agency if the agency does not have an inspector general, must have access to and may inspect the facilities and audit the books and records of any prime contractor or subcontractor under a prime contract awarded by the agency.

(i) Requires each contracting agency to include in each prime contract, other than for commercial products or commercial services, exceeding $200,000, a requirement that the prime contractor must—

(1) Have in place and follow reasonable procedures designed to prevent and detect violations of the Kickbacks statute in its own operations and direct business relationships (e.g., company ethics rules prohibiting kickbacks by employees, agents, or subcontractors; education programs for new employees and subcontractors, explaining policies about kickbacks, related company procedures and the consequences of detection; procurement procedures to minimize the opportunity for kickbacks; audit procedures designed to detect kickbacks; periodic surveys of subcontractors to elicit information about kickbacks; procedures to report kickbacks to law enforcement officials; annual declarations by employees of gifts or gratuities received from subcontractors; annual employee declarations that they have violated no company ethics rules; personnel practices that document unethical or illegal behavior and make such information available to prospective employers); and

(2) Cooperate fully with any Federal agency investigating a possible violation of the Kickbacks statute.

(j) Notwithstanding paragraph (i) of this section, a prime contractor must cooperate fully with any Federal Government agency investigating a violation of 41 U.S.C. 8702 (see 41 U.S.C. 8703(b)).

3.502-3 Contract clause.

The contracting officer must insert the clause at 52.203-7, Anti-Kickback Procedures, in solicitations and contracts exceeding $200,000, other than those for commercial products or commercial services (see part 12).

3.503 Unreasonable restrictions on subcontractor sales.

3.503-1 Policy.

10 U.S.C. 4655 and 41 U.S.C. 4704 require that subcontractors not be unreasonably precluded from making direct sales to the Government of any supplies or services made or furnished under a contract. However, this does not preclude contractors from asserting rights that are otherwise authorized by law or regulation.

3.503-2 Contract clause.

The contracting officer must insert the clause at 52.203-6, Restrictions on Subcontractor Sales to the Government, in solicitations and contracts exceeding the simplified acquisition threshold. For the acquisition of commercial products or commercial services, the contracting officer must use the clause with its Alternate I.

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Subpart 3.6 - Contracts with Government Employees or Organizations Owned or Controlled by Them

3.601 Policy.

(a) Except as specified in 3.602, a contracting officer must not knowingly award a contract to a Government employee or to a business concern or other organization owned or substantially owned or controlled by one or more Government employees. This policy is intended to avoid any conflict of interest that might arise between the employees' interests and their Government duties, and to avoid the appearance of favoritism or preferential treatment by the Government toward its employees.

(b) For purposes of this subpart, special Government employees (as defined in 18 U.S.C. 202) performing services as experts, advisors, or consultants, or as members of advisory committees, are not considered Government employees unless—

(1) The contract arises directly out of the individual's activity as a special Government employee;

(2) In the individual's capacity as a special Government employee, the individual is in a position to influence the award of the contract; or

(3) Another conflict of interest is determined to exist.

3.602 Exceptions.

The agency head, or a designee not below the level of the head of the contracting activity, may authorize an exception to the policy in 3.601 only if there is a compelling reason to do so, such as when the Government's needs cannot reasonably be otherwise met.

3.603 Responsibilities of the contracting officer.

(a) Before awarding a contract, the contracting officer must obtain an authorization under 3.602 if—

(1) The contracting officer knows, or has reason to believe, that a prospective contractor is one to which award is otherwise prohibited under 3.601; and

(2) There is a most compelling reason to make an award to that prospective contractor.

(b) The contracting officer must comply with the requirements and guidance of the conflicts of interest subpart in part 9 before awarding a contract to an organization owned or substantially owned or controlled by Government employees.

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Subpart 3.7 - Voiding and Rescinding Contracts

3.700 Scope of subpart.

This subpart prescribes Governmentwide policies and procedures for exercising discretionary authority to declare void and rescind contracts.

3.701 Purpose.

This subpart provides—

(a) An administrative remedy with respect to contracts in relation to which there has been—

(1) A final conviction for bribery, conflict of interest, disclosure or receipt of contractor bid or proposal information or source selection information in exchange for a thing of value or to give anyone a competitive advantage in the award of a Federal agency procurement contract, or similar misconduct; or

(2) An agency head determination that contractor bid or proposal information or source selection information has been disclosed or received in exchange for a thing of value, or for the purpose of obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract; and

(b) A method to deter similar misconduct in the future by those who are involved in the award, performance, and administration of Government contracts.

3.702 Definition.

Final conviction means a conviction, whether entered on a verdict or plea, including a plea of nolo contendere, for which sentence has been imposed.

3.703 Authority.

(a) Section 1(e) of Pub. L. 87-849, 18 U.S.C. 218 (*the Act*), gives the President or the heads of executive agencies acting under regulations prescribed by the President, the power to declare void and rescind contracts and other transactions listed in the Act. This applies when there has been a final conviction for bribery, conflict of interest, or any other violation of Chapter 11 of Title 18 of the United States Code (18 U.S.C. 201-224). Executive Order 12448, November 4, 1983, delegates the President's authority under the Act to the heads of the executive agencies and military departments.

(b) 41 U.S.C. 2105(c) requires Federal agencies, upon receiving information that a contractor or person has violated 41 U.S.C. 2102, to consider rescinding a contract when-

(1) The contractor or someone acting for the contractor has been convicted of an offense punishable under 41 U.S.C. 2105(a); or

(2) The agency head, or designee, has determined, based on a preponderance of the evidence, that the contractor or someone acting for the contractor has engaged in conduct constituting such an offense.

3.704 Policy.

(a) In cases with a final conviction for any violation of 18 U.S.C. 201-224 involving or relating to agency-awarded contracts, the agency head or designee must consider the available facts. If appropriate, they must declare contracts void and rescind them, and recover the amounts spent and property transferred by the agency according to the policies and procedures in this subpart.

(b) A final conviction under 18 U.S.C. 201-224 relating to a contract may also indicate the party is not presently responsible. The agency should consider starting debarment proceedings according to part 9, if debarment has not already begun or is not in effect when the final conviction occurs.

(c) If there is a final conviction for an offense punishable under 41 U.S.C. 2105, or if the agency head or designee has determined, based on a preponderance of the evidence, that the contractor or someone acting for the contractor has engaged in such conduct, then the head of the contracting activity must consider, in addition to any other penalty prescribed by law or regulation—

(1) Declaring contracts void and rescinding them, as appropriate, and recovering the amounts spent under the contracts by using the procedures at 3.705 (see 3.104-7); and

(2) Recommending the initiation of suspension or debarment proceedings according to part 9.

3.705 Procedures.

(a) *Reporting*. The facts concerning any final conviction for any violation of 18 U.S.C. 201-224 involving or relating to agency contracts must be reported promptly to the agency head or designee for consideration. The agency head or designee must promptly notify the Civil Division, Department of Justice, that an action is being considered under this subpart.

(b) *Decision*. Following an assessment of the facts, the agency head or designee may declare void and rescind contracts with respect to which a final conviction has been entered, and recover the amounts expended and the property transferred by the agency under the terms of the contracts involved.

(c) *Decision-making process*. Agency procedures governing the voiding and rescinding decision-making process must be as informal as is practicable, consistent with the principles of fundamental fairness. At a minimum, agencies must provide the following:

(1) A notice of the proposed action to declare void and rescind the contract must be made in writing.

(2) A thirty calendar day period after receipt of the notice, for the contractor to submit pertinent information before any final decision is made.

(3) Upon request made within the period for submission of pertinent information, an opportunity must be afforded for a hearing at which witnesses may be presented, and any witness the agency presents may be confronted. However, no inquiry may be made regarding the validity of a conviction.

(4) If the agency head or designee decides to declare void and rescind the contracts involved, that official must issue a written decision which—

(i) States that determination;

(ii) Reflects consideration of the fair value of any tangible benefits received and retained by the agency; and

(iii) States the amount due, and the property to be returned, to the agency.

(d) Notice of proposed action. The notice of the proposed action, at a minimum must—

(1) Advise that consideration is being given to declaring void and rescinding contracts awarded by the agency, and recovering the amounts expended and property transferred therefor, under the provisions of 18 U.S.C. 218;

(2) Specifically identify the contracts affected by the action;

(3) Specifically identify the offense or final conviction on which the action is based;

(4) State the amounts expended and property transferred under each of the contracts involved, and the money and the property demanded to be returned;

(5) Identify any tangible benefits received and retained by the agency under the contract, and the value of those benefits, as calculated by the agency;

(6) Advise that pertinent information may be submitted within 30 calendar days after receipt of the notice, and that, if requested within that time, a hearing must be held at which witnesses may be presented and any witness the agency presents may be confronted; and

(7) Advise that action must be taken only after the agency head or designee issues a final written decision on the proposed action.

(e) *Final agency decision*. The agency head or designee must base the final decision on all available information, and any relevant information submitted in writing or presented during a hearing. If the agency decision declares void and rescinds the contract, the final decision must specify the amounts due and property to be returned to the agency and reflect consideration of the fair value of any tangible benefits received and retained by the agency. Notice of the decision must be sent promptly by certified mail, return receipt requested. When contracts are rescinded under the Act's authority and the agency head demands recovery of amounts expended and property transferred, this is not considered a claim under 41 U.S.C. chapter 71, Contract Disputes or part 33. Therefore, the procedures required by the statute and the FAR for the issuance of a final contracting officer decision are not applicable to final agency decisions under this subpart and must not be followed.

Subpart 3.8 - Limitations on the Payment of Funds to Influence Federal Transactions

3.800 Scope of subpart.

This subpart prescribes policies and procedures implementing 31 U.S.C. 1352, "Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions."

3.801 Definitions.

As used in this subpart-

Agency means executive agency as defined in 2.101.

Covered Federal action means any of the following actions:

(1) Awarding any Federal contract.

(2) Making any Federal grant.

(3) Making any Federal loan.

(4) Entering into any cooperative agreement.

(5) Extending, continuing, renewing, amending, or modifying any Federal contract, grant, loan, or cooperative agreement.

Indian tribe and "tribal organization" have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b) and include Alaskan Natives.

Influencing or attempting to influence means making, with the intent to influence, any communication to or appearance before an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

Local government means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

Officer or employee of an agency includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under Title 5, United States Code, including a position under a temporary appointment.

(2) A member of the uniformed services, as defined in subsection 101(3), Title 37, United States Code.

(3) A special Government employee, as defined in section 202, Title 18, United States Code.

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, Title 5, United States Code, appendix 2.

Person means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization eligible to receive Federal contracts, grants, cooperative agreements, or loans from an agency, but only with respect to expenditures by such tribe or organization that are made for purposes specified in paragraph 3.802(a) and are permitted by other Federal law.

Reasonable compensation means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

Reasonable payment means, with respect to professional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

Recipient includes the contractor and all subcontractors. This term excludes an Indian tribe, tribal organization, or any other Indian organization eligible to receive Federal contracts, grants, cooperative agreements, or loans from an agency, but only with respect to expenditures by such tribe or organization that are made for purposes specified in paragraph 3.802(a) and are permitted by other Federal law.

Regularly employed means, with respect to an officer or employee of a person requesting or receiving a Federal contract, an officer or employee who is employed by such person for at least 130 working days within 1 year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract. An officer or employee who is employed by such person for less than 130 working days within 1 year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

State means a State of the United States, the District of Columbia, an outlying area of the United States, an agency or instrumentality of a State, and multi-State, regional, or interstate entity having governmental duties and powers.

3.802 Statutory prohibition and requirement.

(a) 31 U.S.C. 1352 prohibits recipients of Federal contracts, grants, loans, or cooperative agreements from using appropriated funds to pay any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress regarding covered Federal actions.

(1) For purposes of this subpart the term "appropriated funds" does not include profit or fee from a covered Federal action.

(2) If a person shows they have enough non-Federal appropriated funds, the Government must assume these other funds were used for any influencing activities that would be unallowable if paid for with Federal appropriated funds.

(b) 31 U.S.C. 1352 also requires offerors to submit a declaration that includes both certification and disclosure, with regular updates of the disclosure after contract award. These requirements appear in the provision at 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, and the clause at 52.203-12, Limitation on Payments to Influence Certain Federal Transactions.

3.803 Exceptions.

(a) The prohibition of paragraph 3.802(a) does not apply under the following conditions:

(1) *Agency and legislative liaison by own employees.* (i) Payment of reasonable compensation made to an officer or employee of a person requesting or receiving a covered Federal action is permitted when the payment is for agency and legislative liaison activities not directly related to a covered Federal action. Providing any information specifically requested by an agency or Congress is permitted at any time.

(ii) Participating with an agency in discussions unrelated to a specific solicitation for any covered Federal action, is permitted when discussions concern-

(A) The qualities and characteristics (including demonstrations) of the person's products or services, sales terms, and service capabilities; or

(B) How the person's products or services might be adapted for agency use.

(iii) Providing information not specifically requested but necessary for an agency to make an informed decision about starting a covered Federal action is permitted before formal solicitation.

(iv) Participating in technical discussions about preparing an unsolicited proposal before its official submission is permitted.

(v) Making capability presentations before formal solicitation when seeking an award under the Small Business Act, as amended by Public Law 95-507 and later amendments, is permitted.

(2) *Professional and technical services*. (i) Reasonable compensation to an officer or employee of a person requesting or receiving a covered Federal action is permitted when payment is for professional or technical services directly related to preparing, submitting, or negotiating bids, proposals, or applications for that Federal action, or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal action.

(ii) Reasonable payment to persons who are not officers or employees of a person requesting or receiving a covered Federal action is permitted when payment is for professional or technical services directly related to preparing, submitting, or negotiating bids, proposals, or applications for that Federal action, or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal Action. These persons may include consultants and trade associations.

(iii) In this section, "professional and technical services" means advice and analysis directly applying professional or technical expertise. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional or a technical person are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another, are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(iv) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal action includes those in laws, regulations, and the actual award documents.

(b) Only the communications and services specifically authorized in paragraph (a) are permitted.

(c) The disclosure requirements in paragraph 3.802(b) do not apply to reasonable compensation paid to regularly employed officers of a person.

3.804 Policy.

The contracting officer shall obtain certifications and disclosures as required by the provision at 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, prior to the award of any contract exceeding $200,000.

3.805 Exemption.

The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibitions of this subpart whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of the exemption to Congress immediately after making the determination.

3.806 Processing suspected violations.

The contracting officer must report suspected violations of the requirements of 31 U.S.C. 1352 in accordance with agency procedures.

3.807 Civil penalties.

Agencies must impose and collect civil penalties according to the Program Fraud and Civil Remedies Act, 31 U.S.C. 3803 (except subsection (c)), 3804-3808, and 3812. These penalties apply when the Act's provisions do not conflict with the requirements of this subpart.

3.808 Solicitation provision and contract clause.

(a) Insert the provision at 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, in solicitations expected to exceed $200,000.

(b) Insert the clause at 52.203-12, Limitation on Payments to Influence Certain Federal Transactions, in solicitations and contracts expected to exceed $200,000.

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Subpart 3.9 - Whistleblower Protections for Contractor Employees

3.900 Scope of subpart.

This subpart implements various statutory whistleblower programs. This subpart does not implement 10 U.S.C. 4701, which is applicable only to DoD, NASA, and the Coast Guard.

(a) 41 U.S.C. 4712 is implemented in 3.900 through 3.906. These sections do not apply to—

(1) DoD, NASA, and the Coast Guard; or

(2) Any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 3003(4)). Sections 3.900 through 3.906 do not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

(i) Relates to an activity of an element of the intelligence community; or

(ii) Was discovered during contract or subcontract services provided to an element of the intelligence community.

(b) Section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions), is implemented in 3.909, which is applicable to all agencies.

3.901 Definitions.

As used in this subpart-

Abuse of authority means an arbitrary and capricious exercise of authority that is inconsistent with the mission of the executive agency concerned or the successful performance of a contract of such agency.

Authorized official of the Department of Justice means any person responsible for the investigation, enforcement, or prosecution of any law or regulation.

Inspector General means an Inspector General appointed under chapter 4 of title 5 of the United States Code and any Inspector General that receives funding from, or has oversight over contracts awarded for, or on behalf of, the executive agency concerned.

Internal confidentiality agreement or statement means a confidentiality agreement or any other written statement that the contractor requires any of its employees or subcontractors to sign regarding nondisclosure of contractor information, except that it does not include confidentiality agreements arising out of civil litigation or confidentiality agreements that contractor employees or subcontractors sign at the behest of a Federal agency.

Subcontract means any contract as defined in subpart 2.1 entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

Subcontractor means any supplier, distributor, vendor, or firm (including a consultant) that furnishes supplies or services to or for a prime contractor or another subcontractor.

3.902 Classified information.

41 U.S.C. 4712 does not provide any right to disclose classified information not otherwise provided by law.

3.903 Policy.

(a) (1) Contractors and subcontractors are prohibited from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the entities listed at paragraph (b) of this section, information that the employee reasonably believes is—

(i) Evidence of gross mismanagement of a Federal contract;

(ii) A gross waste of Federal funds;

(iii) An abuse of authority relating to a Federal contract;

(iv) A substantial and specific danger to public health or safety; or

(v) A violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract).

(2) A reprisal is prohibited even when requested by an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.

(b) Disclosure may be made to the following entities:

(1) A Member of Congress or a representative of a committee of Congress.

(2) An Inspector General.

(3) The Government Accountability Office.

(4) A Federal employee responsible for contract oversight or management at the relevant agency.

(5) An authorized official of the Department of Justice or other law enforcement agency.

(6) A court or grand jury.

(7) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.

(c) An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Federal contract must be deemed to have made a disclosure.

3.904 Complaints.

3.904-1 Procedures for filing complaints.

A contractor or subcontractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 3.903 may submit a complaint with the Inspector General of the agency concerned. Procedures for submitting fraud, waste, abuse, and whistleblower complaints are generally accessible on agency Office of Inspector General hotline or whistleblower internet sites or the complainant may directly contact the cognizant Office of the Inspector General for submission instructions. A complaint under 41 U.S.C. 4712 must be filed within three years from the date on which the alleged reprisal occurred.

3.904-2 Procedures for investigating complaints.

(a) Investigation of complaints will be conducted according to 41 U.S.C. 4712(b).

(b) After the investigation is complete, the head of the agency must ensure the Inspector General provides the report of findings to-

(1) The head of the agency;

(2) The complainant and any person acting on the complainant's behalf; and

(3) The contractor and/or subcontractor alleged to have committed the violation.

(c) The complainant, contractor, and/or subcontractor must have the opportunity to submit a written response to the report of findings. This response must be submitted to the head of the agency and the Office of Inspector General within a timeframe set by the agency that allows the agency head to take action within 30 days after receiving the report, as required by 3.905-1(a).

3.905 Remedies and enforcement of orders.

3.905-1 Remedies.

(a) *Agency response to Inspector General report.* Not later than 30 days after receiving a report pursuant to 3.904-2, the head of the agency shall—

(1) Determine whether sufficient basis exists to conclude that the contractor or subcontractor has subjected the employee who submitted the complaint to a reprisal as prohibited by 3.903; and

(2) Either issue an order denying relief or take one or more of the following actions:

(i) Order the contractor or subcontractor to take affirmative action to abate the reprisal.

(ii) Order the contractor or subcontractor to reinstate the complainant employee to their previous position, with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply if the reprisal had not occurred.

(iii) Order the contractor or subcontractor to pay the complainant employee an amount equal to all costs and expenses (including attorneys' fees and expert witnesses' fees) reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency.

(iv) Consider disciplinary or corrective action against any executive agency official, if appropriate.

(b) *Complainant's right to go to court*. (1) Paragraph (b)(2) of this section applies if-

(i) The head of the agency issues an order denying relief; or

(ii) (A) The head of the agency has not issued an order-

(1) Within 210 days after the submission of the complaint; or

(2) Within 30 days after the expiration of an extension of time granted in accordance with 41 U.S.C. 4712(b)(2)(B) for the submission of the report to those stated in 3.904-2(b); and

(B) There is no showing that such delay is due to the bad faith of the complainant.

(2) If the conditions in either paragraph (b)(1)(i) or (ii) of this section are met:

(i) The complainant must be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a de novo action at law or equity against the contractor or subcontractor to seek compensatory damages and other relief available under 41 U.S.C. 4712 in the appropriate U.S. district court, which has jurisdiction regardless of the amount in controversy.

(A) Such an action must, at the request of either party to the action, be tried by the court with a jury.

(B) An action under this authority may not be brought more than 2 years after the date on which remedies are deemed to have been exhausted.

(c) *Admissibility in evidence*. An Inspector General determination and an agency head order denying relief under this section must be admissible in evidence in any *de novo* action at law or equity brought pursuant to 41 U.S.C. 4712.

(d) *No waiver*. The rights and remedies provided for in 41 U.S.C. 4712 may not be waived by any agreement, policy, form, or condition of employment.

3.905-2 Enforcement of orders.

(a) When a contractor or subcontractor fails to comply with an order issued under 3.905-1(a)(2), the head of the agency concerned must file an action to enforce the order in the U.S. district court for the district where the reprisal occurred. In any action brought under this authority, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorney fees and costs. The complainant employee upon whose behalf an order was issued may also file such an action or join an action filed by the head of the agency.

(b) Any person adversely affected or aggrieved by an order issued under 3.905-1(a)(2) may seek review of the order's compliance with 41 U.S.C. 4712 and its implementing regulations in the U.S. court of appeals for the circuit where the reprisal is alleged to have occurred. The petition for review must be filed within 60 days after the head of the agency issues the order. Filing such an appeal does not stop enforcement of the agency head's order unless the court specifically grants a stay.

3.906 Contract clause.

The contracting officer must insert the clause at 52.203-17, Contractor Employee Whistleblower Rights, in all solicitations and contracts, except solicitations and contracts of DoD, NASA, the Coast Guard, or applicable elements of the intelligence community (see 3.900(a)).

3.907 [Reserved]

3.908 [Reserved]

3.909 Prohibition on providing funds to an entity that requires certain internal confidentiality agreements or statements.

3.909-1 Prohibition.

(a) The Government cannot use fiscal year 2015 and later fiscal year funds for contracts with entities that require employees or subcontractors to sign internal confidentiality agreements or statements that prohibit or restrict these employees or subcontractors from lawfully reporting waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information. This prohibition comes from section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and continues in subsequent appropriations acts (including continuing resolutions).

(b) The prohibition in paragraph (a) of this section does not conflict with requirements for Standard Form 312 (Classified Information Nondisclosure Agreement), Form 4414 (Sensitive Compartmented Information Nondisclosure Agreement), or any other Federal government form governing nondisclosure of classified information.

3.909-2 Representation by the offeror.

(a) To be eligible for contract award, an offeror must represent that it will not require its employees or subcontractors to sign internal confidentiality agreements or statements that prohibit or restrict them from lawfully reporting waste, fraud, or

abuse related to Government contract performance to authorized Federal investigators (such as agency Office of the Inspector General). Any offeror that does not make this representation is ineligible for contract award.

(b) The contracting officer may rely on an offeror's representation unless there is reason to question it.

3.909-3 Solicitation provision and contract clause.

When using funding subject to the prohibitions in 3.909-1(a), the contracting officer must:

(a) (1) Include provision 52.203-18, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements or Statements—Representation, in all solicitations, except as provided in paragraph (a)(2) of this section; and

(2) Not insert the provision in solicitations for personal services contracts with individuals if the individual will perform all services personally (rather than through contractor or subcontractor employees).

(b) (1) Include clause 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements, in all solicitations and resulting contracts, other than personal services contracts with individuals.

(2) Modify existing contracts, other than personal services contracts with individuals, to include the clause before obligating FY 2015 or later funds that are subject to the same prohibition on internal confidentiality agreements or statements.

Subpart 3.10 - Contractor Code of Business Ethics and Conduct

3.1000 Scope of subpart.

This subpart—

(a) Implements 41 U.S.C. 3509, Notification of Violations of Federal Criminal Law or Overpayments; and

(b) Prescribes policies and procedures for the establishment of contractor codes of business ethics and conduct, and display of agency Office of Inspector General (OIG) fraud hotline posters.

3.1001 Definitions.

As used in this subpart-

Subcontract means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract.

Subcontractor means any supplier, distributor, vendor, or firm that furnished supplies or services to or for a prime contractor or another subcontractor.

United States means the 50 States, the District of Columbia, and outlying areas.

3.1002 Policy.

(a) Government contractors must conduct themselves with the highest degree of integrity and honesty.

(b) Contractors should have a written code of business ethics and conduct. To promote compliance with such code of business ethics and conduct, contractors should have an employee business ethics and compliance training program and an internal control system that—

(1) Are suitable to the size of the company and extent of its involvement in Government contracting;

(2) Facilitate timely discovery and disclosure of improper conduct in connection with Government contracts; and

(3) Ensure corrective measures are promptly instituted and carried out.

3.1003 Requirements.

(a) *Contractor requirements*. (1) Although the policy at 3.1002 provides guidance for all Government contractors, the contract clauses at 52.203-13, Contractor Code of Business Ethics and Conduct, and 52.203-14, Display of Hotline Poster(s), become mandatory when contracts meet the conditions specified in 3.1004.

(2) A contractor may be suspended and/or debarred if a principal knowingly fails to promptly disclose to the Government credible evidence of Federal criminal law violations involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code, or Civil False Claims Act violations. This disclosure requirement applies whether or not clause 52.203-13 is applicable. Failure to timely disclose credible evidence of such violations remains grounds for suspension and/or debarment until 3 years after final contract payment (see part 9).

(3) The Payment clauses at FAR 52.212-4(i)(5), 52.232-25(d), 52.232-26(c), and 52.232-27(l) require contractors to return any contract financing or invoice overpayments they discover to the Government. A contractor may be suspended and/or debarred if a principal knowingly fails to timely disclose credible evidence of a significant overpayment, except for overpayments resulting from contract financing payments as defined in 32.001 (see part 9).

(b) *Notification of possible contractor violation*. If the contracting officer learns of a possible contractor violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C., or a violation of the civil False Claims Act, the contracting officer must:

(1) Coordinate the matter with the agency Office of the Inspector General; or

(2) Take action according to agency procedures.

(c) *Fraud Hotline Poster*. (1) Agency Offices of Inspector General (OIGs) determine the need for and content of their respective agency OIG fraud hotline poster(s).

(2) When requested by the Department of Homeland Security, agencies must ensure that contracts funded with disaster assistance funds require display of applicable fraud hotline posters. As established by the agency OIG, these posters may be displayed instead of, or in addition to, the agency's standard poster.

3.1004 Contract clauses.

(a) Insert the clause at FAR 52.203-13, Contractor Code of Business Ethics and Conduct, in solicitations and contracts if the value of the contract is expected to exceed $7.5 million and the performance period is 120 days or more.

(b) (1) Unless the contract is for the acquisition of a commercial product or commercial service or will be performed entirely outside the United States, insert the clause at 52.203-14, Display of Hotline Poster(s), if—

(i) The contract exceeds $7.5 million or a lesser amount established by the agency; and

(ii) (A) The agency has a fraud hotline poster; or

(B) The contract is funded with disaster assistance funds.

(2) In paragraph (b)(3) of the clause, the contracting officer shall—

(i) Identify the applicable posters; and

(ii) Insert the website link(s) or other contact information for obtaining the agency and/or Department of Homeland Security poster.

(3) In paragraph (d) of the clause, if the agency has established policies and procedures for display of the OIG fraud hotline poster at a lesser amount, the contracting officer shall replace "$7.5 million" with the lesser amount that the agency has established.

Subpart 3.11 - Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions

3.1100 Scope of subpart.

This subpart implements policy on personal conflicts of interest by employees of Government contractors as required by 41 U.S.C. 2303.

3.1101 Definitions.

As used in this subpart-

Acquisition function closely associated with inherently governmental functions means supporting or providing advice or recommendations with regard to the following activities of a Federal agency:

(1) Planning acquisitions.

(2) Determining what supplies or services are to be acquired by the Government, including developing statements of work.

(3) Developing or approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria.

(4) Evaluating contract proposals.

(5) Awarding Government contracts.

(6) Administering contracts (including ordering changes or giving technical direction in contract performance or contract quantities, evaluating contractor performance, and accepting or rejecting contractor products or services).

(7) Terminating contracts.

(8) Determining whether contract costs are reasonable, allocable, and allowable.

Covered employee means an individual who performs an acquisition function closely associated with inherently governmental functions and is-

(1) An employee of the contractor; or

(2) A subcontractor that is a self-employed individual treated as a covered employee of the contractor because there is no employer to whom such an individual could submit the required disclosures.

Personal conflict of interest means a situation in which a covered employee has a financial interest, personal activity, or relationship that could impair the employee's ability to act impartially and in the best interest of the Government when performing under the contract. (A *de minimis* interest that would not "impair the employee's ability to act impartially and in the best interest of the Government" is not covered under this definition.)

(1) Among the sources of personal conflicts of interest are-

(i) Financial interests of the covered employee, of close family members, or of other members of the covered employee's household;

(ii) Other employment or financial relationships (including seeking or negotiating for prospective employment or business); and

(iii) Gifts, including travel.

(2) For example, financial interests referred to in paragraph (1) of this definition may arise from-

(i) Compensation, including wages, salaries, commissions, professional fees, or fees for business referrals;

(ii) Consulting relationships (including commercial and professional consulting and service arrangements, scientific and technical advisory board memberships, or serving as an expert witness in litigation);

(iii) Services provided in exchange for honorariums or travel expense reimbursements;

(iv) Research funding or other forms of research support;

(v) Investment in the form of stock or bond ownership or partnership interest (excluding diversified mutual fund investments);

(vi) Real estate investments;

(vii) Patents, copyrights, and other intellectual property interests; or

(viii) Business ownership and investment interests.

3.1102 Policy.

The Government's policy is to require contractors to—

(a) Identify and prevent personal conflicts of interest of their covered employees; and

(b) Prohibit covered employees who have access to non-public information by reason of performance on a Government contract from using such information for personal gain.

3.1103 Procedures.

(a) By use of the contract clause at 52.203-16, as prescribed at 3.1106, the contracting officer must require each contractor whose employees perform acquisition functions closely associated with inherently Government functions to—

(1) Have procedures in place to screen covered employees for potential personal conflicts of interest by—

(i) Obtaining and maintaining from each covered employee, when the employee is initially assigned to the task under the contract, a disclosure of interests that might be affected by the task to which the employee has been assigned, as follows:

(A) Financial interests of the covered employee, of close family members, or of other members of the covered employee's household.

(B) Other employment or financial relationships of the covered employee (including seeking or negotiating for prospective employment or business).

(C) Gifts, including travel; and

(ii) Requiring each covered employee to update the disclosure statement whenever the employee's personal or financial circumstances change in such a way that a new personal conflict of interest might occur because of the task the covered employee is performing.

(2) For each covered employee—

(i) Prevent personal conflicts of interest, including not assigning or allowing a covered employee to perform any task under the contract for which the Contractor has identified a personal conflict of interest that cannot be satisfactorily prevented or reduced in consultation with the contracting agency;

(ii) Prohibit use of non-public information (information not available to the public) accessed through Government contract work for personal gain; and

(iii) Obtain a signed non-disclosure agreement to prohibit disclosure of non-public information accessed through performance of a Government contract.

(3) Inform covered employees of their obligation—

(i) To disclose and prevent personal conflicts of interest;

(ii) Not to use non-public information accessed through performance of a Government contract for personal gain; and

(iii) To avoid even the appearance of personal conflicts of interest;

(4) Maintain effective oversight to verify compliance with personal conflict-of-interest safeguards;

(5) Take appropriate disciplinary action when covered employees fail to comply with policies established pursuant to this section; and

(6) Report any personal conflict-of-interest violation by a covered employee to the contracting officer as soon as identified. This report must include-

(i) A description of the violation;

(ii) The proposed actions the contractor will take in response to the violation; and

(iii) Follow-up reports of corrective actions taken, as necessary.

(b) If a contractor reports a personal conflict-of-interest violation by a covered employee to the contracting officer according to paragraph (b)(6) of clause 52.203-16, Preventing Personal Conflicts of Interest, the contracting officer must—

(1) Review the actions taken by the contractor;

(2) Determine whether the contractor's actions have resolved the violation satisfactorily; and

(3) Take any appropriate action in consultation with agency legal counsel if the contracting officer determines that the contractor has not resolved the violation satisfactorily.

3.1104 Mitigation or waiver.

(a) In exceptional circumstances, if the contractor cannot satisfactorily prevent a personal conflict of interest as required by paragraph (b)(2)(i) of the clause at 52.203-16, Preventing Personal Conflicts of Interest, the contractor may submit a request, through the contracting officer asking the head of the contracting activity to—

(1) Agree to a plan to mitigate the personal conflict of interest; or

(2) Waive the requirement to prevent personal conflicts of interest.

(b) If the head of the contracting activity determines in writing that such action is in the best interest of the Government, the head of the contracting activity may impose conditions that provide mitigation of a personal conflict of interest or grant a waiver.

(c) This authority shall not be redelegated.

3.1105 Violations.

If the contracting officer suspects violation by the contractor of a requirement of paragraph (b), (c)(3), or (d) of the clause at 52.203-16, Preventing Personal Conflicts of Interest, the contracting officer must contact the agency legal counsel for advice and/or recommendations on a course of action.

3.1106 Contract clause.

(a) Insert the clause at 52.203-16, Preventing Personal Conflicts of Interest, in solicitations and contracts that—

(1) Exceed the simplified acquisition threshold; and

(2) Include a requirement for services by contractor employee(s) that involve performance of acquisition functions closely associated with inherently governmental functions for, or on behalf of, a Federal agency or department.

(b) If only a portion of a contract involves the performance of acquisition functions closely associated with inherently governmental functions, the contracting officer must still insert the clause but must limit the clause's applicability to only that portion of the contract that involves such services.

(c) Do not insert the clause in solicitations or contracts with a self-employed individual if the acquisition functions closely associated with inherently governmental functions are to be performed entirely by the self-employed individual, rather than an employee of the contractor.

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PART 4 - ADMINISTRATIVE AND INFORMATION MATTERS

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Subpart 4.7 - Contractor Records Retention

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4.000 Scope of part.

This part prescribes policies and procedures relating to the administrative aspects of contract execution, contractor-submitted documents, reporting, retention, and files.

4.001 Definitions.

As used in this part-

Executive means officers, managing partners, or any other employees in management positions.

First-tier subcontract means a subcontract awarded directly by the Contractor to acquire supplies or services (including construction) for performing a prime contract. It does not include the contractor's supplier agreements with vendors, such as long-term arrangements for materials or supplies that benefit multiple contracts and/or the costs of which are normally applied to a contractor's general and administrative expenses or indirect costs.

Generic entity identifier means an identifier assigned to a category of vendors, not specific to any individual or entity.

Total compensation means the cash and noncash dollar value earned by the executive during the contractor's preceding fiscal year and includes the information described at 17 CFR 229.402(c)(2).

4.002 Electronic commerce in contracting.

Agencies must use electronic commerce to the maximum extent that is practicable and cost-effective, see 41 U.S.C. 2301.

Subpart 4.1 - Presolicitation

4.101 Contract files.

(a) Each office performing contracting, contract administration, or paying functions must establish a file containing the records of each solicitation and contractual action.

(b) The file documentation must comprehensively record the transaction history to ensure—

(1) A complete background is available for making informed decisions at each step in the acquisition process;

(2) There is clear support for all actions taken;

(3) Necessary information is accessible for reviews and investigations; and

(4) Essential facts are available in case litigation or congressional inquiries arise.

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Subpart 4.2 - Solicitation, Evaluation, and Award

4.201 Unique procurement instrument identifiers.

(a) Agencies must use a procurement instrument identifier (PIID) unique Governmentwide to identify each solicitation, contract, agreement, or order. The PIID must be used in all related procurement actions including forms and electronic generated formats.

(b) The PIID consists of a combination of thirteen to seventeen alpha and/or numeric characters sequenced to convey certain information. Do not use special characters (such as hyphens, dashes, or spaces).

(1) *Positions 1 through 6*. Use the issuing office Activity Address Code to identify the department/agency and office issuing the instrument.

(2) *Positions 7 through 8*. Use the last two digits of the fiscal year in which the procurement instrument is issued or awarded (i.e., signed).

(3) *Position 9*. Use one of the upper-case letters according to Table 4-1. Departments and independent agencies may assign those letters identified for department use below according to agency policy; however, any use must be applied to the entire department or agency.

Table 4-1—PIID Instrument Designation

Instrument	Letter designation
(i) Blanket purchase agreements	A
(ii) Invitations for bids	B
(iii) Contracts of all types except indefinite-delivery contracts (see part 16)	C
(iv) Indefinite-delivery contracts (including Federal Supply Schedules, Governmentwide acquisition contracts (GWACs), and multi-agency contracts)	D
(v) Reserved for future Federal Governmentwide use	E
(vi) Task orders, delivery orders or calls under—	F
• Indefinite-delivery contracts (including Federal Supply Schedules, Governmentwide acquisition contracts (GWACs), and multi-agency contracts);	
• Blanket purchase agreements; or	
• Basic ordering agreements.	
(vii) Basic ordering agreements	G
(viii) Agreements, including basic agreements and loan agreements, but excluding blanket purchase agreements, basic ordering agreements, and leases. Do not use this code for contracts or agreements with provisions for orders or calls	H
(ix) Do not use this letter	I
(x) Reserved for future Federal Governmentwide use	J
(xi) Reserved for departmental or agency use	K
(xii) Lease agreements	L
(xiii) Reserved for departmental or agency use	M

Instrument	Letter designation
(xiv) Reserved for departmental or agency use	N
(xv) Do not use this letter	O
(xvi) Purchase orders (assign V if numbering capacity of P is exhausted during a fiscal year)	P
(xvii) Requests for quotations (assign U if numbering capacity of Q is exhausted during a fiscal year)	Q
(xviii) Requests for proposals	R
(xix) Reserved for departmental or agency use	S
(xx) Reserved for departmental or agency use	T
(xxi) See Q, requests for quotations	U
(xxii) See P, purchase orders	V
(xxiii) Reserved for future Federal Governmentwide use	W
(xxiv) Reserved for future Federal Governmentwide use	X
(xxv) Imprest fund	Y
(xxvi) Reserved for future Federal Governmentwide use	Z

(4) *Positions 10 through 17*. Use the number assigned by the issuing agency in these positions. Agencies may choose between four and eight characters to be used, but the same number of characters must be used agencywide. Do not use leading or trailing zeroes to equal the maximum in any system or data transmission. A separate series of numbers may be used for any type of instrument listed in paragraph (b)(3) of this section. An agency may reserve blocks of numbers or alpha-numeric numbers for its various components to use.

(c) Agencies must use a non-unique identifier for a procurement action (i.e., supplementary PIID) that is used with the PIID. The supplementary PIID is used to identify amendments to solicitations and modifications to contracts, orders, and agreements. The supplementary PIID is reported as a separate data element used with, but not appended to, the PIID.

(1) *Amendments to solicitations*. Use a four-position numeric serial number in addition to the 13–17-character PIID beginning with 0001.

(2) *Modifications to contracts, orders, and agreements*. Use a six-position alpha, numeric, or a combination of both, in addition to the 13–17-character PIID. For example, a modification could be numbered P00001.

(i) *Position 1*. Use the letter P if the modification is issued by the procuring contracting office. Use the letter A if the modification is issued by the contract administration office (if other than the procuring contracting office).

(ii) *Positions 2 through 6*. These positions may be alpha, numeric, or a combination of both, according to agency procedures.

(iii) Each office authorized to issue modifications must assign the supplementary identification numbers in sequence (unless provided otherwise in agency procedures). Do not assign the numbers until the contracting officer determines that a modification is to be issued.

(d) (1) Agencies must not change the PIID unless one of the following circumstances applies:

(i) The PIID serial numbering system is exhausted.

(ii) Continued use of a PIID is administratively burdensome (e.g., for implementing new agency contract writing systems).

(iii) The contract is transferred between contracting departments.

(2) If one of the circumstances described at 4.201(d)(1) applies, the contracting officer may assign a new PIID by issuing an administrative contract modification (see part 43). The modification must identify both the original and the newly assigned PIID.

4.202 Uniform use of line items.

4.202-1 Policy.

(a) Procurement instruments must identify the supplies or services to be acquired as separately identified line items and, as needed, subline items.

(b) Line items—

(1) Are established to define deliverables or organize information about deliverables;

(2) Describe characteristics for the item purchased, e.g., pricing, delivery, and funding information; and

(3) May be subdivided into separate unique subsets (called subline items) to ease administration. Subline items are established to define deliverables (deliverable subline items) or organize information about deliverables (informational subline items). If a line item has deliverable subline items, the line item itself is informational.

4.202-2 Establishing line items.

Establish separate line items for deliverables that have the following characteristics except as provided at 4.202-5:

(a) Separately identifiable.

(1) A supply is separately identifiable if it has its own identification (e.g., national stock number (NSN), item description, manufacturer's part number).

(2) Services are separately identifiable if they have no more than one statement of work or performance work statement.

(3) If the procurement instrument involves a first article (see part 9), establish a separate line item for each item requiring a separate approval. If the first article consists of a lot composed of a mixture of items that will be approved as a single lot, a single line item may be used.

(b) Single unit price or total price.

(c) Single accounting classification citation. A single deliverable may be funded by multiple accounting classifications when the deliverable effort cannot be otherwise subdivided.

(d) Separate delivery schedule, destination, period of performance, or place of performance.

(e) Single contract pricing type (e.g., fixed-price or cost-reimbursement).

4.202-3 Establishing subline items.

Subline items may be used to facilitate tracking of performance, deliverables, payment, and contract funds accounting or for other management purposes. The list of characteristics at 4.202-2 applies to deliverable subline items, but it is not applicable to informational subline items. A line item with subline items must contain only that information that is common to all subline items thereunder. All subline items under one line item must be the same contract type as the line item.

(a) Deliverable subline items. Deliverable subline items may be used for several related items that require separate identification. For example, instead of establishing multiple separate line items, subline items may be established for—

(1) Items that are basically the same, except for minor variations such as—

(i) Size or color;

(ii) Accounting classification, but see also 4.202-4(a)(4); or

(iii) Date of delivery, destination, or period or place of performance;

(2) Separately priced collateral functions that relate to the primary product, such as packaging and handling, or transportation; or

(3) Items to be separately identified at the time of shipment or performance.

(b) Informational subline items.

(1) Informational subline items may be used by agencies for administrative purposes. This type of subline item identifies information that relates directly to the line item and is an integral part of it (e.g., parts of an assembly or parts of a kit).

(2) Position informational subline items within the line item description, not in the quantity or price fields.

4.202-4 Required data elements for line items and subline items.

(a) Except as provided in 4.202-5, each line item or subline item must include in the schedule (or in a comparable section of the procurement instrument), at a minimum, the following information as separate, distinct data elements:

(1) Line item or subline item number established in accordance with agency procedures.

(2) Description of what is being purchased.

(3) Product or Service Code (PSC).

(4) Accounting classification citation.

(i) Line items or deliverable subline items. If multiple accounting classifications for a single deliverable apply, include the dollar amount for each accounting classification in the schedule (or a comparable section of the procurement instrument).

(ii) Informational subline items. An accounting classification citation is not required. (See 4.202-3).

(5) (i) For fixed-price line items:

(A) Unit of measure.

(B) Quantity.

(C) Unit price.

(D) Total price.

(ii) For cost-reimbursement line items:

(A) Unit of measure.

(B) Quantity.

(C) Estimated cost.

(D) Fee (if any).

(E) Total estimated cost plus any fee.

(b) If a contract contains a combination of fixed-price, time-and-materials, labor-hour, or cost- reimbursement line items, identify the contract type for each line item in the schedule (or a comparable section of the procurement instrument) to facilitate payment.

(c) Each deliverable line item or deliverable subline item must have its own delivery schedule, destination, period of performance, or place of performance expressly stated in the appropriate section of the procurement instrument ("as required" constitutes an expressly stated delivery term). When a line item has deliverable subline items, identify the delivery schedule, destination, period of performance, or place of performance at the subline item level, rather than the line item level.

(d) Terms and conditions in other sections of the contract (such as contract clauses or payment instructions) must also specify applicability to individual line items if not applicable to the contract as a whole.

4.202-5 Exceptions to required data elements.

(a) Indefinite-delivery contracts —

(1) General. The following required data elements are not known at time of issuance of an indefinite-delivery contract, however each order must provide them at issuance: accounting classification, delivery date and destination, or period and place of performance.

(2) Indefinite-delivery indefinite-quantity (IDIQ) and requirements contracts.

(i) IDIQ and requirements contracts may omit the quantity at the line item level for the base award provided that the total contract minimum and maximum, or the estimate, respectively, is stated.

(ii) Multiple-award IDIQ contracts awarded using the procedures at parts 13 or 15 may omit price or cost at the line item or subline item level for the contract award, provided that the total contract minimum and maximum is stated (see part 16).

(b) Item description and PSC. These data elements are not required in the line item if there are associated deliverable subline items that include the actual detailed identification. When this exception applies, use a general narrative description for the line item.

(c) Single unit price or single total price. The requirement for a single unit price or single total price at the line item level does not apply if any of the following conditions are present:

(1) There are associated deliverable subline items that are priced.

(2) The line item or subline item is not separately priced.

(3) The supplies or services are being acquired on a cost-reimbursement, time-and-materials, or labor-hour basis.

(4) The procurement instrument is for services and firm prices have been established for elements of the total price, but the actual number of the elements is not known until performance (e.g., a labor-hour contract for maintenance/repair). The contracting officer may structure these procurement instruments to reflect a firm or estimated total amount for each line item.

4.203 System for Award Management.

4.203-1 Policy.

(a) The System for Award Management (SAM) at https://www.sam.gov is the primary method used to collect the following information from entities interested in obtaining Federal Government contracts:

(1) Identifying information about the entity, to issue the unique entity identifier (UEI) and Commercial and Government Entity (CAGE) code;

(2) Entity-level representations and certifications (see 52.204-7(c)(1)); and

(3) Information necessary to receive payment under a contract, collect debts, or for Government reporting purposes, such as taxpayer information required by 31 U.S.C. 7701(c) and 3325(d); 26 U.S.C. 6041, 6041A, and 6050M; and implementing regulations issued by the Internal Revenue Service (IRS).

(b) Offerors or quoters are required to have an active Federal Government contracts registration in SAM when they submit an offer or quotation, and at the time of award, except for— (1) Purchases under the micro-purchase threshold that use a Governmentwide commercial purchase card as the method of purchase and payment;

(2) Micro-purchases that do not use the electronic funds transfer method for payment and are not required to be reported in the Federal Procurement Data System (FPDS);

(3) Classified contracts when registration in SAM could compromise the safeguarding of classified information or national security;

(4) Contracts awarded without providing full and open competition due to unusual or compelling urgency (see part 6);

(5) Contracts awarded by—

(i) Deployed contracting officers supporting military operations including, but not limited to, contingency operations as defined in 10 U.S.C. 101(a)(13) or humanitarian or peacekeeping operations as defined in 10 U.S.C. 3015(2);

(ii) Contracting officers located outside the United States and its outlying areas supporting diplomatic or developmental operations; or

(iii) Contracting officers supporting emergency operations, such as responses to natural or environmental disasters, or national or civil emergencies (see part 18);

(6) Contracts with individuals for performance outside the United States and its outlying areas; and

(7) Contract actions at or below $40,000 awarded to foreign vendors for work performed outside the United States, if it is impractical to obtain SAM registration.

(c) For contracts described under paragraph (b)(4) of this section, the contractor must register in SAM within 30 days after contract award or at least three days before submitting the first invoice, whichever occurs first.

(d) For contracts or agreements described under paragraph (b)(5) of this section, if practical, the contracting officer must modify the contract to require SAM registration.

(e) When SAM registration is not required, the contracting officer must collect certain offeror identifying information and entity-level representations and certifications at the time of receipt of an offer or quotation (see 4.203-2(a)(2)).

(f) Agencies must protect against improper disclosure of nonpublic information contained in SAM.

4.203-2 Procedures.

(a) At the time an offer or quotation is submitted—

(1) Use the offeror or quoter's UEI to verify that the entity has an active Federal Government contracts registration in SAM, and document the date of SAM verification in the contract file; or

(2) If a solicitation does not require registration in SAM—

(i) Review the information provided in response to the provision at 52.204-90, Offeror Identification, and validate the CAGE code using the CAGE code search feature at https://cage.dla.mil; and

(ii) Verify the offeror has included in its offer the entity-level representations and certifications normally collected in SAM.

(b) Use the legal business name or "doing business as" name and physical address in SAM for the successful offeror's UEI to identify the contractor in the award document and all corresponding forms and data exchanges. Do not change data retrieved from SAM.

4.204 Taxpayer identification information.

(a) Agencies must collect the taxpayer identification number (TIN) to comply with the following statutory requirements—

(1) *Debt collection*. 31 U.S.C. 7701(c) requires each contractor doing business with a Government agency to furnish its TIN to that agency. 31 U.S.C. 3325(d) requires the Government to include the TIN of the contractor receiving payment with each certified voucher. The Government may use the TIN to collect and report on any delinquent amounts arising out of the contractor's relationship with the Government.

(2) *Information reporting to the IRS.* The TIN is required for Government reporting of certain contract information and payment information to the IRS. 26 U.S.C. 6109 requires a contractor to provide its TIN if a Form 1099 is required. The payment office is responsible for submitting reports to the IRS.

(b) Contracting officers will obtain the TIN from—

(1) SAM if offerors are required to be registered in SAM, see 4.203-2(a)(1) and 52.204-7; or

(2) Offers if offerors are not required to be registered in SAM, see 4.203-2(a)(2) and 52.204-90.

4.205 Personal identity verification.

(a) Agencies must include their implementation of Homeland Security Presidential Directive-12 and the Federal Information Processing Standards Publication (FIPS PUB) Number 201 in solicitations and contracts. For information on personal identity verification (PIV) products and services see http://www.idmanagement.gov.

(b) When acquiring PIV products and services not using the General Services Administration Federal Supply Schedule for HSPD-12 Product and Service Components, agencies must ensure that the applicable products and services are approved as compliant with FIPS PUB 201 including—

(1) Certifying the products and services procured meet all applicable Federal standards and requirements;

(2) Ensuring interoperability and conformance to applicable Federal standards for the lifecycle of the components; and

(3) Maintaining a written plan for ensuring ongoing conformance to applicable Federal standards for the lifecycle of the components.

4.206 Contracting officer's signature.

Only contracting officers can sign contracts on behalf of the United States. The contracting officer's name and official title must be typed, stamped, or printed on the contract. The contracting officer normally signs the contract after the contractor has signed it. A digital signature using a certificate from the PIV or Common Access Card (CAC) assigned to the contracting officer is considered acceptable as a written signature.

4.207 Contractor's signature.

(a) *Individuals*. A contract with an individual must be signed by that individual. A contract with an individual doing business as a firm must be signed by that individual, and the signature must be followed by the individual's typed, stamped, or printed name and the words ", an individual doing business as _____" [insert name of firm].

(b) *Partnerships*. A contract with a partnership must be signed in the partnership name. Before signing for the Government, the contracting officer must obtain a list of all partners and ensure that the individual(s) signing for the partnership have authority to bind the partnership.

(c) *Corporations*. A contract with a corporation must be signed in the corporate name, followed by the word "by" and the signature and title of the person authorized to sign. The contracting officer must ensure that the person signing for the corporation has authority to bind the corporation.

(d) *Joint venturers.* A contract with joint venturers may involve any combination of individuals, partnerships, or corporations. The contract must be signed by each participant in the joint venture in the manner prescribed in paragraphs (a) through (c) of this section for each type of participant. When a corporation is participating, the contracting officer must verify that the corporation is authorized to participate in the joint venture.

(e) *Agents*. When an agent is to sign the contract, other than as stated in paragraphs (a) through (d) of this section, the agent's authorization to bind the principal must be established by evidence that satisfies the contracting officer.

(f) *Digital signatures*. Contractor's digital signatures are acceptable as a written signature when using authentication and/or signature certificates from a PIV or CAC obtained from a credentialed organization.

4.208 Solicitation provisions and contract clauses.

(a) Insert the provision at 52.204-5, Women-Owned Business (Other Than Small Business), in solicitations that—

(1) Are not set aside for small business concerns;

(2) Exceed the simplified acquisition threshold; and

(3) Are for contracts that will be performed in the United States or its outlying areas.

(b) When offerors are required to be registered in SAM, insert—

(1) The provision at 52.204-7, System for Award Management—Registration, in the solicitation. Use the provision with its Alternate I for acquisitions described at 4.203-1(b)(4); and

(2) The clause at 52.204-13, System for Award Management—Maintenance, in the solicitation and contract. Use the clause with its Alternate I for acquisitions described at 4.203-1(b)(4).

(c) When offerors are not required to be registered in SAM, insert—

(1) In the solicitation—

(i) The provision at 52.204-90, Offeror Identification; and

(ii) Each provision listed in paragraph (c)(1) of the provision at 52.204-7, if applicable based on each provision prescription; and

(2) In the solicitation and contract, the clause at 52.204-91, Contractor Identification.

(d) Insert the clause at 52.204-9, Personal Identity Verification of Contractor Personnel, in solicitations and contracts when contract performance requires contractors to have routine physical access to a Federally-controlled facility and/or routine access to a Federally-controlled information system.

(e) Insert the clause at 52.204-10, Reporting Executive Compensation and First-Tier Subcontract Awards, in solicitations and contracts valued over $40,000—

(1) That are not for the acquisition of commercial products or commercial services; and

(2) When the award is required to be reported in FPDS.

(f) (1) The clauses in paragraphs (f)(2) and (3) of this section provide requirements for obtaining information from agency service contractors. The clauses are not required for—

(i) Actions entirely funded by the Department of Defense;

(ii) Contracts for commercial services; or

(iii) Classified solicitations, contracts, or orders.

(2) Insert the clause at 52.204-14, Service Contract Reporting Requirements, in solicitations and contracts for services (including construction) that meet or exceed the thresholds at 4.303(b), except for indefinite-delivery contracts.

(3) Insert the clause at 52.204-15, Service Contract Reporting Requirements for Indefinite-Delivery Contracts, in solicitations and indefinite-delivery contracts for services (including construction) where one or more orders issued thereunder are expected to each meet or exceed the thresholds at 4.303(b).

(g) Insert the clause at 52.204-19, Incorporation by Reference of Representations and Certifications, in all solicitations and contracts.

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Subpart 4.3 - Post-award

4.301 Contract reporting.

(a) As required by 41 U.S.C. 1122 and 1712, the Federal Procurement Data System (FPDS), *https://www.fpds.gov*, provides a comprehensive web-based tool for agencies to report contract actions.

(1) At a minimum, agencies must report—

(i) The following contract actions over the micro-purchase threshold, regardless of solicitation process used:

(A) Definitive contracts, including purchase orders and imprest fund buys awarded by a contracting officer.

(B) Indefinite delivery vehicle (identified as an "IDV" in FPDS) and all calls and orders awarded under it; and

(ii) Any modification to the contract actions in paragraph (a)(1)(i) that change previously reported contract action data, regardless of dollar value.

(2) Agencies may submit actions other than those listed at paragraph (a)(1) of this section if approved in writing by the Office of Federal Procurement Policy (OFPP).

(3) Agencies will not report the following types of contract actions in FPDS:

(i) Imprest fund transactions below the micro-purchase threshold, including those made via the Government purchase card (unless specific agency procedures prescribe reporting these actions).

(ii) Orders from the General Services Administration (GSA) stock and the GSA Global Supply Program.

(iii) Purchases made at GSA or AbilityOne service stores, as these items stocked for resale have already been reported by GSA.

(iv) Purchases made using non-appropriated fund activity cards, chaplain fund cards, individual Government personnel training orders, and Defense Printing orders.

(v) Actions that, according to other authority, will not be entered into FPDS (*e.g.*, reporting of the information would compromise national security).

(vi) Contract actions in which the required data would constitute classified information.

(vii) Resale activity (*i.e.,* commissary or exchange activity).

(viii) Revenue generating arrangements (*i.e.,* concessions).

(ix) Training expenditures not issued as orders or contracts.

(x) Interagency agreements other than interagency acquisitions required to be reported.

(xi) Letters of obligation used in the A-76 process.

(b) Agencies awarding assisted acquisitions or direct acquisitions must report these actions and identify the Program/Funding Agency and Office Codes from the applicable agency codes maintained by each agency at the System for Award Management (SAM). These codes represent the agency and office that has provided the predominant amount of funding for the contract action. For assisted acquisitions, the requesting agency will receive socioeconomic credit for meeting agency small business goals, where applicable. Requesting agencies must provide the appropriate agency/bureau component code as part of the written interagency agreement between the requesting and servicing agencies (see part 17).

(c) Agencies awarding contract actions with a mix of appropriated and non-appropriated funding must only report the full appropriated portion of the contract action in FPDS.

(d) Agencies may consolidate, at least monthly, multiple action reports for a vendor when it would be overly burdensome to report each action individually.

(e) (1) Agencies may use a generic entity identifier, rather than an entity's assigned unique entity identifier (UEI), for—

(i) Contract actions valued at or below $40,000 that are awarded to a contractor that is—

(A) A student;

(B) A dependent of either a veteran, foreign Service officer, or military member assigned outside the United States and its outlying areas (as defined in 2.101); or

(C) Located outside the United States and its outlying areas for work to be performed outside the United States and its outlying areas and the contractor does not otherwise have a UEI;

(ii) Contracts valued above $40,000 awarded to individuals located outside the United States and its outlying areas for work to be performed outside the United States and its outlying areas; or

(iii) Contracts when specific public identification of the contracted party could endanger the mission, contractor, or recipients of the acquired goods or services. The contracting officer must include a written determination in the contract file of a decision applicable to authority under this paragraph (g)(1)(iii).

(2) The Integrated Award Environment program office will maintain the list of generic entity identifiers that agencies may use.

(f) *Responsibilities*.

(1) The Senior Procurement Executive in coordination with the head of the contracting activity is responsible for developing and monitoring a process to ensure timely and accurate reporting of contractual actions to FPDS.

(2) (i) The contracting officer awarding the contract action is responsible for accurately completing the individual contract action report (CAR). Unpublished CARs in FPDS are not considered complete.

(ii) Complete the CAR in FPDS within three business days after contract award.

(iii) Complete the CAR for any action awarded without providing full and open competition due to unusual or compelling urgency or according to any of the emergency acquisition flexibilities (see part 18) within 30 days after contract award.

(3) The chief acquisition officer of each agency required to report its contract actions must submit to OFPP within 120 days after the end of each fiscal year, an annual certification of whether, and to what degree, agency CAR data for the preceding fiscal year is complete and accurate.

4.302 Personal identity verification.

(a) Agency procedures for the return of Personal Identity Verification (PIV) products must ensure that Government contractors account for all forms of Government-provided identification issued to Government contractor employees under a contract, i.e., the PIV cards or other similar badges, and must ensure that contractors return such identification to the issuing agency as soon as any of the following occurs, unless otherwise determined by the agency:

(1) When no longer needed for contract performance.

(2) Upon completion of a contractor employee's employment.

(3) Upon contract completion or termination.

4.303 Service contracts inventory.

(a) *Requirement*. As required by section 743(a) of Division C of the Consolidated Appropriations Act, 2010 (Pub. L. 111-117), agencies covered by the Federal Activities Inventory Reform Act (Pub. L. 105-270), except the Department of Defense, must submit to the Office of Management and Budget (OMB) annually an inventory of activities performed by service contractors. The information reported in the inventory will be publicly accessible.

(b) *Reporting requirements thresholds*.

(1) Except as exempted by OFPP guidance, service contractor reporting is required for contracts and first-tier subcontracts for services based on type of contract and estimated total value. For indefinite-delivery contracts, the contracting officer must determine the reporting requirements based on the type and estimated total value of each order under the contract.

(2) Reporting is required according to the following thresholds:

(i) All cost-reimbursement, time-and-materials, and labor-hour service contracts and orders with an estimated total value above the simplified acquisition threshold.

(ii) All fixed-price service contracts awarded and orders with an estimated total value of $500,000 or greater.

(3) Reporting is required for all first-tier subcontracts for services as prescribed in paragraphs (c)(2)(i) and (ii) of this section.

(c) *Agency reporting responsibilities*.

(1) Agencies are required to compile annually an inventory of service contracts performed for, or on behalf of, the agency during the previous fiscal year to determine the extent of the agency's reliance on service contractors. Agencies must submit a service contract inventory to OMB by January 15 annually. Then, each agency must post the inventory on its Web site and publish a Federal Register Notice of Availability by February 15 annually.

(2) Agencies must review contractor reported information for reasonableness and consistency with available contract information. The agency is not required to address data for which the agency would not normally have supporting information. If revisions to the contractor-reported information are warranted, the agency must notify the contractor no later than November 15. By November 30, the contractor shall revise the report, or document its rationale for the agency. Authorized agency officials may review the reports at https://www.sam.gov.

4.304 System for Award Management.

(a) Contractors must maintain throughout the life of the contract through final payment—

(1) Their registration, if they are required to be registered in SAM; or

(2) Their identifying information, if they are not required to be registered in SAM.

(b) Contracting officers must validate the contractor has an active Federal Government contracts registration in SAM at the following times:

(1) For contracts described at 4.203-1(b)(4), within 30 days after contract award, or at least three days before submitting the first invoice, whichever occurs first.

(2) Before exercising any options on a contract.

(3) For novation and change-of-name agreements, see paragraph (c) of the clause at 52.204-13.

(4) For assignees for the purpose of assignment of claims (see part 32), see paragraph (d) of the clause at 52.204-13.

4.305 Contractor identification.

(a) Contractors are required to maintain their UEI and Commercial and Government Entity (CAGE) code throughout the life of the contract.

(b) Contractors must communicate any change to their UEI or CAGE code to the contracting officer within 30 days after the change, so the contracting officer can issue a modification to update the UEI or CAGE code on the contract. A change in the unique entity identifier does not necessarily require a novation.

4.306 Executive compensation.

(a) As required by section 2 of the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109-282), as amended by section 6202 of the Government Funding Transparency Act of 2008 (Pub. L. 110-252), contractors must report first-tier subcontract award data and the total compensation of the five most highly compensated executives of the contractor and of each first-tier subcontractor.

(b) Certain data from FPDS will pre-populate SAM data to help contractors complete and submit their reports. If the FPDS data is inaccurate, the contracting officer will correct the data in FPDS.

4.307 Payment office.

Provide the payment office information required to make proper payments under a contract, at least the taxpayer identification number, type of organization, the unique entity identifier, and, if applicable, the electronic funds transfer indicator.

4.308 Contract closeout.

4.308-1 Procedures for closing out contract files.

(a) The administrative closeout procedures must ensure that—

(1) Disposition of classified material is completed;

(2) Final patent report is cleared. If a final patent report is required, the contracting officer may proceed with contract closeout according to the following procedures, or as otherwise prescribed by agency procedures:

(i) Final patent reports should be cleared within 60 days of receipt.

(ii) If the final patent report is not received, the contracting officer must notify the contractor of the contractor's obligations and the Government's rights under the applicable patent rights clause, according to part 27. If the contractor fails to respond to this notification, the contracting officer may proceed with contract closeout upon consultation with the agency legal counsel responsible for patent matters regarding the contractor's failure to respond.

(3) Final royalty report is cleared;

(4) There is no outstanding value engineering change proposal;

(5) Plant clearance report is received;

(6) Property clearance is received;

(7) All interim or disallowed costs are settled;

(8) Price revision is completed;

(9) The prime contractor settles its subcontracts;

(10) Prior year indirect cost rates are settled;

(11) Termination docket is completed;

(12) Contract audit is completed;

(13) Contractor's closing statement is completed;

(14) Contractor's final invoice has been submitted; and

(15) Contract funds review is completed and excess funds deobligated.

(b) When the actions in paragraph (a) of this section have been verified, the contracting officer administering the contract must prepare a contract completion statement containing the following information:

(1) Contract administration office name and address (if different from the contracting office).

(2) Contracting office name and address.

(3) Contract number.

(4) Last modification number.

(5) Last call or order number.

(6) Contractor name and address.

(7) Dollar amount of excess funds, if any.

(8) Voucher number and date, if final payment has been made.

(9) Invoice number and date, if the final approved invoice has been forwarded to a disbursing office of another agency or activity and the status of the payment is unknown.

(10) A statement that all required contract administration actions have been fully and satisfactorily accomplished.

(11) Name and signature of the contracting officer.

(12) Date.

(c) When the statement is completed, the contracting officer must place—

(1) The signed original in the contracting office contract file (or forwarded to the contracting office for placement in the files if the contract administration office is different from the contracting office); and

(2) A signed copy in the appropriate contract administration file if administration is performed by a contract administration office.

4.308-2 Contract closeout by the office administering the contract.

(a) The contract administration office must initiate administrative closeout of the contract after receiving evidence of its physical completion. At the start of this process, the contract administration office must review the contract funds status and notify the contracting office of any excess funds the contract administration office might deobligate.

(b) Except as provided in paragraph (d) of this section, contract files should be closed according to Table 4-2.

Table 4-2— Time Standards for Closing Out Contract Files

Files for:	Should be:
(1) Contracts using simplified acquisition procedures	Considered closed when the contracting officer receives evidence of receipt of property and final payment, unless otherwise specified by agency regulations.
(2) Firm-fixed-price contracts, other than those using simplified acquisition procedures.	Closed within 6 months after the date on which the contracting officer receives evidence of physical completion.
(3) Contracts requiring settlement of indirect cost rates.	Closed within 36 months of the month in which the contracting officer receives evidence of physical completion.
(4) All other contracts.	Closed within 20 months of the month in which the contracting officer receives evidence of physical completion.

(c) When closing out the contract files at 4.308-2(b)(2), (3), and (4), the contracting officer must use the closeout procedures at 4.308-1. However, these closeout actions may be modified to reflect the extent of administration that has been performed. Use quick closeout procedures (see part 42), when appropriate, to reduce administrative costs and to enable deobligation of excess funds.

(d) Do not close a contract file if—

(1) The contract is in litigation or under appeal; or

(2) In the case of a termination, all termination actions have not been completed.

4.309 Storage, handling, and contract files.

(a) Agencies must keep acquisition records according to Table 4-3. This requirement also applies to record copies stored on alternate media when original documents have been converted to alternate media for storage.

Table 4-3—Retention Periods

Record	Retention period
(1) Contracts (and related records or documents, including successful and unsuccessful proposals, except see paragraph (a)(2) of this section regarding contractor payrolls submitted under construction contracts.)	6 years after final payment.
(2) Contractor's payrolls submitted under construction contracts according to Department of Labor regulations (29 CFR 5.5(a)(3)), with related certifications, anti-kickback affidavits, and other related records.	3 years after contract completion unless contract performance is the subject of an enforcement action on that date (see paragraph (a)(8) of this section).
(3) Unsolicited proposals not accepted by a department or agency.	Retain according to agency procedures.
(4) Files for canceled solicitations.	6 years after cancellation.
(5) Other copies of procurement file records used for administrative purposes.	When business use ceases.
(6) Documents pertaining generally to the contractor.	Until superseded or obsolete.
(7) Data submitted to FPDS. Electronic data file maintained by fiscal year, containing unclassified records of all procurements exceeding the micro-purchase threshold, and information required under 4.301.	6 years after submittal to FPDS.
(8) Investigations, cases pending or in litigation (including protests), or similar matters (including enforcement actions).	Until final clearance or settlement, or, if related to a document identified in paragraphs (a)(1) through (7) of this section, for the retention period specified for the related document, whichever is later.

(b) Agencies must prescribe procedures for the handling, storing, and disposing of contract files, according to the National Archives and Records Administration (NARA) General Records Schedule 1.1, Financial Management and Reporting Records. The Financial Management and Reporting Records can be found at http://www.archives.gov/records-mgmt/grs.html. The procedures should conform with the regulatory requirements in paragraph (a) of this section, which have been acknowledged and approved by NARA in its guidance.

(c) If administrative records are mixed with program records and cannot be economically segregated, keep the entire file for the period approved for the program records. Similarly, if documents described in Table 4-3 are part of a subject or case file that documents activities that are not described in the table, treat them the same manner as the files of which they are a part.

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Subpart 4.4 - [Reserved]

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Subpart 4.5 - [Reserved]

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Subpart 4.6 - [Reserved]

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Subpart 4.7 - Contractor Records Retention

4.700 Scope of subpart.

This subpart provides policies and procedures for contractors to retain records to meet the records review requirements of the Government. In this subpart, the terms “contracts” and “contractors” include “subcontracts” and “subcontractors.”

4.701 Purpose.

The purpose of this subpart is to generally describe records retention requirements and to allow reductions in the retention period for specific classes of records under prescribed circumstances.

4.702 Applicability.

(a) This subpart applies to records generated under contracts that contain one of the following clauses:

(1) Audit and Records—Sealed Bidding (52.214-26).

(2) Audit and Records—Negotiation (52.215-2).

(b) This subpart is not mandatory on Department of Energy contracts for which the Comptroller General allows alternative records retention periods. Apart from this exception, this subpart applies to record retention periods under contracts that are subject to 10 U.S.C. chapter 137 legacy provisions (10 U.S.C. 3064) and 10 U.S.C. 3016 and chapter 203 or 40 U.S.C. 101, *et seq*.

4.703 Policy.

(a) Except as stated in 4.703(b), contractors must make available records, which includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form, and other supporting evidence to satisfy contract negotiation, administration, and audit requirements of the contracting agencies and the Comptroller General for—

(1) 3 years after final payment; or

(2) For certain records, the period specified in 4.705, whichever of these periods expires first.

(b) Contractors must make available the foregoing records and supporting evidence for a longer period than is required in 4.703(a) if—

(1) A retention period longer than that cited in 4.703(a) is specified in any contract clause; or

(2) The contractor, for its own purposes, retains the foregoing records and supporting evidence for a longer period. Under this circumstance, the retention period must be the period of the contractor's retention or 3 years after final payment, whichever period expires first.

(3) The contractor does not meet the original due date for submission of final indirect cost rate proposals specified in paragraph (d)(2) of the clause at 52.216-7, Allowable Cost and Payment. Under these circumstances, the retention periods in 4.705 must be automatically extended one day for each day the proposal is not submitted after the original due date.

(c) Nothing in this section must be construed to preclude a contractor from duplicating or storing original records in electronic form unless they contain significant information not shown on the record copy. Original records need not be maintained or produced in an audit if the contractor or subcontractor provides photographic or electronic images of the original records and meets the following requirements:

(1) The contractor or subcontractor has established procedures to ensure that the imaging process preserves accurate images of the original records, including signatures and other written or graphic images, and that the imaging process is reliable and secure to maintain the integrity of the records.

(2) The contractor or subcontractor maintains an effective indexing system to permit timely and convenient access to the imaged records.

(3) The contractor or subcontractor retains the original records for a minimum of one year after imaging to permit periodic validation of the imaging systems.

(d) If the information described in paragraph (a) of this section is maintained on a computer, contractors must retain the computer data on a reliable medium for the time periods prescribed. Contractors may transfer computer data in machine readable form from one reliable computer medium to another. Contractors' computer data retention and transfer procedures must maintain the integrity, reliability, and security of the original computer data. Contractors must also retain an audit trail describing the data transfer. For the record retention time periods prescribed, contractors must not destroy, discard, delete, or write over such computer data.

4.704 Calculating retention periods.

(a) The retention periods in 4.705 are calculated from the end of the contractor's fiscal year in which an entry is made charging or allocating a cost to a Government contract or subcontract. If a specific record contains a series of entries, the retention period is calculated from the end of the contractor's fiscal year in which the final entry is made. The contractor should cut off the records in annual blocks and retain them for block disposal under the prescribed retention periods.

(b) When a contractor relies upon records generated during a prior contract for certified cost or pricing data in negotiating a succeeding contract, the prescribed periods must run from the date of the succeeding contract.

(c) If two or more of the record categories described in 4.705 are interfiled and screening for disposal is not practical, the contractor must retain the entire record series for the longest period prescribed for any category of records.

4.705 Specific retention periods.

The contractor must retain records according to Table 4-4.

Table 4-4—Contractor Records Retention Periods

Category	Record type	Retention period
Financial and cost accounting records	Accounts receivable invoices, adjustments to the accounts, invoice registers, carrier freight bills, shipping orders, and other documents that detail the material or services billed on the related invoices	4 years
	Material, work order, or service order files, consisting of purchase requisitions or purchase orders for material or services, or orders for transferring material or supplies	4 years
	Cash advance recapitulations, prepared as posting entries to accounts receivable ledgers for amounts of expense vouchers prepared for employees' travel and related expenses	4 years
	Paid, canceled, and voided checks, other than those issued for paying salary and wages	4 years
	Accounts payable records to support disbursements of funds for materials, equipment, supplies, and services, containing originals or copies of the following and related documents: remittance advices and statements, vendors' invoices, invoice audits and distribution slips, receiving and inspection reports or comparable certifications of receipt and inspection of material or services, and debit and credit memoranda	4 years
	Labor cost distribution cards or equivalent documents	2 years

Table 4-4—Contractor Records Retention Periods		
Category	**Record type**	**Retention period**
	Petty cash records describing expenditures, to whom paid, name of person authorizing payment, and date, including copies of vouchers and other supporting documents	2 years
Pay administration records	Payroll sheets, registers, or their equivalent, of salaries and wages paid to individual employees for each payroll period; change slips; and tax withholding statements	4 years
	Clock cards or other time and attendance cards	2 years
	Paid checks, receipts for wages paid in cash, or other evidence of payments for services rendered by employees	2 years
Acquisition and supply records	Store requisitions for materials, supplies, equipment, and services	2 years
	Work orders for maintenance and other services	4 years
	Equipment records, consisting of equipment usage and status reports and equipment repair orders	4 years
	Expendable property records, reflecting accountability for receiving and using material to perform a contract	4 years
	Receiving and inspection report records, consisting of reports reflecting receipt and inspection of supplies, equipment, and materials	4 years
	Purchase order files for supplies, equipment, material, or services used to perform a contract; supporting documentation and backup files including, but not limited to, invoices, and memoranda, e.g., memoranda of negotiations showing the principal elements of subcontract price negotiations	4 years
	Production records of quality control, reliability, and inspection	4 years
	Property records (see part 45)	4 years

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PART 5 - PUBLICIZING CONTRACT ACTIONS

Sec.

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5.002 Policy.

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5.000 Scope of part.

This part prescribes the policies and procedures for publicizing contract opportunities and award information in the Governmentwide point of entry (GPE).

5.001 Definitions.

As used in this part—

Contract action means an action resulting in a contract, including actions for additional supplies or services outside the existing contract scope. This does not include actions within the scope and terms of the existing contract, such as contract modifications issued under the Changes clause, or funding and other administrative changes.

Notice means a description of a business opportunity, contract action, or other information posted to the GPE.

Presolicitation notice means a notice used to notify industry and the public that the Government intends to release a solicitation in the near future.

5.002 Policy.

Contracting officers must post presolicitation notices, solicitations, and award notices in the GPE as described in this part to—

(a) Increase competition;

(b) Broaden industry participation in meeting Government requirements; and

(c) Inform small business concerns of contract and subcontract opportunities.

Subpart 5.1 - Presolicitation

5.101 Presolicitation notice.

(a) Requirement. For proposed contract actions expected to be greater than $20,000, post a presolicitation notice to the GPE unless an exemption in paragraph (b) applies.

(b) Exemptions. The contracting officer is not required to post a presolicitation notice to the GPE when—

(1) The proposed contract action—

(i) Is valued at or below the simplified acquisition threshold (SAT) and the solicitation will—

(A) Be posted to the GPE in accordance with 5.201; and

(B) Permit the public to respond to the solicitation electronically;

(ii) Is of such a nature that it is not possible to write the notice in a way that would prevent disclosure of an agency's needs and disclosure would compromise national security;

(iii) Would result from acceptance of—

(A) An unsolicited proposal that is unique and innovative, and sharing details would reveal confidential or proprietary information or original ideas; or

(B) A proposal under the Small Business Innovation Development Act of 1982 (Pub. L. 97-219);

(iv) Is an order issued under a requirements contract, a task order contract, or a delivery order contract;

(v) Is for perishable subsistence supplies;

(vi) Is for utility services (other than telecommunications) for which only one source is available; or

(vii) Is for the services of an expert for use in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government in a trial, hearing, or proceeding before a court, administrative tribunal, or agency, or in any part of an alternative dispute resolution process, whether or not the expert is expected to testify;

(2) Using other than full and open competition (see 6.103), except for the authorities at 6.103-1 (only one responsible source) and 6.103-6 (national security); or

(3) The head of the agency determines in writing, after consulting with the Administrator for Federal Procurement Policy and the Administrator of the Small Business Administration, that advance notice is not appropriate or reasonable.

(c) *Content*. Include the following information in each presolicitation notice sent to the GPE:

(1) Point of contact. Include the name, address, and contact information for the contracting officer.

(2) *Set-asides*. If applicable, identify whether the proposed contract action will be a total or partial small business set-aside (see part 19) or a local area set-aside (see part 26).

(3) *Codes for services or supplies*. Select the appropriate code(s) (i.e., product service code (PSC) and/or North American Industry Classification System (NAICS) code) to identify services or supplies to be procured.

(4) *Description*.

(i) Provide a clear and concise description of supplies or services that does not unnecessarily restrict competition and allows prospective offerors to make an informed business judgment about monitoring the GPE for or requesting a copy of the solicitation. For supplies, this description should include, as appropriate, any agency nomenclature, National Stock Number, or other part number and a brief description of the item's form, fit, or function, physical dimensions, predominant material of manufacture, or similar information.

(ii) If a proposed contract action is estimated to be greater than $25,000, but not greater than the SAT, or when using special simplified procedures to procure certain commercial products or commercial services (see part 12), include a description of the procedures for awarding the contract and the anticipated award date.

(iii) If one or more items under the acquisition is subject to the World Trade Organization Government Procurement Agreement (WTO GPA) and/or a Free Trade Agreement (FTA) (see Part 25) and the solicitation will include one of the following clauses, or an agency equivalent, include the required language regarding trade agreements:

Table 5-1 — Statements Regarding Trade Agreements

FAR Clause	Required Language
FAR 52.225-3, Buy American–Free Trade Agreements–Israeli Trade Act	"One or more of the items under this acquisition is subject to Free Trade Agreements."
FAR 52.225-5, Trade Agreements	"One or more of the items under this acquisition is subject to the World Trade Organization Government Procurement Agreement and Free Trade Agreements."
FAR 52.225-11, Buy American-Construction Materials under Trade Agreements, or FAR 52.225-23, Required Use of American Iron, Steel, and Manufactured Goods-Buy American Statute-Construction Materials under Trade Agreements	"One or more of the items under this acquisition is subject to the World Trade Organization Government Procurement Agreement and Free Trade Agreements."

(iv) If technical data required to respond will not be furnished as part of the solicitation, identify where and how prospective offerors can obtain the data.

(v) If an award of a construction contract to a small business is anticipated, include information about definitization of equitable adjustments for change orders (see part 36).

(vi) Include a statement that all responsible sources may submit a quotation, bid, or proposal, as appropriate, which will be considered by the agency.

(vii) For noncompetitive contract actions (including those at or below the SAT), identify the intended source and explain why competition is lacking.

(viii) State whether an offeror or its product or service must meet a qualification requirement in order to be eligible for award; and if so, identify the office from which the qualification requirement may be obtained.

(d) *Timing*. When a presolicitation notice is required, post it to the GPE as follows:

Table 5-2 — Minimum Timeframes for Posting Presolicitation Notices

Acquisition Value	Description	Timing
>$20,000 to ≤$25,000*	Any acquisition	Must be posted for 10 days
>$25K to ≤SAT*	Any acquisition	15 days before solicitation issuance
>SAT	Acquisition of commercial products or commercial services	Combined with the solicitation
	Noncommercial acquisitions	15 days before solicitation issuance

* Per 5.101(b)(1)(i), a presolicitation notice is not required if the solicitation will be posted in the GPE and allow for electronic submission of offers.

5.102 Paid advertisements.

In addition to posting in the GPE, agencies may place paid advertisements. Agencies that choose to advertise proposed contract actions in newspapers or other public media must follow 41 U.S.C. 3701-3703.

5.103 Special notices.

(a) Federally Funded Research and Development Centers (FFRDCs). For requirements relating to FFRDCs see part 35.

(b) Notices about consolidation, bundling, or substantial bundling. For required notices about consolidation or substantial bundling of contract requirements, see part 7.

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Subpart 5.2 - Solicitation

5.201 Solicitation notice.

(a) Requirements. Unless an exemption at paragraph (b) applies, post the solicitation in the GPE.

(b) Exemptions. The contracting officer does not need to post the solicitation to the GPE if a presolicitation notice for the proposed contract action—

(1) Was not required based on an exemption at 5.101(b), except for 5.101(b)(1)(i); or

(2) Was posted to the GPE in lieu of posting a solicitation in the GPE (see 5.101(b)(1)(i)).

(c) *Content*. The solicitation notice posted to the GPE must include—

(1) The information required by 5.101(c);

(2) Specifications, technical data, and other pertinent information determined necessary by the contracting officer or instructions on how to access the information; and

(3) When an acquisition contains brand name specifications, the justification required by 6.104, redacted as necessary.

(d) *Timing*. Establish a date for receipt of quotations or offers that meets the minimum timeframes in the table below. See part 25 to determine whether an acquisition is subject to the WTO GPA or an FTA.

Table 5-3 — Minimum Timeframes for Receipt of Quotations or Offers.

Value	Description	Not subject to WTO GPA or FTA	Subject to WTO GPA or FTA, but included in annual forecast	Subject to WTO GPA or FTA, but not included in annual forecast
≥$15K to ≤SAT	Any acquisition	None, allow a reasonable opportunity to respond	10 days from presolicitation notice or solicitation, as applicable	40 days from presolicitation notice or solicitation, as applicable
>SAT	Acquisition of commercial products or commercial services	None, allow a reasonable opportunity to respond	10 days from combined synopsis/ solicitation	40 days from combined synopsis/ solicitation
	Research and Development (R&D) acquisitions	45 days from presolicitation notice	N/A	N/A
	Orders under a Basic Ordering Agreement (BOA) or similar (non-R&D)	30 days from presolicitation notice	30 days from presolicitation notice (reducible to 10 days, if warranted)	40 days from presolicitation notice
	All other non-commercial acquisitions	30 days from solicitation	30 days from solicitation (reducible to 10 days, if warranted)	30 days from solicitation

5.202 Requests from small businesses.

Per 15 U.S.C. 637b, when a solicitation is not posted to the GPE, provide to small business concerns, upon request—

(a) A copy of the solicitation and specifications;

(b) The name and email address of the solicitation point of contact; and

(c) Adequate citations to Federal laws and agency rules the small business must follow if awarded a contract.

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Subpart 5.3 - Award

5.301 Award notice.

(a) *Requirement*. Except as provided in paragraph (b) of this section, post an award notice to the GPE for contract actions greater than $25,000 that are—

(1) Covered by the WTO GPA or FTA (see part 25); or

(2) Likely to result in subcontract awards.

(b) Exemptions. An award notice is not required if an exemption at 5.101(b)(1) to the presolicitation notice requirements applied to the contract action.

(c) *Content*. The award notice must include the following information:

(1) A description of the supplies or services.

(2) Contracting office and address.

(3) Contractor receiving the award.

(4) Contract award dollar amount.

(5) Contract award date.

(d) *Timing*. When an award notice is required, post it to the GPE within the following timeframes:

Table 5-4 — Minimum Timeframes for Posting Award Notices

Value	Description	Timing
>$25K	Likely to result in subcontracting opportunities	As soon as possible after award to promote industry and small business participation
	Not likely to result in subcontracting opportunities, but subject to WTO GPA or FTA	Within 60 days of award

5.302 Public announcement.

(a) *Requirement*. Contracting officers must make information available on awards of contract actions over $5.5 million in sufficient time for the agency concerned to publicly announce it by 5 p.m., Eastern Time (ET), on the day of award. Agencies shall not release information on awards before the public release time of 5 p.m., ET. This public announcement is a separate requirement from the award notice requirements of part 5.301.

(b) *Exemption*. Contract actions excluded from this requirement include those—

(1) Placed with the Small Business Administration under Section 8(a) of the Small Business Act;

(2) Placed with foreign firms when delivery or performance is outside the United States and its outlying areas; and

(3) That were exempt from the presolicitation notice requirements at 5.101(b).

5.303 Announcement of contract awards.

(a) The following entities may post a notice of subcontracting opportunities to the GPE:

(1) A contractor awarded a contract greater than the SAT that will likely result in subcontract awards.

(2) A subcontractor or supplier, at any tier, under a contract greater than the SAT with a subcontracting opportunity greater than $20,000.

(b) The notice must include—

(1) The business opportunity information described at 5.101(c)(4)(i), (iv), and (v); and

(2) The due date for receipt of offers.

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PART 6 - COMPETITION REQUIREMENTS

Sec.

6.000 Scope of part.
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Subpart 6.1 - Presolicitation

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6.103-4 International agreement.
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6.104 Justification and approval.
6.104-1 Justification content.
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Subpart 6.2 - [Reserved]

Subpart 6.3 - Postaward

6.301 Availability of the justification.

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6.000 Scope of part.

This part prescribes policies and procedures for full and open competition.

6.001 Applicability.

This part applies to all acquisitions except—

(a) Contracts awarded using the simplified acquisition procedures of part 13;

(b) Contracts awarded using contracting procedures (other than those addressed in this part) that are expressly authorized by statute;

(c) Contract modifications that are within the scope of the contract, including exercising priced options that were evaluated as part of the original competition (see part 17);

(d) Orders placed under requirements contracts or definite-quantity contracts;

(e) Orders placed under indefinite-quantity contracts that were entered into according to this part when—

(1) The contract was awarded under 6.101 or 6.102, and all responsible sources were realistically permitted to compete for the requirements contained in the order; or

(2) The contract was awarded under 6.103, and the justification and approval, if required, adequately covers the requirements contained in the order; or

(f) Orders placed against task order and delivery order contracts entered into according to part 16.

6.002 Limitations.

No agency may contract for supplies or services from another agency to avoid the requirements of this part.

6.003 Advocates for competition.

(a) 41 U.S.C. 1705 requires the head of each executive agency to designate and resource an advocate for competition for the agency and for each procuring activity of the agency.

(b) The advocate promotes full and open competition, promotes the acquisition of commercial products and services, and challenges barriers to acquisition. The advocate reports actions taken to increase competition to the senior procurement executive and chief acquisition officer.

Subpart 6.1 - Presolicitation

6.101 Full and open competition.

(a) Except as authorized by 6.102 and 6.103, contracting officers must obtain full and open competition by using competitive procedures to solicit offers and award Government contracts (see 10 U.S.C. 3201 and 41 U.S.C. 3301).

(b) Contracting officers must use the competitive procedure, or combination of procedures, best suited to efficiently fulfill the Government's requirements. Competitive procedures include sealed bids, competitive proposals, and other procedures explicitly authorized by statute.

(1) *Sealed bids*. For sealed bidding procedures, see part 14. Use sealed bids only when the contracting officer has found that all of the following apply:

(i) Time permits staff to solicit, submit, and evaluate sealed bids;

(ii) The award will be made on the basis of price and other price-related factors;

(iii) Discussion with bidders is unnecessary; and

(iv) Contracting officers reasonably expect to receive more than one sealed bid.

(2) *Competitive proposals*. For competitive proposal procedures, see part 15.

(3) *Other competitive procedures*. The following procedures are also considered competitive procedures (see 41 U.S.C. 152):

(i) Selection of sources for architect-engineer contracts according to the provisions of 40 U.S.C. 1102 *et seq*.

(ii) Competitive selection of basic and applied research, as well as that part of development not related to developing a specific system or hardware procurement, if award results from—

(A) Proposals in response to a general solicitation or broad agency announcement; and

(B) A peer review or scientific review of such proposals.

(iii) Use of procedures established by the Administrator of General Services for the multiple award schedule program of the General Services Administration.

6.102 Full and open competition after excluding sources.

(a) Agencies may contract by providing for full and open competition after excluding one or more sources under authorities specified in this section (see 10 U.S.C. 3203 and 41 U.S.C. 3303).

(b) Acquisitions made under this section require use of the competitive procedures outlined in 6.101(b).

(c) Acquisitions under this section do not require separate justification and approval or determination and findings.

6.102-1 Establishing or maintaining alternative sources.

(a) Agencies may exclude a particular source from a contract action to establish or maintain an alternative source of supply for that supply or service if the agency head determines that to do so would—

(1) Increase or maintain competition and likely result in reduced overall costs for the acquisition, or anticipated acquisition, of the supplies or services;

(2) Serve the interests of national defense to have a facility (or a producer, manufacturer, or other supplier) available for furnishing the supplies or services in case of a national emergency or industrial mobilization;

(3) Serve the interests of national defense by establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center;

(4) Ensure the continuous availability of a reliable source of supplies or services;

(5) Satisfy projected needs based on a history of high demand for the supplies or services; or

(6) Satisfy a critical need for medical, safety, or emergency supplies.

(b) (1) Every proposed contract action under the authority of paragraph (a) of this section must be supported by a determination and findings (D&F) (see subpart 1.5) signed by the head of the agency or designee. This D&F must not be made on a class basis.

(2) Technical and requirements personnel are responsible for providing all necessary data to support their recommendation to exclude a particular source.

(3) When the authority in paragraph (a)(1) of this section is cited, the findings must include a description of the estimated reduction in overall costs and how the estimate was derived.

6.102-2 Set-asides for small business concerns.

Contracting officers may set aside acquisitions for small business concerns. This authority also includes—

(a) Contract actions conducted under the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) programs.

(b) Contract actions set aside for specific small business socioeconomic categories (see part 19).

6.102-3 Set-asides for local firms during a major disaster or emergency.

Contracting officers may set aside solicitations to allow only offerors residing or doing business primarily in the area affected by a major disaster or emergency (see part 26).

6.103 Other than full and open competition.

(a) Agencies may contract without providing for full and open competition under authorities specified in this section (see 10 U.S.C. 3204 and 41 U.S.C. 3304).

(b) Contracting without providing for full and open competition must not be justified on the basis of—

(1) A lack of planning by the requiring activity; or

(2) Concerns related to the amount of funds available to the agency or activity for acquisition.

(c) When not providing for full and open competition, the contracting officer must solicit offers from as many potential sources as is practicable under the circumstances.

(d) Except for contracts awarded under the authority of 6.103-5 and 6.103-7, an acquisition under this section requires—

(1) Consideration of all bids, proposals, quotations, or capability statements received; and

(2) Justification and approval required by 6.104.

6.103-1 Only one responsible source and no other supplies or services will satisfy agency requirements.

(a) *Authority*. 10 U.S.C. 3204(a)(1) or 41 U.S.C. 3304(a)(1).

(b) *One responsible source*. Agencies may contract without providing for full and open competition when the supplies or services required by the agency are available from only one responsible source and no other type of supplies or services will

satisfy agency requirements. For DoD, NASA, and the Coast Guard, this authority extends to situations where only a limited number of responsible sources can satisfy agency requirements.

(c) Supplies and services may be deemed as available from only one source under this authority under the following circumstances—

(1) When an unsolicited research proposal shows a unique and innovative concept (see definition at 2.101) the substance of which is not otherwise available to the Federal Government and does not resemble the substance of a pending competitive acquisition. For DoD, NASA, and the Coast Guard, this authority extends to situations where a source demonstrates a unique capability to provide the particular research services proposed.

(2) When awarding a follow-on contract for the continued development or production of a major system or highly specialized equipment and, for DoD, NASA, and the Coast Guard, for the continued provision of highly specialized services, would result in—

(i) Substantial duplication of cost to the Government that is not expected to be recovered through competition; or

(ii) Unacceptable delays in fulfilling the agency's requirements.

(d) *Application for brand-name descriptions*. Except as authorized at 6.103-5, use of brand-name descriptions, or specification of attributes peculiar to one manufacturer, prevents full and open competition and should only be used when justified and approved according to 6.104. This does not apply to "brand name or equal" descriptions as they provide for full and open competition.

6.103-2 Unusual and compelling urgency.

(a) *Authority*. 10 U.S.C. 3204(a)(2) or 41 U.S.C. 3304(a)(2).

(b) *Urgency*. Agencies may contract without providing for full and open competition when the agency's need for the supplies or services is of such an unusual and compelling urgency that the Government would be seriously injured, financially or otherwise, unless the agency is permitted to limit the number of sources from which it solicits bids or proposals.

(c) *Period of performance*. The total period of performance of a contract greater than the simplified acquisition threshold awarded or modified using this authority—

(1) May not exceed the time necessary—

(i) To meet the unusual and compelling requirements of the work to be performed under the contract; and

(ii) For the agency to enter into another contract for the required goods and services through competitive procedures; and

(2) May not exceed one year, including all options, unless the head of the agency determines that exceptional circumstances apply. This determination—

(i) Is separate from the justification and approval for the use of the unusual and compelling urgency authority and must be documented in the contract file;

(ii) Does not cover any subsequent modification that further extends the period of performance, except for options included in the original determination. Such extensions must be approved at the same level as the original determination.

(d) *Documentation after award*. The justification and approval for the use of this authority, as well as the determination described in paragraph (c)(2) of this section, may be made after contract award when making the determination before award would unreasonably delay the acquisition.

6.103-3 Industrial mobilization; engineering, developmental, or research capability; or expert services.

(a) *Authority*. 10 U.S.C. 3204(a)(3) or 41 U.S.C. 3304(a)(3).

(b) *Application*. Agencies may contract without providing for full and open competition when it is necessary to award the contract to a particular source or sources in order—

(1) To maintain a facility, producer, manufacturer, or other supplier available for furnishing supplies or services in case of a national emergency or to achieve industrial mobilization;

(2) To establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center; or

(3) To acquire the services of an expert or neutral person for any current or anticipated litigation or dispute.

6.103-4 International agreement.

(a) *Authority*. 10 U.S.C. 3204(a)(4) or 41 U.S.C. 3304(a)(4).

(b) *International agreement*. Agencies may contract without providing for full and open competition when precluded by the—

(1) Terms of an international agreement or a treaty between the United States and a foreign government or international organization; or

(2) The written directions of a foreign government reimbursing the agency for the cost of acquiring the supplies or services for such government.

(c) *Limitations*. Contracts awarded by DoD, NASA, and the Coast Guard using this authority do not require the written justifications and approvals described in 6.104.

6.103-5 Authorized or required by statute.

(a) *Authority*. 10 U.S.C. 3204(a)(5) or 41 U.S.C. 3304(a)(5).

(b) *Authorized or required by statute*. Agencies may contract without providing for full and open competition when—

(1) A statute expressly authorizes or requires that the acquisition be made through another agency or from a specified source; or

(2) The agency's need is for a brand-name commercial product for authorized resale (*e.g.*, commercial products for resale through commissaries). This authority does not include other uses of brand name descriptions that generally preclude full and open competition and are required to be addressed in accordance with 6.103-1(d).

(c) *Application*. This authority may be used when statutes expressly authorize or require that acquisition be made from a specified source or through another agency. Examples include, but are not limited to:

(1) Sole-source awards of certain socio-economic small business concerns (see 15 U.S.C. chapter 14A); and

(2) Sole-source awards under the SBIR or STTR programs for Phase III (see 15 U.S.C. 638(r)(4)) or Phase II, when directly following a competitively awarded initial Phase II award (see 15 U.S.C. 638(ff)).

(d) *Limitations*. (1) Do not use this authority when a provision of law requires an agency to award a new contract to a specified non-Federal Government entity unless the provision of law specifically—

(i) Identifies the entity involved; and

(ii) States that award to that entity must be made despite the merit-based selection procedures in 10 U.S.C. 3201(e) for armed services acquisitions or 41 U.S.C. 3105 for civilian agency acquisitions.

(2) This limitation does not apply—

(i) When the work provided for in the contract continues the work performed by the specified entity under a preceding contract; or

(ii) To any contract requiring the National Academy of Sciences to investigate, examine, or experiment upon any subject of science or art of significance to an executive agency and to report on those matters to the Congress or any agency of the Federal Government.

(e) With the exception of sole-source 8(a) contracts over $30 million (section 811 of Public Law 111-84, 41 U.S.C. 3304 note), contracts awarded using this authority do not require written justifications and approvals described in 6.104.

6.103-6 National security.

(a) *Authority*. 10 U.S.C. 3204(a)(6) or 41 U.S.C. 3304(a)(6).

(b) *National security*. Full and open competition need not be provided for when disclosing the agency's needs would compromise national security unless the agency can limit the number of sources from which it solicits bids or proposals.

6.103-7 Public interest.

(a) *Authority*. 10 U.S.C. 3204(a)(7) or 41 U.S.C. 3304(a)(7).

(b) Public interest. Full and open competition need not be provided for when the agency head determines it is not in the public interest for that particular acquisition.

(c) Limitations. (1) A written determination to use this authority must be made in accordance with subpart 1.5, by the head of the executive agency. The authority may not be delegated and the determination must not be made on a class basis.

(2) Agencies must notify Congress, in writing, of such determination not fewer than 30 days before awarding the contract.

6.104 Justification and approval.

(a) A justification and approval must support procedures under 6.103, except 6.103-5 and 6.103-7.

(b) Contracting officers require the support of the broader acquisition team when making decisions regarding competition. Technical and requirements personnel are responsible for providing, and certifying as accurate and complete, necessary data to support their recommendation for other than full and open competition.

(c) Justifications under 6.103, except for 6.103-7, may be made on an individual or class basis. Justifications under 6.103-7 may only be made on an individual basis.

6.104-1 Justification content.

(a) At a minimum, each justification must include the following information:

(1) Identification of the agency and the contracting activity, and specific identification of the document as a "Justification for other than full and open competition."

(2) Nature and/or description of the action being approved.

(3) A description of the supplies or services required to meet the agency's needs (including the estimated value).

(4) An identification of the statutory authority permitting other than full and open competition.

(5) A demonstration that the proposed contractor's unique qualifications or the nature of the acquisition requires using the authority cited.

(6) A description of efforts made to ensure that offers are solicited from as many potential sources as possible, including whether a notice was or will be publicized as required by part 5 and, if not, which exception under part 5 applies.

(7) A determination by the contracting officer that the anticipated cost to the Government will be fair and reasonable.

(8) The market research conducted (see part 10) and the results or a statement of the reason market research was not conducted.

(9) Any other facts supporting using other than full and open competition, such as:

(i) When 6.103-1 is cited for follow-on acquisitions as described in 6.103-1(c)(2), an estimate of the cost to the Government that would be duplicated and how the estimate was derived.

(ii) When 6.103-2 is cited, data, estimated cost, or other rationale as to whether and how much the Government would be harmed.

(10) A listing of the sources, if any, that expressed an interest in the acquisition in writing.

(11) A statement of the actions, if any, the agency may take to remove or overcome any barriers to competition before any subsequent acquisition for the supplies or services required.

(12) Contracting officer certification that the justification is accurate and complete to the best of the contracting officer's knowledge and belief.

(b) For sole-source 8(a) contracts over $30 million, the justification must include, at a minimum, the contents described at paragraphs (a)(3), (a)(4), and (a)(7) of this section. It should also include a determination that using a sole-source contract is in the best interest of the agency concerned and any other matters specified by agency procedures.

6.104-2 Approval of justification.

(a) The justification for other than full and open competition must be approved in writing. Officials at a higher authority level may approve lower dollar justifications. For example, the senior procurement executive as well as the head of the procuring activity may approve a $60 million justification. Approval levels are as follows:

Table 6-1. Approval authorities for other than full and open competition.

Value (including options)	Approval authority
$900,000 or below	Contracting officer. Accomplished by certification required at 6.104(a)(12).
>$900,000 - $20,000,000	Advocate for competition. Not delegable.
>$20,000,000 - $90,000,000 (>20,000,000 - $150,000,000 for DoD, NASA, and the Coast Guard)	Head of the procuring activity. May be delegated to a member of the armed services at the general or flag officer level or a civilian in a grade above the GS-15 (or equivalent) level.
>$90,000,000 (>$150,000,0000 for DoD, NASA, and the Coast Guard)	Senior procurement executive. Not delegable, except in the case of the Under Secretary of Defense for Acquisition and Sustainment, acting as the senior procurement executive for the Department of Defense.

(b) A class justification for other than full and open competition must be approved in writing in accordance with agency procedures. The estimated total value of the class will determine the approval level.

(c) A justification must include the estimated dollar value of all options to determine the approval level.

Subpart 6.2 - [Reserved]

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Subpart 6.3 - Postaward

6.301 Availability of the justification.

(a) The agency must make publicly available the justification required by 6.104 as required by 10 U.S.C. 3204(f) and 41 U.S.C. 3304(f).

(b) The justification must be made publicly available within 14 days after contract award, except—

(1) Justifications under 6.103-2 must be posted within 30 days after contract award; and

(2) Justifications for brand-name descriptions under 6.103-1(d) must be posted with the solicitation (see part 5).

(c) The justifications must be made publicly available—

(1) At the Government Point of Entry (GPE);

(2) On the website of the agency, which may provide access to the justifications by linking to the GPE; and

(3) For a minimum of 30 days.

(d) Contracting officers must carefully screen all justifications for contractor proprietary data and remove all such data, and such references and citations as are necessary to protect the proprietary data, before making the justifications available for public inspection. Contracting officers must also be guided by the exemptions to disclosure of information contained in the Freedom of Information Act (5 U.S.C. 552) and the prohibitions against disclosure in part 24 in determining whether the justification, or portions of it, are exempt from posting.

(e) The requirements of paragraphs (a) through (c) do not apply if posting the justification would compromise national security or create other security risks.

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PART 7 - ACQUISITION PLANNING

Sec.

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7.000 Scope of part.

This part prescribes policies and procedures for-

(a) Acquisition planning and developing acquisition plans;

(b) Determining whether to use commercial or Government resources to acquire supplies or services;

(c) Deciding whether it is more economical to lease or to purchase equipment; and

(d) Determining whether functions are inherently governmental.

Subpart 7.1 - Acquisition Plans

7.101 Definitions.

As used in this subpart—

Acquisition streamlining means more efficient and effective use of resources to design and develop or produce quality systems.

Life-cycle cost means the total cost to the Government of acquiring, operating, supporting, and (if applicable) disposing of the items being acquired.

Order means an order placed under a-

(1) Federal Supply Schedule contract; or

(2) Task-order contract or delivery-order contract.

Planner means the person or office responsible for developing and maintaining a plan, whether written or not.

7.102 Requirements.

(a) Agencies must perform acquisition planning for all acquisitions. Agencies should establish procedures to determine when a written or oral acquisition plan is required (see 7.103). The record of the acquisition plan must be appropriate for the type of acquisition and document decisions and actions to ensure-

(1) Information is available for making informed decisions at each step in the acquisition process;

(2) There is clear support for all actions taken;

(3) Necessary information is available for reviews or investigations; and

(4) Essential facts are available in case litigation arises.

(b) Acquisition plans must promote and provide for:

(1) Acquisition of commercial products or commercial services, whenever feasible. If available commercial products or services do not meet agency needs, acquire nondevelopmental items, to the maximum extent practicable (10 U.S.C. 3453 and 41 U.S.C. 3307).

(2) Full and open competition (see part 6). When using an exception to full and open competition, obtain competition to the maximum extent practicable for the procurement.(10 U.S.C. 3206(a)(1)and 41 U.S.C. 3306(a)(1)).

(3) Selection of the appropriate contract type to fulfill the agency's needs.

(4) Use of existing contracts, if appropriate, including interagency and intra-agency contracts, to fulfill the requirement, before awarding new contracts (see part 8).

(c) Planning must integrate the efforts of agency personnel responsible for significant aspects of the acquisition to ensure that the Government meets its needs in the most effective, economical, and timely manner.

(d) A written plan is required for cost reimbursement and other high-risk contracts other than firm-fixed-price contracts. Agencies may require written plans for firm-fixed-price contracts as appropriate.

7.103 Agency-head responsibilities.

(a) The agency head must establish agency acquisition planning criteria and thresholds for when increasingly greater detail and formality in the planning process is required. The agency procedures must—

(1) Create streamlined acquisition planning procedures for using Governmentwide acquisition contracts or multi-agency contracts for requirements that are not complex, including for orders, particularly for repetitive orders;

(2) Create streamlined acquisition planning procedures when an acquisition plan has been developed for a single indefinite delivery indefinite quantity contract to allow the resulting orders to be covered by and reference the same acquisition plan;

(3) Allow for acquisition planning at the program level that covers multiple procurement actions. Acquisition plans may be on a system basis, individual contract basis, or individual order basis depending on the acquisition;

(4) Consider streamlined acquisition planning procedures for procurements for commercial services and products, including COTS;

(5) Establish criteria for identifying high-risk contracts;

(6) Identify when design-to-cost and life-cycle-cost techniques will be used; and

(7) Provide procedures to waive planning requirements for acquisitions because of an urgent need.

(b) The agency head or designee are responsible for ensuring:

(1) Market research is conducted to define requirements and that the statement of work, statement of objectives, or performance work statement closely aligns with needed outcomes and cost estimates.

(2) The principles of this subpart are used, as appropriate, for all acquisitions, whether a written plan is required or not.

(3) Small business opportunities are considered in acquisitions to the maximum extent practicable (see 7.107 and part 19).

(4) No purchase request is started or contract entered into that would result in the performance of an inherently governmental function by a contractor, and that all contracts or orders are adequately managed to ensure effective official control over contract or order performance (see subpart 7.5).

(5) Effective agency responsiveness to disaster and emergencies using the authorities and flexibilities at parts 18 and 26.

(6) Information security and supply chain security requirements (see part 40) and information and communication technology (ICT) accessibility standards (see part 39) are considered, as appropriate.

(7) Before issuing a solicitation for advisory and assistance services for analyzing and evaluating solicitation proposals, a determination is made that there are insufficient covered personnel within the agency or from another Federal agency with the training and capability to do the analyzing and evaluating (see part 37).

(8) Agency planners on information technology acquisitions comply with the capital planning and investment control requirements in 40 U.S.C. 11312 and OMB Circular A-130.

(9) Acquisition plans and revisions to these plans are reviewed and approved to ensure compliance with FAR requirements.

7.104 General procedures.

(a) Start acquisition planning as soon as an agency need is identified. Early planning can create opportunities to structure the procurement approach in a way that promotes competition and innovation.

(b) In developing the plan, the planner must do the following:

(1) Form a team consisting of all those who will be responsible for significant aspects of the acquisition, such as contracting, small business, fiscal, legal, technical personnel, and the combatant commander or chief of mission.

(2) Review previous plans for similar acquisitions and discuss them with the key personnel involved.

(3) Review and revise the plan at key dates specified in the plan or whenever significant changes occur, and no less often than annually.

(4) If the plan proposes using other than full and open competition when awarding a contract, coordinate the plan with the appropriate advocate for competition.

(5) Coordinate the plan with the appropriate small business specialist from the agency Office of Small and Disadvantaged Business Utilization or the Office of Small Business Programs when the plan strategy involves consolidation or bundling (see 7.107).

(6) Ensure that a Contracting Officer Representative is nominated as early as possible in the acquisition process by the requirements official or according to agency procedures.

(7) Consult with requirements and logistics personnel who determine type, quality, quantity, and delivery requirements. Requirements and logistics personnel should avoid issuing requirements on an urgent basis or with unrealistic delivery or performance schedules, since it generally restricts competition and increases prices.

(8) Coordinate and reach agreement on the plan with the contracting officer.

(c) The specific content of plans will vary, depending on the nature, circumstances, and stage of the acquisition. In preparing the plan, the planner should follow the agency's implementing procedures and address the elements relevant to the specific procurement to achieve the acquisition objectives.

7.105 [Reserved]

7.106 Additional requirements for major systems.

(a) In planning for the solicitation of a major system (see part 34) development contract, planners must consider requiring offerors to include, in their offers, proposals to incorporate in the design of a major system—

(1) Items that are currently available within the supply system of the agency responsible for the major system, available elsewhere in the national supply system, or commercially available from more than one source; and

(2) Items that the Government will be able to acquire competitively in the future if they are likely to be needed in substantial quantities during the system's service life.

(b) In planning for the solicitation of a major system (see part 34) production contract, planners must consider requiring offerors to include, in their offers, proposals identifying opportunities to assure that the Government will be able to obtain, on a competitive basis, items acquired in connection with the system that are likely to be acquired in substantial quantities during the service life of the system. Proposals submitted in response to such requirements may include the following:

(1) Proposals to provide the Government the right to use technical data to be provided under the contract for competitive future acquisitions, together with the cost to the Government, if any, of acquiring such technical data and the right to use such data.

(2) Proposals for the qualification or development of multiple sources of supply for competitive future acquisitions.

(c) In determining whether to apply paragraphs (a) and(b) of this section, planners must consider why the system is being acquired and the technology necessary to meet the system's required capabilities. If such proposals are required, the contracting officer must consider them in evaluating competing offers. In noncompetitive awards, the contracting officer may consider the factors in paragraphs (a) and(b) of this section as objectives in negotiating the contract.

7.107 Additional requirements for acquisitions involving consolidation, bundling, or substantial bundling.

7.107-1 General.

(a) Consolidation and bundling may provide substantial benefits to the Government. However, because of the potential impact on small business participation, before conducting an acquisition that consolidates or bundles requirements the agency must-

(1) Conduct market research;

(2) Identify any alternative contracting approaches that would involve a lesser degree of consolidation or bundling (e.g., separate smaller contracts or orders);

(3) Coordinate with the agency's Office of Small Disadvantaged Business Utilization or the Office of Small Business Programs;

(4) Identify any negative impact by the acquisition strategy on contracting with small business concerns;

(5) Take steps to include small business concerns in the acquisition strategy; and

(6) When required in paragraph (b) of this section, make a written determination that the consolidation (15 U.S.C. 657q) or bundling (15 U.S.C. 644(e)) of contract requirements is necessary and justified.

(b) Unless excepted in paragraph (c), a written determination is required for—

(1) Consolidation requirements above $2 million (15 U.S.C. 657q);

(2) Bundling requirements; and

(3) Substantial bundling requirements with a cumulative estimated dollar value (including options) of:

(i) $8 million or more for the Department of Defense.

(ii) $6 million or more for the National Aeronautics and Space Administration, the General Services Administration, and the Department of Energy.

(iii) $2.5 million or more for all other agencies.

(iv) These thresholds apply to multiple-award contracts, task orders or delivery orders issued against a GSA Schedule contract, or task orders or delivery orders issued against a task-order or delivery-order contract awarded by another agency.

(c) The requirements of section 7.107 do not apply—

(1) To orders placed under single-agency task-order contracts or delivery-order contracts, when the requirement was considered in determining that the consolidation or bundling of the underlying contract was necessary and justified; or

(2) To requirements for which there is a mandatory source (see part 8). This exception does not apply—

(i) When the requiring agency obtains a waiver or an exception according to part 8; or

(ii) When optional acquisitions of supplies and services permitted under part 8 are included.

(d) Agencies must publish the Governmentwide policy regarding contract bundling, including regarding the solicitation of teaming and joint ventures, on their agency's website. (15 U.S.C. 644(q)(2)(A)(ii)).

7.107-2 Policy.

(a) The Senior Procurement Executive (SPE) or Chief Acquisition Officer (CAO) may determine that consolidation or bundling is necessary and justified if the benefits of that approach would substantially exceed the benefits that would be derived from each of the alternative contracting approaches identified under 7.107-1(a)(2), including benefits that are quantifiable in dollar amounts as well as any other specifically identified benefits.

(b) If a determination is made that consolidation or bundling is necessary and justified, the contracting officer must include the justification in the acquisition strategy documentation and provide it to the Small Business Administration (SBA) upon request.

(c) (1) The agency must quantify and document in its strategy the specific benefits identified through the use of market research and other techniques to explain how their impact would be substantial.

(2) Benefits may include cost savings, price reduction, or, regardless of whether quantifiable in dollar amounts—

(i) Quality improvements that will save time or improve or enhance performance or efficiency;

(ii) Reduction in acquisition cycle times;

(iii) Better terms and conditions; or

(iv) Any other benefit.

(3) Benefits are substantial if quantified in dollar amounts individually, in combination, or in the aggregate if the anticipated financial benefits are equivalent to—

(i) Ten percent of the estimated contract or order value (including options) if the value is $94 million or less; or

(ii) Five percent of the estimated contract or order value (including options) or $9.4 million, whichever is greater, if the value exceeds $94 million.

(4) Benefits that are not quantifiable in dollar amounts must be specifically identified and otherwise quantified to the extent feasible.

(5) In assessing whether cost savings and/or price reduction would be achieved through consolidation or bundling, the agency and SBA must—

(i) Compare the price that has been charged by small businesses for the work that they have performed; or

(ii) Where previous prices are not available, compare the price, based on market research, that could have been or could be charged by small businesses for the work previously performed by other than a small business.

(6) For a contract or task or delivery order with a cumulative estimated dollar value (including options) above the substantial bundling thresholds at 7.107-1(b), the agency must also document in its strategy—

(i) The specific benefits expected to be derived from substantial bundling;

(ii) An assessment of the specific barriers to participation by small business concerns as contractors that result from substantial bundling;

(iii) Actions designed to maximize small business participation as contractors, including provisions that encourage small business teaming;

(iv) Actions designed to maximize small business participation as subcontractors (including suppliers) at any tier under the contract or order that may be awarded to meet the requirements;

(v) The determination that the anticipated benefits of the proposed bundled contract or order justify its use; and

(vi) Alternative strategies that would reduce or minimize the scope of the bundling, and the reason for not choosing those alternatives.

(d) Reduction of administrative or personnel costs alone is not enough justification for consolidation or bundling unless the cost savings are expected to be substantial.

(e) When the expected benefits are not substantial but the requirements are critical to the agency's mission success, and the procurement strategy provides for maximum practicable participation by small business, the Deputy Secretary or equivalent (or for DoD the SPE), on a non-delegable basis, may determine that consolidation or bundling is necessary and justified.

7.107-3 Notifications.

(a) *Notifications to current small business contractors of the agency's intent to consolidate or bundle.*

(1) The contracting officer must notify each small business performing a contract that it intends to consolidate or bundle the requirement at least 30 days before issuing the solicitation for the bundled requirement.

(2) The notification must provide the name, phone number and address of the applicable SBA procurement center representative (PCR), or if an SBA PCR is not assigned to the procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located.

(b) *Notification to the public.* The SPE or CAO must publish in the GPE—

(1) A notice that the agency has determined consolidation or bundling of contract requirements is necessary and justified (see 7.107-2) no later than 7 days after making the determination; the solicitation may not be publicized prior to 7 days after publication of the notice of the agency determination; and

(2) The determination that consolidation or bundling is necessary and justified with the publication of the solicitation. See 7.107-2 for the required content of the determination.

(c) *Notification to SBA of follow-on consolidated or bundled requirements.* For each follow-on consolidated or bundled requirement, the contracting officer must obtain the following from the requiring activity and notify the SBA PCR no later than 30 days before issuing the solicitation:

(1) The amount of savings and benefits achieved under the prior consolidation or bundling.

(2) Whether such savings and benefits will continue to be realized if the contract remains consolidated or bundled.

(3) Whether such savings and benefits would be greater if the procurement requirements were divided into separate solicitations suitable for awarding to small business concerns.

(4) List of requirements that have been added or deleted for the follow-on.

(d) *Annual notification to the public of the reason for consolidated or bundled requirements.* The agency must publish on its website a list and reason for any consolidated or bundled requirement for which the agency solicited offers or issued an award. The notification must be made annually within 30 days of the agency's data certification regarding the validity and verification of data entered in the Federal Procurement Data System to the Office of Federal Procurement Policy (see part 4).

7.107-4 Solicitation provision.

Insert the provision at 52.207-6, Solicitation of Offers from Small Business Concerns and Small Business Teaming Arrangements or Joint Ventures (Multiple-Award Contracts), in solicitations for multiple-award contracts above the substantial bundling threshold of the agency (see 7.107-1(b)(3).

7.108 Additional requirements for teleworking.

(a) According to 41 U.S.C. 3306(f), an agency must not discourage a contractor from allowing its employees to telework while performing Government contracts, unless—

(1) The contracting officer has determined that the requirements of the agency, including security requirements, cannot be met if teleworking is permitted;

(2) The basis of the determination is documented in writing; and

(3) The prohibition is specified in the solicitation.

(b) When a teleworking prohibition is stated in a solicitation, the contracting officer will unfavorably evaluate an offer that includes teleworking.

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Subpart 7.2 - Planning for the Purchase of Supplies in Economic Quantities

7.200 [Reserved]

7.201 [Reserved]

7.202 Policy.

Agencies are required by 10 U.S.C. 3242 and 41 U.S.C.3310 to procure supplies in such quantity as-

(a) Will result in the total cost and unit cost most advantageous to the Government, where practicable; and

(b) Does not exceed the quantity reasonably expected to be required by the agency.

7.203 Solicitation provision.

Insert the provision at 52.207-4, Economic Purchase Quantity—Supplies, in solicitations for supplies. The provision may not be necessary if the solicitation is for a contract under the General Services Administration's multiple award schedule contract program, or if the contracting officer determines that—

(a) The Government already has the data;

(b) The data is otherwise readily available; or

(c) It is impracticable for the Government to vary its future requirements.

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Subpart 7.3 - [Reserved]

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Subpart 7.4 - Equipment Acquisition

7.400 Scope of subpart.

This subpart—

(a) Implements section 555 of the FAA (Federal Aviation Administration) Reauthorization Act of 2018 (Pub. L. 115-254);

(b) Provides guidance when acquiring equipment and more than one method of acquisition is available for use; and

(c) Applies to both the initial acquisition of equipment and the renewal or extension of existing equipment leases or rental agreements.

7.401 Acquisition considerations.

(a) (1) Agencies must acquire equipment using the method of acquisition most advantageous to the Government based on a case-by-case analysis of comparative costs and other factors according to this subpart and agency procedures.

(2) The methods of acquisition to be compared in the analysis must include, at a minimum—

(i) Purchase;

(ii) Short-term rental or lease;

(iii) Long-term rental or lease;

(iv) Interagency acquisition (see part 2); and

(v) Agency acquisition agreements, if applicable, with a State or local government.

(b) (1) The factors to be compared in the analysis must include, at a minimum:

(i) Estimated length of the period the equipment is to be used and the extent of use within that period;

(ii) Financial and operating advantages of alternative types and makes of equipment;

(iii) Cumulative rent, lease, or other periodic payments, however described, for the estimated period of use;

(iv) Net purchase price;

(v) Transportation, installation, and storage costs;

(vi) Maintenance, repair, and other service costs; and

(vii) Potential for the equipment to become outdated because of upcoming technological improvements.

(2) The following additional factors should be considered, as appropriate, depending on the type, cost, complexity, and estimated period of use of the equipment:

(i) Availability of purchase options.

(ii) Cancellation, extension, and early return conditions and fees.

(iii) Ability to swap out or exchange equipment.

(iv) Available warranties.

(v) Insurance, environmental, or licensing requirements.

(vi) Potential for use of the equipment by other agencies after its use by the acquiring agency is ended.

(vii) Trade-in or salvage value.

(viii) Imputed interest.

(ix) Availability of a servicing capability, especially for highly complex equipment; e.g., can the equipment be serviced by the Government or other sources if it is purchased?

(c) The analysis in paragraph (a) is not required—

(1) When the President has issued an emergency declaration or a major disaster declaration pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.);

(2) In other emergency situations if the agency head makes a determination that obtaining such equipment is necessary to protect human life or property; or

(3) When otherwise authorized by law.

7.402 Acquisition methods.

(a) Purchase method. (1) If the equipment will be used beyond the point in time when cumulative rental or leasing costs exceed the purchase costs, use the purchase method if appropriate.

(2) The mere possibility that future technological advances might make the selected equipment less desirable, alone, is not a reason to rule out the purchase method.

(b) *Rent or lease method.* (1) The rent or lease method may serve as a short-term measure when the circumstances—

(i) Require immediate use of equipment to meet program or system goals; but

(ii) Do not currently support acquisition by purchase.

(2) If a rent or lease method is selected, the inclusion of an evaluated purchase option is preferable.

(3) Generally, a long-term rental or lease agreement should be avoided unless there is an option to purchase or other favorable terms.

(4) If a rental or lease agreement with option to purchase is used, the contract must state the purchase price or provide a formula that shows how the purchase price will be established at the time the option to purchase is exercised.

7.403 OMB guidance.

(a) For additional OMB guidance, see—

(1) Section 13, Special Guidance for Lease-Purchase Analysis, and paragraph 8.c.(2), Lease-Purchase Analysis, of OMB Circular A-94, Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs, (1992 OMB Circular A-94 at https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/circulars/a094/a094.html but use Appendix C from 2025 at https://bidenwhitehouse.archives.gov/wp-content/uploads/2023/12/CircularA-94AppendixC.pdf); and

(2) Appendix B, Budgetary Treatment of Lease-Purchases and Leases of Capital Assets, of OMB Circular A-11, Preparation, Submission, and Execution of the Budget, (https://www.whitehouse.gov/wp-content/uploads/2018/06/app_b.pdf).

7.404 Contract clause.

Insert a clause substantially the same as the clause in 52.207-5, Option to Purchase Equipment, in solicitations and contracts involving a rental or lease agreement with option to purchase.

Subpart 7.5 - Inherently Governmental Functions

7.500 Scope of subpart.

The purpose of this subpart is to prescribe policies and procedures to ensure that inherently governmental functions are not performed by contractors.

7.501 [Reserved]

7.502 Applicability.

This subpart applies to all contracts for services. This subpart does not apply to services obtained through either personnel appointments, advisory committees, or personal services contracts issued under statutory authority.

7.503 Policy.

(a) Contracts must not be used to perform inherently governmental functions.

(b) Agency decisions that determine whether a function is or is not an inherently governmental function may be reviewed and modified by appropriate Office of Management and Budget officials.

(c) The following is a non-exclusive list of inherently governmental functions or functions which must be treated as such.

(1) Directly conducting criminal investigations.

(2) Controlling prosecutions and performance of adjudicatory functions other than those relating to arbitration or other methods of alternative dispute resolution.

(3) Commanding military forces, especially the leadership of military personnel who are members of the combat, combat support, or combat service support role.

(4) Conducting foreign relations and determining foreign policy.

(5) Determining agency policy, such as deciding the application of regulations.

(6) Determining Federal program priorities for budget requests.

(7) Directing and controlling Federal employees.

(8) Directing and controlling intelligence and counter-intelligence operations.

(9) Selecting or not selecting individuals for Federal Government employment, including interviewing individuals for employment.

(10) Approving position descriptions and performance standards for Federal employees.

(11) Determining what Government property is to be disposed of and on what terms (although an agency may give contractors authority to dispose of property at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency).

(12) In Federal procurement activities with respect to prime contracts—

(i) Determining what supplies or services are to be acquired by the Government (although an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency);

(ii) Participating as a voting member on any source selection boards;

(iii) Approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria;

(iv) Awarding contracts;

(v) Administering contracts (including ordering changes in contract performance or contract quantities, taking action based on evaluations of contractor performance, and accepting or rejecting contractor products or services);

(vi) Terminating contracts;

(vii) Determining whether contract costs are reasonable, allocable, and allowable; and

(viii) Participating as a voting member on performance evaluation boards.

(13) Approving agency responses to Freedom of Information Act requests (other than routine responses that, because of statute, regulation, or agency policy, do not require the exercise of judgment in determining whether documents are to be released or withheld), and approving agency responses to the administrative appeals of denials of Freedom of Information Act requests.

(14) Conducting administrative hearings to determine the eligibility of any person for a security clearance, or involving actions that affect matters of personal reputation or eligibility to participate in Government programs.

(15) Approving Federal licensing actions and inspections.

(16) Determining budget policy, guidance, and strategy.

(17) Collecting, controlling, and disbursing fees, royalties, duties, fines, taxes, or other public funds, unless authorized by statute, such as 31 U.S.C. 3718 (relating to private collection contractors and private attorney collection services), but not including—

(i) Collecting fees, fines, penalties, costs, or other charges from visitors to or patrons of mess halls, post or base exchange concessions, national parks, and similar entities or activities, or from other persons, where the amount to be collected is easily calculated or predetermined and the funds collected can be easily controlled using standard case management techniques; and

(ii) Examining routine vouchers and invoices.

(18) Controlling treasury accounts.

(19) Administering public trusts.

(20) Drafting Congressional testimony, responses to Congressional correspondence, or agency responses to audit reports from the Inspector General, the Government Accountability Office, or other Federal audit entity.

(d) The following is a non-exclusive list of functions generally not considered inherently governmental but may, depending on contractor or Government approach, cross the line into that category.

(1) Services that involve or relate to budget preparation, including workload modeling, fact finding, efficiency studies, and should-cost analyses, etc.

(2) Services that involve or relate to reorganization and planning activities.

(3) Services that involve or relate to analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy.

(4) Services that involve or relate to developing regulations.

(5) Services that involve or relate to evaluating another contractor's performance.

(6) Services that support acquisition planning.

(7) Contract management support including:

(i) Assistance in technical evaluation of proposals.

(ii) Assistance in developing statements of work or objectives.

(iii) Assistance in providing responses to Freedom of Information Act inquiries.

(iv) Working in situations that might provide access to confidential business information or other sensitive information (other situations than covered by the National Industry Security Program described in 4.402(b).

(v) Providing information regarding agency policies or regulations, such as attending conferences on behalf of an agency, conducting community relations campaigns, or conducting agency training courses.

(vi) Participating in any situation where it might be assumed that they are agency employees or representatives.

(vii) Participating as technical advisors to a source selection board or participating as voting or nonvoting members of a source evaluation board.

(viii) Serving as arbitrators or providing alternative methods of dispute resolution.

(ix) Constructing buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments.

(x) Providing inspection services.

(xi) Providing legal advice and interpretations of regulations and statutes to Government officials.

(xii) Providing special non-law enforcement, security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details.

(e) Agency implementation must include procedures requiring the agency head or designated requirements official to provide the contracting officer, when the statement of work or objectives (or any modification thereof) is submitted, a written determination that none of the functions to be performed are inherently governmental. This assessment should emphasize the degree to which conditions and facts restrict the discretionary authority, decision-making responsibility, or accountability of Government officials using contractor services or work products. Disagreements regarding the determination will be resolved according to agency procedures before issuing a solicitation.

PART 8 - REQUIRED SOURCES OF SUPPLIES AND SERVICES

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8.000 Scope.

This part addresses prioritizing sources of supplies and services for use by the Government.

8.001 Definitions.

As used in this part—

AbilityOne Commission is the operating name for the Committee for Purchase From People Who are Blind or Severely Disabled.

AbilityOne participating nonprofit agencies means a qualified nonprofit agency employing people who are blind or have other severe disabilities approved by the Committee to furnish a commodity or a service to the Government under 41 U.S.C. chapter 85.

Committee means the Committee for Purchase From People Who Are Blind or Severely Disabled.

Central nonprofit agency means National Industries for the Blind, which has been designated to represent AbilityOne participating nonprofit agencies serving people who are blind; or NISH (also known as SourceAmerica), which has been designated to represent AbilityOne participating nonprofit agencies serving people with severe disabilities other than blindness.

Government printing means printing, binding, and blank-book work for the use of an executive department, independent agency, or establishment of the Government.

Procurement List means a list of supplies (including military resale commodities) and services that the Committee has determined are suitable for purchase by the Government under 41 U.S.C. chapter 85.

Related supplies means supplies that are used and equipment that is usable in printing and binding operations.

Subpart 8.1 - Presolicitation

8.101 Mandatory sources for specific supplies and services.

Agencies must acquire the following supplies and services using the procedures listed below:

Requirement	Procedures
Public utility services	Part 41
Government printing and related supplies	Subpart 8.5
Leased motor vehicles	Contact GSA Fleet
Strategic and critical materials (e.g., metals and ores) from inventories exceeding Defense National Stockpile requirements	DLA Strategic Materials https://www.dla.mil/Strategic-Materials/

8.102 Mandatory source for services.

Unless otherwise required by law or 8.101, agencies must procure services that are on the Procurement List maintained by the Committee, from AbilityOne Participating Nonprofit Agencies in accordance with subpart 8.2. Other sources may be used as prescribed in 41 CFR 101-26.301, and in an unusual and compelling urgency as prescribed in 6.302-2 and in 41 CFR 101-25.101-5.

8.103 Mandatory sources of supplies.

(a) Unless otherwise required by law or subpart 8.101, agencies must procure supplies, in the following order-

(1) From inventories of the requiring agency, in accordance with agency procedures;

(2) From excess from other agencies, in accordance with 41 C.F.R. 102-36;

(3) From Federal Prison Industries (FPI), Inc., in accordance with subpart 8.3; and

(4) When on the Procurement List maintained by the Committee, from AbilityOne Participating Nonprofit Agencies, in accordance with subpart 8.2.

8.104 Use of existing contracts.

(a) When supplies or services are unavailable from the mandatory sources listed above, agencies should procure commercial products and commercial services, including those that can be modified to fill agencies' needs, to the maximum extent possible, in accordance with the policy of Executive Order 14271, Ensuring Commercial, Cost-Effective Solutions in Federal Contracts. When a commercial product or commercial service meets an agency's needs and is available on an existing contract or Blanket Purchase Agreement awarded for Governmentwide use (such as the Federal Supply Schedule, Governmentwide Acquisition Contract, or other Indefinite-Delivery, Indefinite-Quantity contracts), the agency -

(1) must use the existing government-wide contract or blanket purchase agreement to buy the supply or service if the contract has been designated by the Office of Federal Procurement Policy a "required use" contract, unless the head of the contracting activity provides an exception (e.g., because the contract's terms and conditions, scope, or performance period do not meet the agency's needs); and

(2) should consider use of other existing government-wide contracts or blanket purchase agreements if there is not a suitable "required use" contract to meet the agency's needs.

(b) Agencies should also consider the use of shared services to fulfill requirements. A shared service is a business or mission function provided by one agency for consumption by multiple other agencies, either within or between federal agencies.

8.105 Contractor use of Government supply sources.

When authorizing contractors to use Government supply sources, agencies must follow the requirements of this subpart.

8.105-1 Contractor required use of Government supply sources.

(a) *Policy*. Agencies must authorize contractors purchasing supply items for Government use that are on the Procurement List maintained by the Committee to purchase such items from DLA, GSA, and VA, if they are available from these agencies through their distribution facilities. When these items are not available from DLA, GSA, or VA, contractors must order them through the appropriate central nonprofit agency which will determine how to fulfill the order.

(b) *Contract clause*. Insert the clause at 52.208-9, Contractor Use of Mandatory Sources of Supply and Services, in solicitations and contracts that require a contractor to provide supplies or services for Government use that are on the Procurement List maintained by the Committee.

8.105-2 Contractor permitted use of Government supply sources.

(a) *General*.

(1) Agencies may authorize contractors to use Government supply sources to obtain supplies or services required to perform a Government contract, when it is in the Government's interest and the supplies or services are available from Government supply sources. In this section, the terms "contractors" and "contracts" include "subcontractors" and "subcontracts."

(2) Agencies may authorize the contractors to use these sources in performing—

(i) A contract awarded using other than sealed bidding procedures; or

(ii) A contract awarded to an AbilityOne Participating Nonprofit Agency for supplies or services on Procurement List maintained by the Committee, if-

(A) The nonprofit agency requesting use of the supplies and services is providing a commodity or service to the Government; and

(B) The supplies or services received are directly used in making or providing a commodity or service on the Procurement List.

(3) Contractors with fixed-price Government contracts that require protection of security classified information may acquire security equipment through GSA sources in accordance with 41 CFR 101-26.507.

(b) *Exclusion*. Agencies must not require a contractor, or subcontractor at any tier, to use FPI as a subcontractor to perform a contract by any means, including means such as—

(1) A solicitation provision requiring a potential contractor to offer to use FPI supplies or services;

(2) A contract specification requiring the contractor to use specific supplies or services (or classes of supplies or services) offered by FPI; or

(3) Any contract modification directing the use of FPI supplies or services.

(c) *Contract clause*. The contracting officer shall insert the clause at 52.208-90, Government Supply Sources, in solicitations and contracts when the contracting officer authorizes the contractor to acquire supplies or services from a Government supply source.

8.105-3 Contractor use of GSA Fleet.

(a) Agencies may authorize contractors performing under cost-reimbursement contracts to obtain vehicles and related services through the GSA Fleet in accordance with 41 C.F.R. 101-39.202, 41 C.F.R. 102-34. In this section, the terms "contractors" and "contracts" include "subcontractors" and "subcontracts.

(b) When providing the authorization in paragraph (a), agencies must ensure that contractors establish and enforce suitable penalties against employees who use, or authorize the use of, Government motor vehicles for unofficial purposes or for other than in the performance of the contract.

(c) *Contract Clause*. The contracting officer shall insert the clause at 52.208-91, GSA Fleet Vehicles and Related Services, in solicitations and contracts when a cost-reimbursement contract is contemplated and the contracting officer may authorize the contractor to use GSA Fleet vehicles and related services.

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Subpart 8.2 - Acquisition From AbilityOne Participating Nonprofit Agencies

When buying supplies or services from AbilityOne Nonprofit Agencies, agencies must follow the requirements of this subpart and 41 CFR chapter 51.

8.201 General.

The AbilityOne Commission has sole authority to set the price and to authorize or deauthorize sources of supply. Agencies may propose price development through the Commission, or propose additions to the Procurement List at any time through the AbilityOne Commission.

8.202 Presolicitation.

(a) Policy. In accordance with 41 U.S.C. chapter 85 and as required by 8.102 and 8.103, agencies must buy supplies or services that are on the Procurement List maintained by the Committee unless a purchase exception applies.

(b) Purchase exception. Agencies may submit a request to the AbilityOne Commission, or the appropriate central non-profit agency, for a waiver to the Procurement List requirement. If the waiver is approved, agencies may fulfill their requirement with a commercial item. No other provision of the FAR shall be construed as permitting an exception to the mandatory purchase of items on the Procurement List.

8.203 Evaluation and award.

When buying supplies and services on the Procurement List, agencies must obtain them from the designated central nonprofit agency, designated AbilityOne participating nonprofit agencies, or the DLA, GSA, or VA.

8.204 Postaward.

If the ordering office cannot resolve performance issues with the nonprofit agency, the ordering office must refer the matter to the applicable central nonprofit agency and, if necessary, to the AbilityOne Commission for appropriate resolution.

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Subpart 8.3 - Acquisitions From Federal Prison Industries, Inc

8.301 General.

When buying supplies or services from FPI (also known as UNICOR), agencies must follow the requirements of this subpart and UNICOR's ordering procedures.

8.302 Exclusion.

Agencies must not enter into any contract with FPI that allows an inmate worker access to any—

(a) Classified data;

(b) Geographic data regarding the location of—

(1) Surface and subsurface infrastructure providing communications or water or electrical power distribution;

(2) Pipelines that distribute natural gas, bulk petroleum products, or other commodities; or

(3) Other utilities; or

(c) Personal or financial information about any individual private citizen, including information relating to such person's real property however described, without the prior consent of the individual.

8.303 Presolicitation.

In accordance with 10 U.S.C. 3905 and Section 637 of Division H of the Consolidated Appropriations Act, 2005 (Pub. L. 108-447) (18 U.S.C. 4124 note), agencies must—

(a) Before purchasing an item of supply listed in the FPI Schedule, conduct market research to determine whether the FPI item is comparable to supplies available from the private sector that best meet the Government's needs in terms of price, quality, and time of delivery. This is a unilateral determination made at the discretion of the contracting officer. The arbitration provisions of 18 U.S.C. 4124(b) do not apply;

(b) Prepare a written determination that includes supporting rationale explaining the assessment of price, quality, and time of delivery, based on the results of market research comparing the FPI item to supplies available from the private sector.

8.304 Solicitation.

After making the determination in 8.303—

(a) If the FPI item is comparable, agencies must purchase the item from FPI, unless a waiver is obtained; and

(b) If the FPI item is not comparable in one or more of the areas of price, quality, and time of delivery, agencies must—

(1) Acquire the item using—

(i) Competitive procedures; or

(ii) The fair opportunity procedures in part 16, if placing an order under a multiple award delivery-order contract; and

(2) Include FPI in the solicitation process and consider a timely offer from FPI for award in accordance with the item description or specifications, and evaluation factors in the solicitation.

(i) If the solicitation is available through the Governmentwide point of entry (Contract Opportunities at SAM.gov), agencies do not need to provide a separate copy of the solicitation to FPI;

(ii) If the solicitation is not available through Contract Opportunities at SAM.gov, agencies must provide a copy of the solicitation to FPI

(iii) When using a multiple award schedule issued under the procedures in subpart 8.4 or when using the fair opportunity procedures in part 16—

(A) Establish and communicate to FPI the item description or specifications, and evaluation factors that will be used as the basis for selecting a source, so an offer from FPI can be evaluated on the same basis as the contract or schedule holder; and

(B) Consider a timely offer from FPI.

8.305 Evaluation and award.

Agencies must make award to the source offering the item determined by the agency to provide the best value to the Government. If the agency determines that the FPI item provides the best value to the Government as a result of FPI's response to a competitive solicitation, follow UNICOR's ordering procedures.

8.306 Postaward.

Disputes regarding price, quality, character, or suitability of supplies produced by FPI, except for determinations under 8.303 of this section, are subject to arbitration as specified in 18 U.S.C. 4124.

Subpart 8.4 - Ordering under the Federal Supply Schedule

8.401 General.

(a) The Federal Supply Schedule (FSS) program is directed and managed by GSA and provides Federal agencies with a simplified process to obtain commercial supplies and commercial services at prices associated with volume buying. Agencies must use the FSS, in accordance with 8.104.

(b) When placing an order under the FSS, agencies must follow the ordering procedures established by GSA and found at 538.71. GSA ordering procedures follow all statutory requirements, including the requirements of section 863 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, and have been coordinated with the Office of Federal Procurement Policy for consistency with governmentwide acquisition policy.

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Subpart 8.5 - Acquisitions of Government printing and related supplies

8.501 General.

When acquiring Government printing and related supplies, agencies must follow the requirements of this subpart and Government Publishing Office's (GPO) ordering procedures.

8.502 Policy.

Government printing must be done by or through the GPO (44 U.S.C. 501), unless—

(a) The GPO cannot provide the printing service (44 U.S.C. 504);

(b) The printing is done in field printing plants operated by an executive agency (44 U.S.C. 501(2));

(c) The printing is acquired by an executive agency from allotments for contract field printing (44 U.S.C. 501(2)); or

(d) The printing is specifically authorized by statute to be done other than by the GPO.

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PART 9 - CONTRACTOR QUALIFICATIONS

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Subpart 9.1 - Responsible Prospective Contractors

9.101 Definitions.

Administrative proceeding means a non-judicial process that is adjudicatory in nature in order to make a determination of fault or liability (e.g., Securities and Exchange Commission Administrative Proceedings, Civilian Board of Contract Appeals Proceedings, and Armed Services Board of Contract Appeals Proceedings). This includes administrative proceedings at the Federal and state level but only in connection with performance of a Federal contract or grant. It does not include agency actions such as contract audits, site visits, corrective plans, or inspection of deliverables.

9.102 Applicability.

(a) This subpart applies to all proposed contracts with any prospective contractor located—

(1) In the United States or its outlying areas; or

(2) Elsewhere, unless application of this subpart would be inconsistent with the laws or customs where the contractor is located.

(b) This subpart does not apply to proposed contracts with—

(1) Foreign, State, or local governments;

(2) Other U.S. Government agencies or their instrumentalities; or

(3) Agencies for people who are blind or severely disabled (see part 8).

9.103 Policy.

(a) Award contracts to responsible prospective contractors only.

(b) Do not award a contract award before making an affirmative determination of contractor responsibility. Without a clear indication of responsibility, make a determination of nonresponsibility. If the prospective contractor is a small business concern, comply with the subpart, Certificates of Competency and Determinations of Responsibility, at part 19.

(c) A prospective contractor must affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors.

9.104 Standards.

9.104-1 General standards.

To demonstrate responsibility, a prospective contractor must—

(a) Have adequate financial resources to perform the contract, or the ability to obtain them (see 9.104-3(a));

(b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;

(c) Have a satisfactory performance record (see 9.104-3(b) and part 42). Do not determine a prospective contractor responsible or nonresponsible based solely on a lack of relevant performance history;

(d) Have a satisfactory record of integrity and business ethics (see part 42);

(e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors) (see 9.104-3(a));

(f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them (see 9.104-3(a)); and

(g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations (see also inverted domestic corporation prohibition at 9.108).

9.104-2 [Reserved]

9.104-3 Application of standards.

(a) *Ability to obtain resources*. Except to the extent that a prospective contractor has sufficient resources or proposes to perform the contract by subcontracting, require evidence of the prospective contractor's ability to obtain required resources (see 9.104-1(a), (e), and (f)).

(b) *Satisfactory performance record*. Presume a prospective contractor is nonresponsible if it is or recently been deficient in contract performance, unless the circumstances were beyond the contractor's control, or the contractor has taken corrective action.

(c) (1) *Affiliated concerns*. Treat a prospective contractor's affiliated concerns as separate entities. However, consider the affiliate's past performance and integrity when these factors may adversely affect the prospective contractor's responsibility.

(2) *Joint ventures.* For a prospective contractor that is a joint venture, consider the past performance of the joint venture. If the joint venture lacks past performance, consider the past performance of each party to the joint venture.

(d) (1) *Small business concerns*. Upon determining a small business concern is nonresponsible, refer the matter to the Small Business Administration, which will decide whether to issue a Certificate of Competency (see part 19).

(2) *Limitations on subcontracting*. A small business that does not agree to or is unable to comply with the limitations on subcontracting may be nonresponsible (see 52.219-3, Notice of HUBZone Set-Aside or Sole-Source Award; 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns; 52.219-14, Limitations on Subcontracting; 52.219-27, Notice of Set-Aside for, or Sole-Source Award to, Service-Disabled Veteran-Owned Small Business (SDVOSB) Concerns Eligible Under the SDVOSB Program; 52.219-29, Notice of Set-Aside for, or Sole-Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns; and 52.219-30, Notice of Set-Aside for, or Sole-Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program).

9.104-4 Subcontractor responsibility.

(a) Generally, prospective prime contractors are responsible for determining the responsibility of their prospective subcontractors (but see 9.405 and 9.405-2 regarding debarred, ineligible, or suspended firms). Determinations of prospective subcontractor responsibility may affect determination of the prospective prime contractor's responsibility. Require a prospective contractor to provide written evidence of a proposed subcontractor's responsibility, as necessary to determine responsibility.

(b) When in the Government's interest, the contracting officer may directly determine a prospective subcontractor's responsibility (e.g., when the prospective contract involves medical supplies, urgent requirements, or substantial subcontracting). Apply the same standards for prime contractor responsibility to determine subcontractor responsibility.

9.104-5 Representation and certifications regarding responsibility matters.

(a) When an offeror provides an affirmative response in paragraph (a)(1) of the provision at 52.209-5, Certification Regarding Responsibility Matters, or paragraph (h) of provision 52.212-3—

(1) Promptly, upon receipt of offers, request the offeror submit additional information to demonstrate the offeror's responsibility to the contracting officer (but see 9.405); and

(2) Notify, prior to proceeding with award, in accordance with agency procedures (see 9.406-3(a) and 9.407-3(a)), the agency official responsible for initiating debarment or suspension action, where an offeror indicates the existence of an indictment, charge, conviction, or civil judgment, or Federal tax delinquency in an amount that exceeds $15,000.

(b) The provision at 52.209-11, Representation by Corporations Regarding Delinquent Tax Liability or a Felony Conviction under any Federal Law, implements sections 744 and 745 of Division E of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) (and similar provisions in subsequent appropriations acts). When an offeror provides an affirmative response in paragraph (b)(1) or (2) of the provision at 52.209-11 or paragraph (q)(2)(i) or (ii) of provision 52.212-3—

(1) Promptly, upon receipt of offers, request the offeror submit additional information to demonstrate the offeror's responsibility to the contracting officer (but see 9.405);

(2) Notify, in accordance with agency procedures (see 9.406-3(a) and 9.407-3(a)), the agency official responsible for initiating debarment or suspension action; and

(3) Not award to the offeror unless an agency suspending and debarring official has considered suspension or debarment of the corporation and made a determination that suspension or debarment is not necessary to protect the interests of the Government.

(c) If the provision at 52.209-12, Certification Regarding Tax Matters, is applicable (see 9.104-7(e)), do not award any contract in an amount greater than $7 million, unless the offeror affirmatively certified in its offer, as required by paragraph (b)(1), (2), and (3) of the provision.

(d) Give offerors who do not furnish the representation or certifications or other requested information an opportunity to remedy the deficiency. Failure to furnish the representation or certifications or other requested information may render the offeror nonresponsible.

9.104-6 Federal Awardee Performance and Integrity Information System.

(a) (1) Before awarding a contract exceeding the simplified acquisition threshold, review the performance and integrity information available in the Federal Awardee Performance and Integrity Information System (FAPIIS), (available at https://www.cpars.gov, including FAPIIS information from the System for Award Management (SAM) Exclusions and the Contractor Performance Assessment Reporting System (CPARS).

(2) FAPIIS also identifies—

(i) An affiliate that is an immediate owner or subsidiary of the offeror, if any; and

(ii) All predecessors of the offeror that held a Federal contract or grant within the last three years.

(b) (1) When making a responsibility determination, consider all the information available through FAPIIS regarding the offeror and any immediate owner, predecessor, or subsidiary identified for that offeror in FAPIIS, as well as other past performance information on the offeror (see part 42).

(2) For evaluation of information available through FAPIIS relating to an affiliate of the offeror, see 9.104-3(c).

(3) For source selection evaluations of past performance, see 15.305(a)(2). Use sound judgment in determining the weight and relevance of the information contained in FAPIIS and how it relates to the present acquisition.

(4) Since FAPIIS may contain information on any of the offeror's previous contracts and information covering a 5-year period, some of that information might be irrelevant to a determination of present responsibility. For example, a prior administrative action such as debarment, suspension, voluntary exclusion, or administrative agreement, that has expired or otherwise been resolved, or information relating to contracts for completely different products or services, might be irrelevant.

(5) Because FAPIIS is a database that provides information about prime contractors, the contracting officer posts information about a subcontractor, such as trafficking in persons violations, to the record of the prime contractor (see 42.1503(h)(1)(v)). The prime contractor may post in FAPIIS any mitigating factors. Consider any mitigating factors posted in FAPIIS by the prime contractor, such as degree of compliance by the prime contractor with the terms of FAR clause 52.222-50.

(c) Upon obtaining relevant information from FAPIIS regarding criminal, civil, or administrative proceedings in connection with the award or performance of a Government contract; terminations for default or cause; determinations of nonresponsibility because the contractor does not have a satisfactory performance record or a satisfactory record of integrity and business ethics; or comparable information relating to a grant, unless the contractor has already been debarred, suspended, or has agreed to a voluntary exclusion—

(1) Promptly request from the offeror additional information to demonstrate the offeror's responsibility (but see 9.405); and

(2) Notify, prior to proceeding with award, in accordance with agency procedures (see 9.406-3(a) and 9.407-3(a)), the agency official responsible for initiating debarment or suspension action, if the information appears appropriate for the official's consideration.

(d) Document the contract file for each contract exceeding the simplified acquisition threshold to indicate how the information in FAPIIS was considered in any responsibility determination, as well as the action that was taken as a result of the information. Document nonresponsibility determinations in FAPIIS in accordance with 9.105-2 (b)(2).

9.104-7 Solicitation provisions and contract clauses.

(a) Insert the provision at 52.209-5, Certification Regarding Responsibility Matters, in solicitations where the contract value is expected to exceed the simplified acquisition threshold.

(b) Insert the provision at 52.209-7, Information Regarding Responsibility Matters, in solicitations where the resultant contract value is expected to exceed $750,000.

(c) Insert the clause at 52.209-9, Updates of Publicly Available Information Regarding Responsibility Matters—

(1) In solicitations where the resultant contract value is expected to exceed $750,000; and

(2) In contracts in which the offeror checked “has” in paragraph (b) of the provision at 52.209-7.

(d) Insert the provision at 52.209-11, Representation by Corporations Regarding Delinquent Tax Liability or a Felony Conviction under any Federal Law, in all solicitations.

(e) For agencies receiving funds subject to section 523 of Division B of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and similar provisions in subsequent appropriations acts, insert the provision at 52.209-12, Certification Regarding Tax Matters, in solicitations where the resultant contract value (including options) might exceed $7 million.

9.105 Procedures.

9.105-1 Obtaining information.

(a) Before determining responsibility, obtain information establishing that a prospective contractor currently meets the standards in 9.104.

(b) (1) Generally, obtain information regarding responsibility promptly after a bid opening or receipt of offers.

(2) For negotiated contracting, especially for research and development, consider obtaining information regarding responsibility before issuing the request for proposals. Limit such requests to information concerning the low bidder or those offerors in range for award.

(3) To the extent feasible, obtain or update information regarding financial resources and performance capability up to the date of award.

(c) When determining responsibility, consider information available through FAPIIS (see 9.104-6) regarding the offeror and any immediate owner, predecessor, or subsidiary identified for that offeror in FAPIIS. This includes information linked to FAPIIS such as from SAM, and CPARS, as well as any other relevant past performance information on the offeror (see 9.104-1(c) and part 42). In addition, consider using the following sources of information to support such determinations:

(1) Records and experience data, including verifiable knowledge of personnel within the contracting office, audit offices, contract administration offices, and other contracting offices.

(2) The prospective contractor, including bid or proposal information (including the certification at 52.209-5 or 52.212-3(h) (see 9.104-5)), questionnaire replies, financial data, information on production equipment, and personnel information.

(3) Commercial sources of supplier information of a type offered to buyers in the private sector.

(4) Other sources, such as publications; suppliers, subcontractors, and customers of the prospective contractor; financial institutions; Government agencies; and business and trade associations.

(d) Contracting offices and cognizant contract administration offices that become aware of circumstances casting doubt on a contractor's ability to perform contracts successfully must promptly exchange relevant information.

9.105-2 Determinations and documentation.

(a) Determinations. (1) The contracting officer's signing of a contract constitutes a determination that the prospective contractor is responsible with respect to that contract. Upon rejecting an offer that would otherwise generate an award because the prospective contractor is nonresponsible, sign a determination of nonresponsibility, stating the grounds for nonresponsibility.

(2) If the contracting officer determines that a responsive small business lacks certain elements of responsibility, comply with the procedures in part 19. If, in response, the Small Business Administration issues a Certificate of Competency for the small business concern (see part 19), award the contract to the concern.

(b) *Support documentation*. (1) Include in the contract file documents and reports supporting a determination of responsibility or nonresponsibility, including the use of FAPIIS information (see 9.104-6) and any applicable Certificate of Competency.

(2) (i) Document the determination of nonresponsibility in FAPIIS (available at https://www.cpars.gov) if—

(A) The contract is valued at more than the simplified acquisition threshold;

(B) The determination of nonresponsibility is based on lack of satisfactory performance record or satisfactory record of integrity and business ethics; and

(C) The Small Business Administration does not issue a Certificate of Competency.

(ii) Submit documentation regarding the nonresponsibility determination within three working days of making the determination.

(iii) All information posted in FAPIIS on or after April 15, 2011, except past performance reviews, will be publicly available (see section 3010 of Pub. L. 111-212). FAPIIS consists of two segments—

(A) The non-public segment, into which Government officials and contractors post information, which can only be viewed by—

(1) Government personnel and authorized users performing business on behalf of the Government; or

(2) An offeror or contractor, when viewing data on itself; and

(B) The publicly-available segment, to which all data in the non-public segment of FAPIIS is automatically transferred after a waiting period of 14 calendar days, except for—

(1) Past performance reviews required by part 42;

(2) Information that was entered prior to April 15, 2011; or

(3) Information that is withdrawn during the 14-calendar-day waiting period by the Government official who posted it in accordance with paragraph (b)(2)(iv) of this section.

(iv) Do not post any information in the non-public segment of FAPIIS covered by a disclosure exemption under the Freedom of Information Act. If the contractor asserts within 7 calendar days, to the Government official who posted the information, that some of the information posted to the non-public segment of FAPIIS is covered by a disclosure exemption under the Freedom of Information Act, the Government official who posted the information must, within 7 calendar days, remove the posting from FAPIIS. Resolve the issue in accordance with agency Freedom of Information Act procedures prior to reposting the releasable information.

9.105-3 Disclosure of preaward information.

Except as provided in part 24 concerning the Freedom of Information Act, do not release or disclose outside the Government information gathered for purposes of determining the responsibility of a prospective contractor.

9.106 [Reserved]

9.107 [Reserved]

9.108 Prohibition on contracting with inverted domestic corporations.

9.108-1 Definitions.

As used in this section-

Inverted domestic corporation means a foreign incorporated entity that meets the definition of an inverted domestic corporation under 6 U.S.C. 395(b), applied in accordance with the rules and definitions of 6 U.S.C. 395(c).

Subsidiary means an entity in which more than 50 percent of the entity is owned—

(1) Directly by a parent corporation; or

(2) Through another subsidiary of a parent corporation.

9.108-2 Authority.

Section 9.108 implements section 745 of Division D of the Consolidated Appropriations Act, 2008 (Pub. L. 110-161) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions).

9.108-3 Prohibition.

(a) Do not use appropriated funds, or funds otherwise made available, for contracts with either an inverted domestic corporation, or a subsidiary of such a corporation, except as provided in paragraph (b) of this section and in 9.108-5, Waiver.

(b) This prohibition does not apply to any contract entered into before December 26, 2007, or to any task order issued pursuant to such a contract.

(c) Consult with legal counsel if, during the performance of a contract, a contractor becomes an inverted domestic corporation or a subsidiary of one.

9.108-4 Representation by the offeror.

(a) To be eligible for contract award, an offeror must represent that it is neither an inverted domestic corporation, nor a subsidiary of an inverted domestic corporation. Any offeror that cannot so represent is ineligible for award of a contract, unless waived in accordance with the procedures at 9.108-5.

(b) The contracting officer may rely on an offeror's representation that it is not an inverted domestic corporation unless reason exists to question the representation.

9.108-5 Waiver.

An agency head may waive the prohibition in subsection 9.108-3 and the requirement of subsection 9.108-4 for a specific contract if the agency head determines in writing that the waiver is required in the interest of national security and reports the waiver issuance to Congress.

9.108-6 Solicitation provision and contract clause.

(a) Include the provision at 52.209-2, Prohibition on Contracting with Inverted Domestic Corporations—Representation, in each solicitation for the acquisition of products or services (including construction).

(b) Include the clause at 52.209-10, Prohibition on Contracting with Inverted Domestic Corporations, in each solicitation and contract for the acquisition of products or services (including construction).

9.109 Prohibition on contracting with an entity involved in activities that violate arms control treaties or agreements with the United States.

9.109-1 Authority.

This section implements 22 U.S.C. 2593e.

9.109-2 Prohibition.

Do not award, renew, or extend a contract with an entity identified as excluded in the System for Award Management, specifically for this subpart, based on involvement in activities that violate arms control treaties or agreements with the United States.

9.109-3 Exception.

The prohibition in 9.109-2 does not apply to contracts for the procurement of products or services along a major route of supply to a zone of active combat or major contingency operation, as specified in statute or by the cognizant Combatant Commander, in consultation with the Chief of Mission. As of May 10, 2018, countries along the major route of supply to support operations in Afghanistan are Afghanistan, Georgia, the Kyrgyz Republic, Pakistan, the Republic of Armenia, the Republic of Azerbaijan, the Republic of Kazakhstan, the Republic of Tajikistan, the Republic of Uzbekistan, and Turkmenistan.

9.109-4 Certification by the offeror.

(a) To be eligible for contract award, an offeror must—

(1) Certify that it does not engage and has not engaged in any activity that contributed to or was a significant factor in the President's or Secretary of State's determination that a foreign country is—

(i) In violation of its obligations undertaken in any arms control, nonproliferation, or disarmament agreement to which the United States is a party; or

(ii) Not adhering to its arms control, nonproliferation, or disarmament commitments in which the United States is a participating state; and

(2) Similarly certify regarding any entity owned or controlled by the offeror; or

(3) Provide with its offer information that the President of the United States has—

(i) Waived application under 22 U.S.C. 2593e(d) or (e); or

(ii) Determined under 22 U.S.C. 2593e(g)(2) that the entity has ceased all activities for which measures were imposed under 22 U.S.C. 2593e(b).

(b) If certifying in accordance with 52.209-13(b)(1), the Offeror is required to submit the certification with the offer. It is not included in the annual representations and certifications in the System for Award Management.

(c) The contracting officer may rely on an offeror's certification unless reason exists to question the certification.

(d) Upon the determination of a false certification under 52.209-13, an offeror will be subject to such remedies as suspension or debarment under subpart 9.4, or termination of any contract resulting from the false certification. Debarments pursued as a remedy under subpart 9.4 are for a period of not less than 2 years, inclusive of any suspension period, if suspension precedes a debarment (see 9.406-4(a)(1)(iii) and (a)(2)).

(e) The determinations referenced in 9.109-4(a)(1) are described in the most recent unclassified annual report provided to Congress pursuant to section 403 of the Arms Control and Disarmament Act (22 U.S.C. 2593a). The report is available at https://www.state.gov/bureaus-offices/under-secretary-for-arms-control-and-international-security-affairs/bureau-of-arms-control-verification-and-compliance/”

9.109-5 Solicitation provision.

Unless the exception at 9.109-3 applies, include the provision at 52.209-13, Violation of Arms Control Treaties or Agreements—Certification, in each solicitation for the acquisition of products or services (including construction)

that exceeds the simplified acquisition threshold, other than solicitations for the acquisition of commercial products or commercial services.

9.110 Reserve Officer Training Corps and military recruiting on campus.

9.110-1 Definitions.

As used in this section—

Covered agency means–

(1) The Department of Defense;

(2) Any department or agency for which regular appropriations are made in a Department of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act;

(3) The Department of Homeland Security;

(4) The National Nuclear Security Administration of the Department of Energy;

(5) The Department of Transportation; or

(6) The Central Intelligence Agency.

Institution of higher education means an institution that meets the requirements of 20 U.S.C. 1001 and includes all sub-elements of such an institution.

9.110-2 Authority

This section implements 10 U.S.C. 983.

9.110-3 Policy.

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

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

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

(3) The Secretary of a military department or the Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer; or

(4) Military recruiters from accessing certain information pertaining to students (who are 17 years of age or older) enrolled at that institution:

(i) Name, address, and telephone listings.

(ii) Date and place of birth, educational level, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

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

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

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

9.110-4 Procedures.

(a) If the Secretary of Defense determines, pursuant to the procedures at 32 CFR part 216, that an institution of higher education is ineligible to receive funds from a covered agency because of a policy or practice described in 9.110-3, then the Secretary of Defense will create an active exclusion record for the institution in the System for Award Management.

(b) Upon a determination described in paragraph (a), a covered agency must not solicit offers from, award contracts to, or consent to subcontracts with the institution. This prohibition does not apply to acquisitions at or below the simplified acquisition threshold or to acquisitions of commercial products and commercial services, including commercially available off-the-shelf items.

9.110-5 Contract clause.

Insert the clause at 52.209-14, Reserve Officer Training Corps and Military Recruiting on Campus, in solicitations and contracts expected to exceed the simplified acquisition threshold, with institutions of higher education, when using funds

from a covered agency. Do not insert the clause in solicitations and contracts using part 12 for the acquisition of commercial products and commercial services.

Subpart 9.2 - Qualifications Requirements

9.200 Scope of subpart.

This subpart implements 10 U.S.C. 3243 and 41 U.S.C.3311.

9.201 Definitions.

As used in this subpart-

Qualified bidders list (QBL) means a list of bidders who have had their products examined and tested and who have satisfied all applicable qualification requirements for that product or have otherwise satisfied all applicable qualification requirements.

Qualified manufacturers list (QML) means a list of manufacturers who have had their products examined and tested and who have satisfied all applicable qualification requirements for that product.

9.202 Policy.

(a) (1) Before establishing a qualification requirement, the head of the agency must prepare a written justification—

(i) Stating the necessity for the qualification requirement and specifying why the qualification requirement must be demonstrated before contract award;

(ii) Estimating the likely costs for testing and evaluation which will be incurred by the potential offeror to become qualified; and

(iii) Specifying all requirements that a potential offeror (or its product) must satisfy to become qualified.

(2) Specify only the least restrictive qualification requirements necessary to meet agency purposes.

(3) Upon request, provide potential offerors—

(i) All requirements that they or their products must satisfy to become qualified; and

(ii) At their expense (but see 9.204(a)(2) with regard to small businesses), a prompt opportunity to demonstrate their abilities to meet the standards specified for qualification using qualified personnel and facilities of the agency concerned, or of another agency obtained through interagency agreements or under contract, or other methods approved by the agency (including use of approved testing and evaluation services not provided under contract to the agency).

(4) If the services in (a)(3)(ii) of this section are under contract, select only those contractors to provide testing and evaluation services that are—

(i) Not expected to benefit from an absence of additional qualified sources; and

(ii) Required by their contracts to adhere to any restriction on technical data asserted by the potential offeror seeking qualification.

(5) Promptly inform a potential offeror seeking qualification whether it attained qualification and, in the event it has not, promptly furnish them specific reasons why it did attain qualification.

(b) (1) When justified under the circumstances, the agency activity responsible for establishing a qualification requirement must submit to the advocate for competition for the procuring activity responsible for purchasing the item subject to the qualification requirement, a determination that specifying a qualification requirement is unreasonable.

(2) After considering any comments from the advocate for competition reviewing the determination, the head of the procuring activity may waive the requirements of 9.202(a)(1)(ii) through (5) of this section for up to 2 years with respect to the item subject to the qualification requirement. The waiver authority provided in this paragraph does not apply with respect to qualification requirements contained in a QPL, QML, or QBL.

(3) The head of the procuring activity must furnish a copy of the waiver to the head of the agency or other official responsible for actions under paragraph (a)(1) of this section).

(c) If a potential offeror can demonstrate to the satisfaction of the contracting officer that the potential offeror (or its product) meets qualification standards, or can meet them before the date specified for award of the contract, do not deny the potential offeror the opportunity to submit and have considered an offer for a contract solely because the potential offeror—

(1) Is not on a QPL, QML, or QBL maintained by the Department of Defense (DoD) or the National Aeronautics and Space Administration (NASA); or

(2) Has not been identified as meeting a qualification requirement established after October 19, 1984, by DoD or NASA; or

(3) Has not been identified as meeting a qualification requirement established by a civilian agency (not including NASA).

(d) The procedures in part 19 for referring matters to the Small Business Administration are not mandatory on the contracting officer when the basis for a referral would involve a challenge by the offeror to either the validity of the qualification requirement or the offeror's compliance with such requirement.

(e) The contracting officer need not delay a proposed award to provide a potential offeror with an opportunity to demonstrate its ability to meet qualification standards. In addition, when approved by the head of an agency or designee, a procurement need not be delayed in order to comply with paragraph (a) of this section.

(f) Within 7 years following enforcement of a QPL, QML, or QBL by DoD or NASA, or within 7 years after any qualification requirement was originally established by a civilian agency other than NASA, the qualification requirement must be examined and revalidated in accordance with the requirements of paragraph (a) of this section. For DoD and NASA, qualification requirements, other than QPL's, QML's, and QBL's, must be examined and revalidated within 7 years after establishment of the requirement under paragraph (a) of this section. Any periods for which a waiver under paragraph (b) of this section is in effect must be excluded in computing the 7 years within which review and revalidation must occur.

9.203 QPL's, QML's, and QBL's.

(a) Qualification and listing in a QPL, QML, or QBL is the process by which products are obtained from manufacturers or distributors, examined and tested for compliance with specification requirements, or manufacturers or potential offerors, are provided an opportunity to demonstrate their abilities to meet the standards specified for qualification. The names of successful products, manufacturers, or potential offerors are included on lists evidencing their status. Generally, qualification is performed in advance and independently of any specific acquisition action. After qualification, the products, manufacturers, or potential offerors are included in a Federal or Military QPL, QML, or QBL. (See 9.202(a)(2) regarding any product, manufacturer, or potential offeror not yet included on an applicable list.)

(b) Specifications requiring a qualified product are included—

(1) In the General Services Administration Index of Federal Specifications, Standards and Commercial Item Descriptions; and

(2) On the Department of Defense Acquisition Streamlining and Standardization Information System (ASSIST) website at *https://assist.dla.mil*.

(c) Instructions concerning qualification procedures are included in the following publications:

(1) Federal Standardization Manual, FSPM-0001.

(2) Department of Defense Manual 4120.24, Defense Standardization Program (DSP) Procedures, (*www.esd.whs.mil/Directives/Issuances/dodm*) as amended by Military Standards 961 and 962 (*https://assist.dla.mil*).

(d) The publications in paragraphs (b)(1) and (c)(1) of this section may be obtained from the address in 11.201(d)(1).

9.204 Responsibilities when establishing qualification requirements.

(a) *Arranging publicity*. If active competition on anticipated future qualification requirements is likely to be fewer than two manufacturers or the products of two manufacturers, the activity responsible for establishment of the qualification requirements must—

(1) Periodically furnish through the Governmentwide point of entry (GPE) a notice seeking additional sources or products for qualification unless the contracting officer determines that such publication would compromise the national security.

(2) Bear the cost of conducting the specified testing and evaluation (excluding the costs associated with producing the item or establishing the production, quality control, or other system to be tested and evaluated) for a small business concern or a product manufactured by a small business concern which has met the standards specified for qualification and which could reasonably be expected to compete for a contract for that requirement. However, such costs may be borne only upon a determination in accordance with agency procedures that such additional qualified sources or products are likely to result in cost savings from increased competition for future requirements sufficient to amortize the costs incurred by the agency within a reasonable period, considering the duration and dollar value of anticipated future requirements. A prospective contractor requesting the United States to bear testing and evaluation costs must certify as to its status as a small business concern under section 3 of the Small Business Act in order to receive further consideration.

(b) *Other responsibilities when establishing qualification requirements.* (1) Qualifying products that meet specification requirements.

(2) Listing manufacturers and suppliers whose products are qualified in accordance with agency procedures.

(3) Furnishing QPL's, OML's, or QBL's or the qualification requirements themselves to prospective offerors and the public upon request (see 9.202(a)(2)(i)).

(4) Clarifying, as necessary, qualification requirements.

(5) In appropriate cases, when requested by the contracting officer, providing concurrence in a decision not to enforce a qualification requirement for a solicitation.

(6) Withdrawing or omitting qualification of a listed product, manufacturer or offeror, as necessary.

(7) Advising persons that furnished any list of products, manufacturers or offerors meeting a qualification requirement and suppliers whose products are on any such list that—

(i) The list does not constitute endorsement of the product, manufacturer, or other source by the Government;

(ii) The products or sources listed have been qualified under the latest applicable specification;

(iii) The list may be amended without notice;

(iv) The listing of a product or source does not release the supplier from compliance with the specification; and

(v) Use of the list for advertising or publicity is permitted. However, the list must not state or imply that a particular product or source is the only product or source of that type qualified, or that the Government in any way recommends or endorses the products or the sources listed.

(8) Reexamining a qualified product or manufacturer when-

(i) The manufacturer has modified its product, or changed the material or the processing sufficiently so that the validity of previous qualification is questionable;

(ii) The requirements in the specification have been amended or revised sufficiently to affect the character of the product; or

(iii) Circumstances require confirmation that the product conforms with the specification.

9.205 Opportunity for qualification before award.

(a) If an agency determines that a qualification requirement is necessary, the agency activity responsible for establishing the requirement must—

(1) Urge manufacturers and other potential sources to demonstrate their ability to meet the standards specified for qualification;

(2) When possible, give sufficient time to arrange for qualification before award; and

(3) Before establishing any qualification requirement, furnish notice through the GPE. The notice must include—

(i) A statement of the intent to establish a qualification requirement;

(ii) The specification number and name of the product;

(iii) The name and address of the activity to which to submit a request for the information and opportunity;

(iv) The anticipated date that the agency will begin awarding contracts subject to the qualification requirement;

(v) A precautionary notice that when a product is submitted for qualification testing, the applicant must furnish any specific information that may be requested of the manufacturer before testing will begin; and

(vi) The approximate time period following submission of a product for qualification testing within which the applicant will be notified whether the product passed or failed the qualification testing (see 9.202(a)(5)).

(b) The activity responsible for establishing a qualification requirement must keep any list maintained of those already qualified open for inclusion of additional products, manufacturers, or other potential sources.

9.206 Acquisitions subject to qualification requirements.

9.206-1 General.

(a) Do not enforce any QPL, QML, or QBL without first complying with the requirements of 9.202(a). However, qualification requirements themselves, whether or not previously embodied in a QPL, QML, or QBL, in either of the following categories are enforceable:

(1) Any qualification requirement established by statute prior to October 30, 1984, for civilian agencies (not including NASA).

(2) Any qualification requirement established by statute or administrative action prior to October 19, 1984, for DOD or NASA. Qualification requirements established after the above dates must comply with 9.202(a) to be enforceable.

(b) Except when the agency head determines that an emergency exists, whenever an agency elects not to enforce a qualification requirement, the agency may not thereafter enforce that qualification requirement unless the agency complies with 9.202(a).

(c) If a qualification requirement applies, consider only those offers identified as meeting the requirement or included on the applicable QPL, QML, or QBL, unless an offeror can satisfactorily demonstrate that it or its product, or its subcontractor or its product, can meet the qualification standards before the date specified for award.

(d) If a component of an end item is subject to a qualification requirement, assure that all such components and their qualification requirements are properly identified in the solicitation.

(e) In acquisitions subject to qualification requirements, take the following steps:

(1) Use presolicitation notices as appropriate to advise potential suppliers before issuing solicitations involving qualification requirements. The notices must identify the specification containing the qualification requirement and establish an allowable time period, consistent with delivery requirements, for prospective offerors to demonstrate their abilities to meet the qualification standards.

(2) Distribute solicitations to prospective contractors whether or not they have been identified as meeting applicable qualification requirements.

(3) When appropriate, request in accordance with agency procedures that a qualification requirement not be enforced in a particular acquisition and, if granted, so specify in the solicitation (see 9.206-1(b)).

(4) Forward requests from potential suppliers for information on a qualification requirement to the agency activity responsible for establishing the requirement.

(5) Allow the maximum time, consistent with delivery requirements, between issuing the solicitation and the contract award. As a minimum, comply with the time frames specified in part 5 when applicable.

9.206-2 Contract clause.

Insert the clause at 52.209-1, Qualification Requirements, in solicitations and contracts when the acquisition is subject to a qualification requirement.

9.206-3 Competition.

(a) *Presolicitation*. If a qualification requirement applies to an acquisition, review the applicable QPL, QML, or QBL or other identification of those sources meeting the requirement before issuing a solicitation to ascertain whether the number of sources is adequate for competition. If the number of sources is inadequate, request the agency activity which established the requirement to—

(1) Indicate the anticipated date on which any sources presently undergoing evaluation will have demonstrated their abilities to meet the qualification to allow for rescheduling; or

(2) Indicate whether a means other than the qualification requirement is feasible for testing or demonstrating quality assurance.

(b) *Postsolicitation*. Submit to the agency activity that established the qualification requirement the names and addresses of concerns that expressed interest in the acquisition but are not included on the applicable QPL, QML, or QBL or identified as meeting the qualification requirement. The activity will then assist interested concerns in meeting the standards specified for qualification (see 9.202(a)(3) and (5)).

9.207 Changes in status regarding qualification requirements.

(a) Promptly report to the agency activity that established the qualification requirement any conditions meriting removal or omission from a QPL, QML, or QBL or that affect whether a source should continue as identified as meeting the requirement. These conditions exist when—

(1) Products or services are submitted for inspection or acceptance that do not meet the qualification requirement;

(2) Products or services were previously rejected and the defects were not corrected when resubmitted for inspection or acceptance;

(3) A supplier fails to request reevaluation following change of location or ownership of the plant where the product which met the qualification requirement was manufactured (see the clause at 52.209-1, Qualification Requirements);

(4) A manufacturer of a product which met the qualification requirement has discontinued manufacture of the product;

(5) A source requests removal from a QPL, QML, or QBL;

(6) A condition of meeting the qualification requirement was violated; *e.g.,* advertising or publicity contrary to 9.204(b)(7)(v);

(7) A revised specification imposes a new qualification requirement;

(8) Manufacturing or design changes have been incorporated in the qualification requirement;

(9) The source is listed in the System for Award Management Exclusions (see subpart 9.4); or

(10) Performance of a contract subject to a qualification requirement is otherwise unsatisfactory.

(b) After considering these or other conditions related to whether a product or source continues to meet the standards specified for qualification, an agency may take appropriate action without advance notification. The agency must, however, promptly notify the affected parties if a product or source is removed from a QPL, QML, or QBL, or will no longer be identified as meeting the standards specified for qualification. This notice must contain specific information why the product or source no longer meets the qualification requirement.

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Subpart 9.3 - First Article Testing and Approval

9.301 Definition.

As used in this subpart—

Approval means the contracting officer's written notification to the contractor accepting the test results of the first article.

9.302 General.

First article testing and approval (testing and approval) ensures that the contractor can furnish a product conforming to all contract requirements for acceptance. Before requiring testing and approval, consider the—

(a) Impact on cost or time of delivery;

(b) Risk to the Government of foregoing such test; and

(c) Availability of other, less costly, methods of ensuring the desired quality.

9.303 Use.

Testing and approval may be appropriate when-

(a) The contractor has not previously furnished the product to the Government;

(b) The contractor previously furnished the product to the Government, but-

(1) Subsequent changes in processes or specifications have occurred;

(2) Production has been discontinued for an extended period of time; or

(3) The product acquired under a previous contract developed a problem during its life.

(c) The product is described by a performance specification; or

(d) An approved first article is essential to serve as a manufacturing standard.

9.304 Exceptions.

Normally, do not require testing and approval in contracts for—

(a) Research or development;

(b) Products requiring qualification before award (*e.g.,* when an applicable qualified products list exists (see subpart 9.2));

(c) Products normally sold in the commercial market; or

(d) Products covered by complete and detailed technical specifications, unless the requirements are so novel or exacting that the products might not meet the requirements without testing and approval.

9.305 Risk.

(a) To minimize contractor risk, provide sufficient time in the delivery schedule for acquisition of materials and components as well as for production after receipt of first article approval.

(b) Notwithstanding paragraph (a), the contracting officer may, before approval of the first article, authorize the contractor to acquire specific materials or components or commence production to the extent necessary to meet the delivery schedule (see Alternate II of the clause at 52.209-3, First Article Approval—Contractor Testing, and Alternate II of the clause at 52.209-4, First Article Approval—Government Testing. Costs incurred based on this authorization are allocable to the contract for—

(1) Progress payments; and

(2) Termination settlements if the contract is terminated for the convenience of the Government.

9.306 Solicitation requirements.

Solicitations including a testing and approval requirement must—

(a) Provide, where the contractor is responsible for the first article approval testing—

(1) The performance or other characteristics that the first article must meet for approval;

(2) The detailed technical requirements for the tests necessary for approval; and

(3) The data the contractor must submit in the first article approval test report;

(b) Provide, where the Government is responsible for the first article approval testing—

(1) The performance or other characteristics that the first article must meet for approval; and

(2) The tests to which the first article will be subjected for approval;

(c) Inform offerors that the requirement may be waived when supplies identical or similar to those called for have previously been delivered by the offeror and accepted by the Government (see 52.209-3(h) and 52.209- 4(i));

(d) Permit the submission of alternative offers, i.e., one including and the other excluding testing and approval (if eligible under paragraph (c) of this section);

(e) State clearly the first article's relationship to the contract quantity (see paragraph (e) of the clause at 52.209-3, First Article Approval—Contractor Testing, or 52.209-4, First Article Approval—Government Testing);

(f) Contain a delivery schedule for the production quantity (see 11.403). The delivery schedule may—

(1) Be the same whether or not testing and approval is waived; or

(2) Provide for earlier delivery when testing and approval is waived and the Government requires earlier delivery.

In the latter case, any resulting difference in delivery schedules must not be an evaluation factor for award. The clause at 52.209-4, First Article Approval—Government Testing, must contain the delivery schedule for the first article;

(g) Provide for the submission of contract numbers, if any, to document the offeror's eligibility under paragraph (c) of this section;

(h) State whether the approved first article will serve as a manufacturing standard;

(i) Include the Government's estimated testing costs as an evaluation factor, if appropriate, when the Government is responsible for first article testing; and

(j) Inform offerors that the prices for first articles and first article tests in relation to production quantities must not be materially unbalanced (see 15.404-1(g)) if first article test items or tests are to be separately priced.

9.307 Administrative procedures.

(a) Before the contractor ships the first article, or the first article test report, to the Government laboratory or other activity responsible for approval, the contract administration office must provide that activity with as much advance notification as is feasible of the forthcoming shipment, and—

(1) Advise that activity of the contractual requirements for testing and approval, or evaluation, as appropriate;

(2) Call attention to the notice requirement in paragraph (b) of the clause at 52.209-3, First Article Approval—Contractor Testing, or 52.209-4, First Article Approval—Government Testing; and

(3) Request that the activity inform the contract administration office of the date when testing or evaluation will be completed.

(b) The Government laboratory or other activity responsible for first article testing or evaluation must inform the contracting office whether to approve, conditionally approve, or disapprove the first article. The contracting officer must then notify the contractor of the action taken and furnish a copy of the notice to the contract administration office. The notice must include the first article shipment number, when available, and the applicable line item number. Make any necessary changes in the drawings, designs, or specifications only under the Changes clause.

9.308 Contract clauses.

9.308-1 Testing performed by the contractor.

(a) (1) Insert the clause at 52.209-3, First Article Approval—Contractor Testing, in solicitations and contracts when intending a fixed-price contract that requires—

(i) First article approval; and

(ii) The contractor to conduct the first article testing.

(2) Use the clause with its Alternate I where the contract requires the contractor to produce the first article and the production quantity at the same facility.

(3) Use the clause with its Alternate II where necessary to authorize the contractor to purchase material or to commence production before first article approval.

(b) (1) Insert a clause substantially the same as the clause at 52.209-3, First Article Approval—Contractor Testing, in solicitations and contracts when intending a cost-reimbursement contract that requires—

(i) First article approval; and

(ii) The contractor to conduct the first article test.

(2) Insert the clause in paragraph (1) with its Alternate I where the contract requires the contractor to produce the first article and the production quantity at the same facility.

(3) Insert the clause in paragraph (1) with its Alternate II where necessary to authorize the contractor to purchase material or to commence production before first article approval.

9.308-2 Testing performed by the Government.

(a) (1) Insert the clause at 52.209-4, First Article Approval—Government Testing, in solicitations and contracts when intending a fixed-price contract that requires first article approval and the Government will conduct the first article test.

(2) Use the clause with its Alternate I where the contract requires the contractor to produce the first article and the production quantity at the same facility.

(3) Use the clause with its Alternate II where necessary to authorize the contractor to purchase material or to commence production before first article approval.

(b) (1) Insert a clause substantially the same as the clause at 52.209-4, First Article Approval—Government Testing, in solicitations and contracts when intending a cost-reimbursement contract that requires—

(i) First article approval; and

(ii) The Government to conduct the first article test.

(2) Use a clause substantially the same as the clause at 52.209-4, First Article Approval—Government Testing, with its Alternate I where the contract requires the contractor to produce the first article and the production quantity at the same facility.

(3) Use a clause substantially the same as the clause at 52.209-4, First Article Approval—Government Testing, with its Alternate II where necessary to authorize the contractor to purchase material or to commence production before first article approval.

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Subpart 9.4 - Debarment, Suspension, and Ineligibility

9.400 Scope of subpart.

(a) This subpart-

(1) Prescribes policies and procedures governing the debarment and suspension of contractors by agencies for the causes given in 9.406-2 and 9.407-2;

(2) Provides for the listing of contractors debarred, suspended, proposed for debarment, and declared ineligible (see the definition of "ineligible" in 2.101); and

(3) Sets forth the consequences of this listing.

(b) Although this subpart does cover the listing of ineligible contractors (9.404) and the effect of this listing (9.405), it does not prescribe policies and procedures governing declarations of ineligibility except for contractors that have been declared ineligible pursuant to 10 U.S.C. 983 (see 9.110, and 9.405-1(b)).

(c) For Federal Acquisition Supply Chain Security Act (FASCSA) orders, see part 40.

9.401 Applicability.

In accordance with Public Law 103-355, Section 2455 (31 U.S.C. 6101, note), and Executive Order 12689, any debarment, suspension or other Governmentwide exclusion initiated under the Nonprocurement Common Rule implementing Executive Order 12549 on or after August 25, 1995, must be recognized by and effective for Executive Branch agencies as a debarment or suspension under this subpart. Similarly, any debarment, suspension, proposed debarment or other Governmentwide exclusion initiated on or after August 25, 1995, under this subpart must also be recognized by and effective for those agencies and participants as an exclusion under the Nonprocurement Common Rule.

9.402 Policy.

(a) Agencies must solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only. Debarment and suspension are discretionary actions that, taken in accordance with this subpart, are appropriate means to effectuate this policy.

(b) The serious nature of debarment and suspension requires that these remedies be imposed only in the public interest for the Government's protection and not for purposes of punishment. Agencies must impose debarment or suspension to protect the Government's interest and only for the causes and in accordance with the procedures in this subpart.

(c) Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

(d) When more than one agency has an interest in the debarment or suspension of a contractor, the Interagency Suspension and Debarment Committee, established under Executive Order 12549, and authorized by section 873 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417) (31 U.S.C. 6101 note), must resolve the lead agency issue and coordinate such resolution among all interested agencies prior to the initiation of any suspension, debarment, or related administrative action by any agency.

(e) Agencies must establish appropriate procedures to implement the policies and procedures of this subpart.

9.403 Definitions.

As used in this subpart—

Administrative agreement means an agreement between an agency suspending and debarring official and the contractor used to resolve a suspension or debarment proceeding, or a potential suspension or debarment proceeding.

Affiliates.–

(1) Business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly–

(i) Either one controls or has the power to control the other; or

(ii) A third party controls or has the power to control both.

(2) Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended, or proposed for debarment.

Agency means any executive department, military department or defense agency, or other agency or independent establishment of the executive branch.

Civil judgment means the disposition of a civil action by any court of competent jurisdiction, whether by verdict, decision, settlement, stipulation, other disposition that creates a civil liability for the complained of wrongful acts, or a final determination of liability under the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801-3812).

Contractor means any individual or other legal entity that–

(1) Directly or indirectly (e.g., through an affiliate), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Government contract, including a contract for carriage under Government or commercial bills of lading, or a subcontract under a Government contract; or

(2) Conducts business, or reasonably may be expected to conduct business, with the Government as an agent or representative of another contractor.

Conviction means—

(1) A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of nolo contendere; or

(2) Any other resolution that is the functional equivalent of a judgment establishing a criminal offense by a court of competent jurisdiction, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.

Indictment means indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense is given the same effect as an indictment.

Legal proceedings means any civil judicial proceeding to which the Government is a party or any criminal proceeding. The term includes appeals from such proceedings.

Nonprocurement Common Rule means the procedures used by Federal Executive Agencies to suspend, debar, or exclude individuals or entities from participation in nonprocurement transactions under Executive Order 12549. Examples of nonprocurement transactions are grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements. See 2 CFR part 180 and agency enacting regulations in 2 CFR subtitle B.

Pre-notice letter means a written correspondence issued to a contractor in a suspension or debarment matter, which does not immediately result in an exclusion or ineligibility. The letter is issued at the discretion of the suspending and debarring official. The letter is not a mandatory step in the suspension or debarment process.

Unfair trade practices means the commission of any of the following acts by a contractor:

(1) A violation of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) as determined by the International Trade Commission.

(2) A violation, as determined by the Secretary of Commerce, of any agreement of the group known as the "Coordination Committee" for purposes of the Export Administration Act of 1979 (50 U.S.C. App. 2401, et seq.) or any similar bilateral or multilateral export control agreement.

(3) A knowingly false statement regarding a material element of a certification concerning the foreign content of an item of supply, as determined by the Secretary of the Department or the head of the agency to which such certificate was furnished.

Voluntary exclusion means a contractor's written agreement to be excluded for a period under the terms of a settlement between the contractor and the suspending and debarring official of one or more agencies. A voluntary exclusion must have Governmentwide effect.

9.404 Exclusions in the System for Award Management.

(a) The General Services Administration—

(1) Operates the web-based System for Award Management (SAM) at https://www.sam.gov, which contains exclusion records; and

(2) Provides technical assistance to Federal agencies in the use of SAM.

(b) An exclusion record in SAM contains the—

(1) Legal business name and physical address of the entities debarred, suspended, proposed for debarment, voluntarily excluded, declared ineligible, or excluded or disqualified under the nonprocurement common rule, with cross-references when more than one name is involved in a single action;

(2) Name of the agency or other authority taking the action;

(3) Cause for the action (see 9.406-2 and 9.407-2 for causes authorized under this subpart) or other statutory or regulatory authority;

(4) Effect of the action;

(5) Termination date for each listing;

(6) Unique Entity Identifier;

(7) Social Security Number (SSN), Employer Identification Number (EIN), or other Taxpayer Identification Number (TIN), if available; and

(8) Name and telephone number of the agency point of contact for the action.

(c) Each agency must—

(1) Identify the individual(s) responsible for entering and updating exclusions data in SAM and assign the appropriate roles;

(2) Remove the exclusion roles in SAM when the individual leaves the organization or changes functions;

(3) For each exclusion, including each voluntary exclusion, accomplished by the agency—

(i) Enter the information required by paragraph (b) of this section within 3 business days after the action becomes effective;

(ii) Determine whether it is legally permitted to enter the SSN, EIN, or other TIN, under agency authority to suspend or debar; and

(iii) Update the exclusion record in SAM, generally within 5 business days after modifying or rescinding an action;

(4) In accordance with internal retention procedures, maintain records relating to each debarment, suspension, proposed debarment, or voluntary exclusion taken or entered into by the agency;

(5) Establish procedures to ensure that the agency does not solicit offers from, award contracts to, or consent to subcontracts with contractors who have an active exclusion record in SAM, except as otherwise provided in this subpart; and

(6) Direct inquiries concerning listed contractors and other entities to the agency or other authority that took the action.

9.405 Effect of listing.

(a) Contractors debarred, suspended, proposed for debarment, or voluntarily excluded, are excluded from receiving contracts, and agencies must not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head determines that a compelling reason exists for such action (see 9.405-1(a)(2), 9.405-2, 9.406-1(d), 9.407-1(d), and 26.505(e)). Contractors debarred, suspended, proposed for debarment, or voluntarily excluded, are also excluded from conducting business with the Government as agents or representatives of other contractors.

(b) Contractors and other entities that have an active exclusion record in SAM because they have been declared ineligible based on statutory or other regulatory procedures are excluded from receiving contracts, and if applicable, subcontracts, under the conditions and for the period set forth in the statute or regulation. Do not solicit offers from, award contracts to, or consent to subcontracts with these contractors under those conditions and for that period.

(c) Do not enter into, renew, or extend contracts with contractors that have been declared ineligible pursuant to 22 U.S.C. 2593e.

(d) Contractors debarred, suspended, proposed for debarment, or voluntarily excluded, are excluded from acting as individual sureties (see part 28).

(e) (1) After the opening of bids or receipt of proposals or quotes, review the exclusion records in SAM.

(2) Bids received from any listed contractor in response to an invitation for bids must be entered on the abstract of bids and then rejected unless the agency head determines in writing that compelling reason exists to consider the bid.

(3) Unless the agency head determines in writing that a compelling reason exists otherwise, do not evaluate for award or include in the competitive range proposals, quotations, or offers received from, and do not conduct discussions with, a listed offeror during a period of ineligibility. If the period of ineligibility expires or is terminated prior to award, the contracting officer may, but is not required to, consider such proposals, quotations, or offers.

(4) Immediately prior to award, review again the exclusion records in SAM to ensure that no award is made to a listed contractor.

9.405-1 Continuation of current contracts.

(a) *Contractors debarred, suspended, proposed for debarment, or voluntarily excluded* . (1) Notwithstanding the debarment, suspension, proposed debarment, or voluntary exclusion, of a contractor, agencies may continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, proposed for debarment, or voluntarily excluded, unless the agency head directs otherwise. A decision as to the type of termination action, if any, to be taken should be made only after review by agency contracting and technical personnel and by counsel to ensure the propriety of the proposed action.

(2) For contractors debarred, suspended, proposed for debarment, or voluntarily excluded, unless the agency head makes a written determination of the compelling reasons for doing so, ordering activities must not—

(i) Place orders exceeding the guaranteed minimum under indefinite quantity contracts;

(ii) Place orders under Federal Supply Schedule contracts, blanket purchase agreements, or basic ordering agreements; or

(iii) Add new work, exercise options, or otherwise extend the duration of current contracts or orders.

(b) *Ineligible contractors*. A covered agency, as defined in 9.110-1, must terminate existing contracts and must not place new orders or award new contracts with contractors that have been declared ineligible pursuant to 10 U.S.C. 983 (see 9.110), except for contracts at or below the simplified acquisition threshold or contracts for the acquisition of commercial products and commercial services.

9.405-2 Restrictions on subcontracting.

(a) If an offeror proposes a contractor debarred, suspended, proposed for debarment, or voluntarily excluded, as a subcontractor for any subcontract subject to Government consent (see part 44), do not consent to such subcontracts unless the agency head states in writing the compelling reasons for this approval action. (See 9.405 concerning declarations of ineligibility affecting subcontracting.)

(b) The Government suspends or debars contractors to protect the Government's interests. Contractors are prohibited from entering into any subcontract in excess of $45,000, other than a subcontract for a commercially available off-the-shelf item, with a contractor that has been debarred, suspended, proposed for debarment, or voluntarily excluded, unless a compelling reason exists to do so. If a contractor intends to enter into a subcontract in excess of $45,000, other than a subcontract for a commercially available off-the-shelf item, with a party that is debarred, suspended, proposed for debarment, or voluntarily excluded, as evidenced by the party's having an active exclusion record in SAM (see 9.404), a corporate officer or designee of the contractor is required by operation of the clause at 52.209-6, Protecting the Government's Interest when Subcontracting with Contractors Debarred, Suspended, Proposed for Debarment, or Voluntarily Excluded, to notify the contracting officer, in writing, before entering into such subcontract. For contracts for the acquisition of commercial products, the notification requirement applies only for first-tier subcontracts. For all other contracts, the notification requirement applies to subcontracts at any tier. The notice must provide the following:

(1) The name of the subcontractor;

(2) The contractor’s knowledge of the reasons for the subcontractor having an active exclusion record in SAM;

(3) The compelling reason(s) for doing business with the subcontractor notwithstanding its having an active exclusion record in SAM; and

(4) The systems and procedures the contractor has established to ensure that it is fully protecting the Government's interests when dealing with such subcontractor in view of the specific basis for the party's debarment, suspension, proposed debarment, or voluntary exclusion.

(c) The contractor's compliance with the requirements of 52.209-6 will be reviewed during Contractor Purchasing System Reviews (see part 44).

9.406 Debarment.

9.406-1 General.

(a) The suspending and debarring official is responsible for determining whether debarment is in the Government's interest. The suspending and debarring official may, in the public interest, debar a contractor for any of the causes in 9.406-2, using the procedures in 9.406-3. The existence of a cause for debarment, however, does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any remedial measures, mitigating factors, or aggravating factors should be considered in making any debarment decision. Before arriving at any debarment decision, the suspending and debarring official should consider factors such as the following (some of the factors below could apply to individuals such as contractors that are individuals, and are so marked):

(1) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment.

(2) Whether the contractor (including an individual) brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner.

(3) Whether the contractor has fully investigated the circumstances surrounding the cause for debarment (or the individual cooperated with the investigation) and, if so, made the result of the investigation available to the suspending and debarring official.

(4) Whether the contractor (including an individual) cooperated fully with Government agencies during the investigation and any court or administrative action.

(5) Whether the contractor (including an individual) has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.

(6) Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment.

(7) Whether the contractor (including an individual) has implemented or agreed to implement remedial measures, including any identified by the Government.

(8) (i) Whether the contractor has instituted or agreed to institute new or revised review and control procedures, ethics training, or other relevant training programs.

(ii) For an individual, whether the individual has attended relevant remediation training.

(9) Whether the contractor (including an individual) has had adequate time to eliminate the circumstances that led to the cause for debarment.

(10) (i) Whether the contractor's management recognizes, accepts, and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence.

(ii) For an individual, whether the individual recognizes, accepts, and understands the seriousness of the misconduct giving rise to the cause for debarment and has adopted practices to prevent recurrence.

(11) Whether the contractor (including an individual) has a pattern or prior history of wrongdoing, the frequency of incidents and/or duration of the wrongdoing, and the actual or potential harm or impact that results, or may result, from the wrongdoing.

(12) Whether and to what extent the contractor (including an individual) planned, initiated, or carried out the wrongdoing, and the kind of positions within the contractor's organization held by the individual involved in the wrongdoing.

(13) Whether the wrongdoing was pervasive within the contractor's organization.

(14) Whether the individual or the contractor's principals tolerated the offense.

(15) Whether the contractor (including an individual) is or has been excluded or disqualified by an agency of the Federal Government or has not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this subpart.

(16) Whether the contractor (including an individual) has entered into an administrative agreement with a Federal agency or a similar agreement with a State or local government that is not Governmentwide but is based on conduct similar to one or more of the causes for debarment specified in this subpart.

(17) Whether any other factors meriting consideration exist for the contractor (including an individual) under the circumstances.

(b) The existence or nonexistence of any aggravating or mitigating factors or remedial measures such as set forth in paragraph (a) of this section is not necessarily determinative of a contractor's present responsibility. Accordingly, if a cause for debarment exists, the contractor has the burden of demonstrating, to the satisfaction of the suspending and debarring official, its present responsibility and that debarment is not necessary.

(c) Debarment constitutes debarment of all divisions or other organizational elements of the contractor, unless the debarment decision is limited by its terms to specific divisions, organizational elements, or commodities. The suspending and debarring official may extend the debarment decision to include any affiliates of the contractor if they are—

(1) Specifically named; and

(2) Given written notice of the proposed debarment and an opportunity to respond (see 9.406-3(c)).

(d) A contractor's debarment, or proposed debarment, is effective throughout the executive branch of the Government, unless the agency head or a designee (except see 26.505(e)) states in writing the compelling reasons justifying continued business dealings between that agency and the contractor.

(e) (1) When the suspending and debarring official has authority to debar contractors from both contracts pursuant to the Federal Acquisition Regulation in this chapter and contracts for the purchase of Federal personal property pursuant to the Federal Management Regulation (FMR) in 41 CFR part 102-38, that official must consider simultaneously debarring the contractor from the award of acquisition contracts and from the purchase of Federal personal property.

(2) A notice debarring a contractor from the award of acquisition contracts and from the purchase of Federal personal property must include the appropriate FAR and FMR citations.

9.406-2 Causes for debarment.

The suspending and debarring official may debar-

(a) A contractor for a conviction of or civil judgment for-

(1) Commission of fraud or a criminal offense in connection with-

(i) Obtaining;

(ii) Attempting to obtain; or

(iii) Performing a public contract or subcontract.

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property;

(4) Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States or its outlying areas, when the product was not made in the United States or its outlying areas (see Section 202 of the Defense Production Act (Public Law 102-558)); or

(5) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(b) (1) A contractor, based upon a preponderance of the evidence, for any of the following—

(i) Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as—

(A) Willful failure to perform in accordance with the terms of one or more contracts; or

(B) A history of failure to perform, or of unsatisfactory performance of, one or more contracts.

(ii) Violations of 41 U.S.C. chapter 81, Drug-Free Workplace, as indicated by—

(A) Failure to comply with the requirements of the clause at 52.226-7, Drug-Free Workplace; or

(B) Such a number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace (see 26.504).

(iii) Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States or its outlying areas, when the product was not made in the United States or its outlying areas (see Section 202 of the Defense Production Act (Public Law 102-558)).

(iv) Commission of an unfair trade practice as defined in 9.403 (see Section 201 of the Defense Production Act (Public Law 102-558)).

(v) Delinquent Federal taxes in an amount that exceeds the threshold at 9.104-5(a)(2). Federal taxes are considered delinquent for purposes of this provision if both of the following criteria apply:

(A) *The tax liability is finally determined*. The liability is finally determined if it has been assessed. A liability is not finally determined if a pending administrative or judicial challenge remains. In the case of a judicial challenge to the liability, the liability is not finally determined until all judicial appeal rights have been exhausted.

(B) *The taxpayer is delinquent in making payment*. A taxpayer is delinquent if the taxpayer has failed to pay the tax liability when full payment was due and required. A taxpayer is not delinquent in cases where enforced collection action is precluded.

(vi) Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of—

(A) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;

(B) Violation of the civil False Claims Act (31 U.S.C. 3729-3733); or

(C) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in 32.001.

(vii) Determination of a false certification under 52.209-13, Violation of Arms Control Treaties or Agreements-Certification.

(viii) Failure to comply with the requirements of clause 52.222-90, Addressing DEI Discrimination by Federal Contractors.

(2) A contractor, based on a determination by the Secretary of Homeland Security or the Attorney General of the United States, that the contractor is not in compliance with Immigration and Nationality Act employment provisions (see Executive Order12989, as amended by Executive Order13286). Such determination is not reviewable in the debarment proceedings.

(c) A contractor or subcontractor based on any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor.

9.406-3 Procedures.

(a) *Investigation and referral*. Agencies must establish procedures for the prompt reporting, investigation, and referral to the suspending and debarring official of matters appropriate for that official's consideration.

(b) *Decision-making process* (1) Agencies must establish procedures governing the debarment decision-making process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures must afford the contractor (and any specifically named affiliates) an opportunity to submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment. If the suspending and debarring official extends the opportunity for the contractor to submit material in opposition, then the official should also give a deadline for submission of materials. The suspending and debarring official may use flexible procedures to allow a contractor to present matters in opposition in person or remotely through appropriate technology; if so, the suspending and debarring official should change the notice in paragraph (c)(3)(iv) of this section to include those flexible procedures.

(2) In actions not based upon a conviction or civil judgment, if the contractor's submission in opposition raises a genuine dispute over facts material to the proposed debarment, agencies must also—

(i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the agency, by mutual agreement, waive the requirement for a transcript.

(c) *Notice of proposal to debar*. The suspending and debarring official must issue the notice of proposed debarment to the contractor and any specifically named affiliates.

(1) The written notice must be sent—

(i) By U.S. mail or private delivery service to the last known street address, with delivery notification service;

(ii) By email to the point of contact email address in the contractor's SAM registration, if any, or to the last known email address as confirmed by the agency; or

(iii) By certified mail to the last known street address with return receipt requested.

(2) The notice must be sent—

(i) To the contractor, the contractor's identified counsel for purposes of the administrative proceedings, or the contractor's agent for service of process; and

(ii) For each specifically named affiliate, to the affiliate itself, the affiliate's identified counsel for purposes of the administrative proceedings, or the affiliate's agent for service of process.

(3) The notice must state—

(i) That debarment is being considered;

(ii) The reasons for the proposed debarment in terms sufficient to put the contractor on notice of the conduct or transaction(s) upon which it is based;

(iii) The cause(s) relied upon under 9.406-2 for proposing debarment;

(iv) That, within 30 days after receipt of the notice, the contractor may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment, including any additional specific information that raises a genuine dispute over the material facts;

(v) The agency's procedures governing debarment decision making;

(vi) The effect of the issuance of the notice of proposed debarment;

(vii) The potential effect of an actual debarment;

(viii) That in addition to any information and argument in opposition to a proposed debarment, the contractor must identify—

(A) Specific facts that contradict the statements contained in the notice of proposed debarment. Include any information about any of the factors listed in 9.406-1(a). A general denial is insufficient to raise a genuine dispute over facts material to the proposed debarment;

(B) All existing, proposed, or prior exclusions and all similar actions taken by Federal, State, or local agencies, including administrative agreements that affect only those agencies;

(C) All criminal and civil proceedings not included in the notice of proposed debarment that grew out of facts relevant to the cause(s) stated in the notice; and

(D) All of the contractor's affiliates; and

(ix) That if the contractor fails to disclose the information in paragraph (c)(3)(viii) of this section, or provides false information, the agency taking the action may seek further criminal, civil, or administrative action against the contractor, as appropriate.

(d) *Suspending and debarring official's decision*. (1) In actions based upon a conviction or civil judgment, or in which no genuine dispute exists over material facts, the suspending and debarring official must decide based on all the information in the administrative record, including any contractor submission. If no suspension is in effect, the suspending and debarring official must make a decision within 45 days from the date that the official administrative record is closed, unless the suspending and debarring official extends this period for good cause. The official record closes upon the expiration of the contractor's time to submit information and argument in opposition, including any extensions (see paragraph (b)(1) of this section).

(2) (i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact must be prepared. The suspending and debarring official must base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(ii) The debarring official may refer matters involving disputed material facts to another official for findings of fact. The suspending and debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(iii) The suspending and debarring official must make a decision after the conclusion of the proceedings with respect to disputed facts.

(3) In any action in which the proposed debarment is not based upon a conviction or civil judgment, the cause for debarment must be established by a preponderance of the evidence.

(e) *Notice of suspending and debarring official's decision.* (1) If the suspending and debarring official decides to impose debarment, the contractor and any affiliates involved must be given prompt notice using the procedures in paragraphs (c)(1) and (2) of this section—

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective throughout the executive branch of the Government unless the head of an agency or a designee makes the statement called for by 9.406-1(d).

(2) If debarment is not imposed, the suspending and debarring official must promptly notify the contractor and any affiliates involved, using the procedures in paragraphs (c)(1) and (2) of this section.

(f) *Administrative agreements.* (1) If the contractor enters into an administrative agreement with the Government in order to resolve a debarment or potential debarment proceeding, the suspending and debarring official must access the website (available at https://www.cpars.gov, then select FAPIIS), enter the requested information, and upload documentation reflecting the administrative agreement.

(2) The suspending and debarring official is responsible for the timely and accurate submission of documentation reflecting the administrative agreement. The submission should be made within 3 working days.

(3) With regard to information that may be covered by a disclosure exemption under the Freedom of Information Act, the suspending and debarring official must follow the procedures at 9.105-2(b)(2)(iv).

(g) *Voluntary exclusions*. (1) If the contractor enters into a voluntary exclusion with the Government in order to resolve a debarment or potential debarment matter, the suspending and debarring official must access the website (available at https://www.sam.gov) and enter the requested information into the exclusions section of SAM (see 9.404(c)(3)).

(2) The suspending and debarring official is responsible for the timely and accurate submission of documentation reflecting the voluntary exclusion. The submission should be made within 3 working days.

(3) Regarding information that may be covered by a disclosure exemption under the Freedom of Information Act, the suspending and debarring official must follow the procedures at 9.105-2(b)(2)(iv).

(h) *Pre-notice letters*. Prior to initiating a proposed debarment, the suspending and debarring official has discretion to issue a pre-notice letter. A pre-notice letter is not required to initiate debarment under this subpart. (See 9.403.)

9.406-4 Period of debarment.

(a) (1) Debarment must be for a period commensurate with the seriousness of the cause(s). Generally, debarment should not exceed 3 years, except that—

(i) Debarment for violation of the provisions of 41 U.S.C. chapter 81, Drug-Free Workplace (see 26.505) may be for a period not to exceed 5 years;

(ii) Debarments under 9.406-2(b)(2) must be for 1 year unless extended pursuant to paragraph (b) of this section; and

(iii) Debarments under 9.406-2(b)(1)(vii) must be for a period of not less than 2 years, inclusive of any suspension period, if suspension precedes a debarment (see paragraph (a)(2) of this section).

(2) If suspension precedes a debarment, the suspension period factors in determining the debarment period.

(b) The suspending and debarring official may extend the debarment for an additional period, if that official determines that an extension is necessary to protect the Government's interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. Debarments under 9.406-2(b)(2) may be extended for additional periods of one year if the Secretary of Homeland Security or the Attorney General determines that the contractor continues to be in violation of the employment provisions of the Immigration and Nationality Act. Upon determining that debarment for an additional period is necessary, the suspension and debarring official must follow the procedures in 9.406-3 to extend the debarment.

(c) The suspending and debarring official may reduce the period or extent of debarment, upon the contractor's request, supported by documentation, for reasons such as—

(1) Newly discovered material evidence;

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the suspending and debarring official deems appropriate.

9.406-5 Scope of debarment.

(a) The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a contractor may be imputed to the contractor when the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct is evidence of such knowledge, approval, or acquiescence.

(b) The fraudulent, criminal, or other seriously improper conduct of a contractor may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the contractor who participated in, knew of, or had reason to know of the contractor’s conduct.

(c) The fraudulent, criminal, or other seriously improper conduct of one contractor participating in a joint venture or similar arrangement may be imputed to other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these contractors. Acceptance of the benefits derived from the conduct is evidence of such knowledge, approval, or acquiescence.

9.407 Suspension.

9.407-1 General.

(a) The suspending and debarring official may, in the public interest, suspend a contractor for any of the causes in 9.407-2, using the procedures in 9.407-3.

(b) (1) Suspension is a serious action to be imposed based on adequate evidence, pending the completion of an investigation or legal proceedings, when the suspending and debarring official determines that immediate action is necessary to protect the Government's interest. In deciding whether immediate action is necessary to protect the Government's interest, the suspending and debarring official has wide discretion. The suspending and debarring official may infer the necessity for immediate action to protect the Government's interest either from the nature of the circumstances giving rise to a cause for suspension or from potential business relationships or involvement with a program of the Federal Government. In assessing the adequacy of the evidence, agencies should consider how much information is available, how credible it is given the circumstances, whether important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as contracts, inspection reports, and correspondence. An

indictment or other official findings by Federal, State, or local bodies that determine factual and/or legal matters, constitutes adequate evidence for purposes of suspension actions.

(2) The existence of a cause for suspension does not necessarily require that the contractor be suspended. The suspending and debarring official should consider the seriousness of the contractor's acts or omissions and may, but is not required to, consider remedial measures, mitigating factors, or aggravating factors, such as those in 9.406-1(a). A contractor has the burden of promptly presenting to the suspending and debarring official evidence of remedial measures or mitigating factors when it has reason to know that a cause for suspension exists. The existence or nonexistence of any remedial measures or aggravating or mitigating factors is not necessarily determinative of a contractor's present responsibility.

(c) Suspension constitutes suspension of all divisions or other organizational elements of the contractor, unless the suspension decision is limited by its terms to specific divisions, organizational elements, or commodities. The suspending and debarring official may extend the suspension decision to include any affiliates of the contractor if they are—

(1) Specifically named; and

(2) Given written notice of the suspension and an opportunity to respond (see 9.407-3(c)).

(d) A contractor's suspension is effective throughout the executive branch of the Government, unless the agency head or a designee (except see 26.505(e)) states in writing the compelling reasons justifying continued business dealings between that agency and the contractor.

(e) (1) When the suspending and debarring official has authority to suspend contractors from both contracts pursuant to the Federal Acquisition Regulation in this chapter and contracts for the purchase of Federal personal property pursuant to Federal Management Regulation (FMR) in 41 CFR part 102-38, that official must consider simultaneously suspending the contractor from the award of acquisition contracts and from the purchase of Federal personal property.

(2) A notice suspending a contractor from the award of acquisition contracts and from the purchase of Federal personal property must include the appropriate FAR and FMR citations.

9.407-2 Causes for suspension.

(a) The suspending and debarring official may suspend a contractor suspected, upon adequate evidence, of—

(1) Commission of fraud or a criminal offense in connection with-

(i) Obtaining;

(ii) Attempting to obtain; or

(iii) Performing a public contract or subcontract.

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property;

(4) Violations of 41 U.S.C. chapter 81, Drug-Free Workplace, as indicated by—

(i) Failure to comply with the requirements of the clause at 52.226-7, Drug-Free Workplace; or

(ii) Such a number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace (see 26.504);

(5) Intentionally affixing a label bearing a “Made in America” inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States or its outlying areas, when the product was not made in the United States or its outlying areas (see Section 202 of the Defense Production Act (Public Law 102-558));

(6) Commission of an unfair trade practice as defined in 9.403 (see section 201 of the Defense Production Act (Pub. L. 102-558));

(7) Delinquent Federal taxes in an amount that exceeds the threshold at 9.104-5(a)(2). See the criteria at 9.406-2(b)(1)(v) for determination of when taxes are delinquent;

(8) Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of—

(i) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;

(ii) Violation of the civil False Claims Act (31 U.S.C. 3729-3733); or

(iii) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in 32.001; or

(9) Determination of a false certification under 52.209-13, Violation of Arms Control Treaties or Agreements-Certification.

(10) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(11) Failure to comply with the requirements of clause 52.222-90, Addressing DEI Discrimination by Federal Contractors.

(b) Indictment for any of the causes in paragraph (a) of this section constitutes adequate evidence for suspension.

(c) The suspending and debarring official may upon adequate evidence also suspend a contractor for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

9.407-3 Procedures.

(a) *Investigation and referral*. Agencies must establish procedures for the prompt reporting, investigation, and referral to the suspending and debarring official of matters appropriate for that official's consideration.

(b) *Decision-making process*. (1) Agencies must establish procedures governing the suspension decision-making process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures must afford the contractor (and any specifically named affiliates) an opportunity, following the imposition of suspension, to submit, in person, in writing, or through a representative, information and argument in opposition to the suspension. If the suspending and debarring official extends the opportunity for the contractor to submit material in opposition, then the official should also give a deadline for submission of materials. The suspending and debarring official may use the flexible procedures in 9.406-3(b)(1); if so, the suspending and debarring official should change the notice in paragraph (c)(5) of this section to include those flexible procedures.

(2) In actions not based on an indictment, if the contractor's submission in opposition raises a genuine dispute over facts material to the suspension and if no determination has been made, on the basis of Department of advice from the Department of Justice, a U.S. Attorney's office, State attorney general's office, or a State or local prosecutor's office, that substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced, agencies must also—

(i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the agency, by mutual agreement, waive the requirement for a transcript.

(c) *Notice of suspension*. When a contractor and any specifically named affiliates are suspended, the suspending and debarring official must immediately notify them using the procedures in 9.406-3(c)(1) and (2). While describing any irregularities in terms sufficient to place the contractor on notice without disclosing the Government's evidence, the notice must state—

(1) That they have been suspended and that the suspension is based on an indictment or other adequate evidence that the contractor has committed irregularities—

(i) Of a serious nature in business dealings with the Government; or

(ii) Seriously reflecting on the propriety of further Government dealings with the contractor;

(2) That the suspension is for a temporary period pending the completion of an investigation and such legal proceedings as may ensue;

(3) Of the cause(s) relied upon under 9.407-2 for imposing suspension;

(4) Of the effect of the suspension;

(5) That, within 30 days after receipt of the notice, the contractor may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension, including any additional specific information that raises a genuine dispute over the material facts;

(6) That additional proceedings to determine disputed material facts will be conducted unless—

(i) The action is based on an indictment; or

(ii) A determination is made, on the basis of advice by the Department of Justice, a U.S. Attorney's office, State attorney general's office, or a State or local prosecutor's office, that the substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced;

(7) That, in addition to any information and argument in opposition to a suspension, the contractor must identify–

(i) Specific facts that contradict the statements contained in the notice of suspension. Include any information about any of the factors listed in 9.406-1(a). A general denial is insufficient to raise a genuine dispute over facts material to the suspension;

(ii) All existing, proposed, or prior exclusions and all similar actions taken by Federal, State, or local agencies, including administrative agreements that affect only those agencies;

(iii) All criminal and civil proceedings not included in the notice of suspension that grew out of facts relevant to the cause(s) stated in the notice; and

(iv) All of the contractor's affiliates; and

(8) That if the contractor fails to disclose the information in paragraph (c)(7) of this section or provides false information, the agency taking the action may seek further criminal, civil, or administrative action against the contractor, as appropriate.

(d) *Suspending and debarring official's decision*. (1) The suspending and debarring official must make a decision based on all the information in the administrative record, including any submission from the contractor, for actions—

(i) Based on an indictment;

(ii) In which the contractor's submission does not raise a genuine dispute over material facts; or

(iii) In which additional proceedings to determine disputed material facts have been denied based on advice from the Department of Justice, a U.S. Attorney's office, State attorney general's office, or a State or local prosecutor's office.

(2) (i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact must be prepared. The suspending and debarring official must base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(ii) The suspending and debarring official may refer matters involving disputed material facts to another official for findings of fact. The suspending and debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(iii) The suspending and debarring official must make a decision after the conclusion of the proceedings with respect to disputed facts.

(3) The suspending and debarring official may modify or terminate the suspension or leave it in force (for example, see 9.406-4(c) for the reasons for reducing the period or extent of debarment). However, a decision to modify or terminate the suspension must be without prejudice to the subsequent imposition of—

(i) Suspension by any other agency; or

(ii) Debarment by any agency.

(4) Prompt written notice of the suspending and debarring official's decision must be sent to the contractor and any affiliates involved, using the procedures in 9.406-3(c)(1) and (2).

(e) *Administrative agreement*. (1) If the contractor enters into an administrative agreement with the Government to resolve a suspension or potential suspension proceeding, the suspending and debarring official must access the website (available at https://www.cpars.gov, then select FAPIIS), enter the requested information, and upload documentation reflecting the administrative agreement.

(2) The suspending and debarring official is responsible for the timely and accurate submission of documentation reflecting the administrative agreement. The submission should be made within 3 working days.

(3) With regard to information that may be covered by a disclosure exemption under the Freedom of Information Act, the suspending and debarring official must follow the procedures at 9.105-2(b)(2)(iv).

(f) *Voluntary exclusion*. (1) If the contractor enters into a voluntary exclusion with the Government in order to resolve a suspension or potential suspension proceeding, the suspending and debarring official must access the website (available at https://www.sam.gov) and enter the requested information into the exclusions section of SAM (see 9.404(c)(3)).

(2) The suspending and debarring official is responsible for the timely and accurate submission of documentation reflecting the voluntary exclusion. The submission should be made within 3 working days.

(3) Regarding information that may be covered by a disclosure exemption under the Freedom of Information Act, the suspending and debarring official must follow the procedures at 9.105-2(b)(2)(iv).

(g) *Pre-notice letter*. Prior to initiating a suspension, the suspending and debarring official has discretion to issue a pre-notice letter. A pre-notice letter is not required to initiate suspension under this subpart. (See 9.403.)

9.407-4 Period of suspension.

(a) Suspension must be for a temporary period pending the completion of an investigation and any ensuing legal proceedings, unless sooner terminated by the suspending and debarring official or as provided in this section.

(b) If legal proceedings are not initiated within 12 months after the date of the suspension notice, the suspension must be terminated unless an office of a U.S. Assistant Attorney General, U.S. Attorney, or other responsible prosecuting official requests its extension, in which case it may be extended for an additional 6 months. In no event may a suspension extend beyond 18 months, unless legal proceedings have been initiated within that period.

(c) The suspending and debarring official must notify the Department of Justice or other responsible prosecuting official of the proposed termination of the suspension, at least 30 days before the 12-month period expires, to give that official an opportunity to request an extension on the Government's behalf.

9.407-5 Scope of suspension.

The scope of suspension must be the same as that for debarment (see 9.406-5), except that the procedures of 9.407-3 must be used in imposing suspension.

9.408 [Reserved]

9.409 Contract clause.

Insert the clause at 52.209-6, Protecting the Government's Interest when Subcontracting with Contractors Debarred, Suspended, Proposed for Debarment, or Voluntarily Excluded, in solicitations and contracts where the contract value exceeds $45,000.

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Subpart 9.5 - Organizational and Consultant Conflicts of Interest

9.500 Scope of subpart.

This subpart:

(a) Prescribes responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest;

(b) Provides examples to assist contracting officers in applying these rules and procedures to individual contracting situations; and

(c) Implements section 8141 of the 1989 Department of Defense Appropriation Act, Pub.L.100-463, 102 Stat.2270-47 (1988).

9.501 Definition.

Marketing consultant, as used in this subpart, means any independent contractor who furnishes advice, information, direction, or assistance to an offeror or any other contractor in support of the preparation or submission of an offer for a Government contract by that offeror. An independent contractor is not a marketing consultant when rendering-

(1) Services excluded in subpart 37.2;

(2) Routine engineering and technical services (such as installation, operation, or maintenance of systems, equipment, software, components, or facilities);

(3) Routine legal, actuarial, auditing, and accounting services; and

(4) Training services.

9.502 Applicability.

(a) This subpart applies to contracts with either profit or nonprofit organizations, including nonprofit organizations created largely or wholly with Government funds.

(b) The applicability of this subpart is not limited to any particular kind of acquisition. However, organizational conflicts of interest are more likely to occur in contracts involving-

(1) Management support services;

(2) Consultant or other professional services;

(3) Contractor performance of or assistance in technical evaluations; or

(4) Systems engineering and technical direction work performed by a contractor that does not have overall contractual responsibility for development or production.

(c) An organizational conflict of interest may result when factors create an actual or potential conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future acquisition. In the latter case, some restrictions on future activities of the contractor may be required.

(d) Acquisitions subject to unique agency organizational conflict of interest statutes are excluded from the requirements of this subpart.

9.503 Waiver.

The agency head or a designee may waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the Government's interest. Any request for waiver must be in writing, must set forth the extent of the conflict, and requires approval by the agency head or a designee. Agency heads must not delegate waiver authority below the level of head of a contracting activity.

9.504 Contracting officer responsibilities.

(a) Using the general rules, procedures, and examples in this subpart, contracting officers must analyze planned acquisitions in order to—

(1) Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and

(2) Avoid, neutralize, or mitigate significant potential conflicts before contract award.

(b) Contracting officers should obtain the advice of counsel and the assistance of appropriate technical specialists in evaluating potential conflicts and in developing any necessary solicitation provisions and contract clauses (see 9.506).

(c) Before issuing a solicitation for a contract that may involve a significant potential conflict, the contracting officer must recommend to the head of the contracting activity a course of action for resolving the conflict (see 9.506).

(d) In fulfilling their responsibilities for identifying and resolving potential conflicts, contracting officers should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation. The contracting officer's judgment need be formally documented only when a substantive issue concerning potential organizational conflict of interest exists.

(e) The contracting officer must award the contract to the apparent successful offeror unless a conflict of interest is determined to exist that cannot be avoided or mitigated. Before determining to withhold award based on conflict of interest considerations, the contracting officer must notify the contractor, provide the reasons therefor, and allow the contractor a reasonable opportunity to respond. If the contracting officer finds that it is in the best interest of the United States to award the contract notwithstanding a conflict of interest, a request for waiver must be submitted in accordance with 9.503. The waiver request and decision must be included in the contract file.

9.505 General rules.

The general rules in 9.505-1 through 9.505-4 prescribe limitations on contracting as the means of avoiding, neutralizing, or mitigating organizational conflicts of interest that might otherwise exist in the stated situations. Some illustrative examples are provided in 9.508. Conflicts may arise in situations not expressly covered in this section 9.505 or in the examples in 9.508. Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it. The two underlying principles are—

(a) Preventing the existence of conflicting roles that might bias a contractor's judgment; and

(b) Preventing unfair competitive advantage. In addition to the other situations described in this subpart, an unfair competitive advantage exists where a contractor competing for award of any Federal contract possesses-

(1) Proprietary information that was obtained from a Government official without proper authorization; or

(2) Source selection information (as defined in 2.101) that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract.

9.505-1 Providing systems engineering and technical direction.

(a) A contractor that provides systems engineering and technical direction for a system but does not have overall contractual responsibility for its development, its integration, assembly, and checkout, or its production shall not—

(1) Be awarded a contract to supply the system or any of its major components; or

(2) Be a subcontractor or consultant to a supplier of the system or any of its major components.

(b) Systems engineering includes a combination of substantially all of the following activities: determining specifications, identifying and resolving interface problems, developing test requirements, evaluating test data, and supervising design. Technical direction includes a combination of substantially all of the following activities: developing work statements, determining parameters, directing other contractors' operations, and resolving technical controversies. In performing these activities, a contractor occupies a highly influential and responsible position in determining a system's basic concepts and supervising their execution by other contractors. Therefore this contractor should not be in a position to make decisions favoring its own products or capabilities.

9.505-2 Preparing specifications or work statements.

(a) (1) If a contractor prepares and furnishes complete specifications covering nondevelopmental items, to be used in a competitive acquisition, that contractor shall not be allowed to furnish these items, either as a prime contractor or as a subcontractor, for a reasonable period of time including, at least, the duration of the initial production contract. The restriction in this paragraph (a)(1) must not apply to—

(i) Contractors that furnish at Government request specifications or data regarding a product they provide, even though the specifications or data may have been paid for separately or in the price of the product; or

(ii) Situations in which contractors, acting as industry representatives, help Government agencies prepare, refine, or coordinate specifications, regardless of source, provided this assistance is supervised and controlled by Government representatives.

(2) If a single contractor drafts complete specifications for nondevelopmental equipment, it should be eliminated for a reasonable time from competition for production based on the specifications. This should be done in order to avoid a situation in which the contractor could draft specifications favoring its own products or capabilities. In this way the Government can

be assured of getting unbiased advice as to the content of the specifications and can avoid allegations of favoritism in the award of production contracts.

(3) In development work, it is normal to select firms that have done the most advanced work in the field. These firms can be expected to design and develop around their own prior knowledge. Development contractors can frequently start production earlier and more knowledgeably than firms that did not participate in the development, and this can affect the time and quality of production, both of which are important to the Government. In many instances the Government may have financed the development. Thus, while the development contractor has a competitive advantage, it is an unavoidable one that is not considered unfair; hence no prohibition should be imposed.

(b) (1) If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services-or provides material leading directly, predictably, and without delay to such a work statement-that contractor may not supply the system, major components of the system, or the services unless—

(i) It is the sole source;

(ii) It has participated in the development and design work; or

(iii) More than one contractor has been involved in preparing the work statement.

(2) Agencies should normally prepare their own work statements. When contractor assistance is necessary, the contractor might often be in a position to favor its own products or capabilities. To overcome the possibility of bias, contractors are prohibited from supplying a system or services acquired on the basis of work statements growing out of their services, unless excepted in paragraph (b)(1) of this section.

(3) For the reasons given in paragraph (a)(3) of this section, no prohibitions are imposed on development and design contractors.

9.505-3 Providing evaluation services.

Contracts for the evaluation of offers for products or services must not be awarded to a contractor that will evaluate its own offers for products or services, or those of a competitor, without proper safeguards to ensure objectivity to protect the Government's interests.

9.505-4 Obtaining access to proprietary information.

(a) When a contractor requires proprietary information from others to perform a Government contract and can use the leverage of the contract to obtain it, the contractor may gain an unfair competitive advantage unless restrictions are imposed. These restrictions protect the information and encourage companies to provide it when necessary for contract performance. They are not intended to protect information—

(1) Furnished voluntarily without limitations on its use; or

(2) Available to the Government or contractor from other sources without restriction.

(b) A contractor that gains access to proprietary information of other companies in performing advisory and assistance services for the Government must agree with the other companies to protect their information from unauthorized use or disclosure for as long as it remains proprietary and refrain from using the information for any purpose other than that for which it was furnished. The contracting officer must obtain copies of these agreements and ensure that they are properly executed.

(c) Contractors also obtain proprietary and source selection information by acquiring the services of marketing consultants which, if used in connection with an acquisition, may give the contractor an unfair competitive advantage. Contractors should make inquiries of marketing consultants to ensure that the marketing consultant has provided no unfair competitive advantage.

9.506 Procedures.

(a) If information concerning prospective contractors is necessary to identify and evaluate potential organizational conflicts of interest or to develop recommended actions, contracting officers should first seek the information from within the Government or from other readily available sources. Government sources include the files and the knowledge of personnel within the contracting office, other contracting offices, the cognizant contract administration and audit activities and offices concerned with contract financing. Non-Government sources include publications and commercial services, such as credit rating services, trade and financial journals, and business directories and registers.

(b) If the contracting officer decides that a particular acquisition involves a significant potential organizational conflict of interest, the contracting officer must, before issuing the solicitation, submit for approval to the chief of the contracting office (unless a higher level official is designated by the agency)—

(1) A written analysis, including a recommended course of action for avoiding, neutralizing, or mitigating the conflict, based on the general rules in 9.505 or on another basis not expressly stated in that section;

(2) A draft solicitation provision (see 9.507-1); and

(3) If appropriate, a proposed contract clause (see 9.507-2).

(c) The approving official must—

(1) Review the contracting officer's analysis and recommended course of action, including the draft provision and any proposed clause;

(2) Consider the benefits and detriments to the Government and prospective contractors; and

(3) Approve, modify, or reject the recommendations in writing.

(d) The contracting officer must—

(1) Include the approved provision(s) and any approved clause(s) in the solicitation or the contract, or both;

(2) Consider additional information provided by prospective contractors in response to the solicitation or during negotiations; and

(3) Before awarding the contract, resolve the conflict or the potential conflict in a manner consistent with the approval or other direction by the head of the contracting activity.

(e) If, during the effective period of any restriction (see 9.507), a contracting office transfers acquisition responsibility for the item or system involved, it must notify the successor contracting office of the restriction, and send a copy of the contract under which the restriction was imposed.

9.507 Solicitation provisions and contract clause.

9.507-1 Solicitation provisions.

As indicated in the general rules in 9.505, significant potential organizational conflicts of interest are normally resolved by imposing some restraint, appropriate to the nature of the conflict, upon the contractor's eligibility for future contracts or subcontracts. Therefore, affected solicitations must contain a provision that—

(a) Invites offerors' attention to this subpart;

(b) States the nature of the potential conflict as seen by the contracting officer;

(c) States the nature of the proposed restraint upon future contractor activities; and

(d) Depending on the nature of the acquisition, states whether or not the terms of any proposed clause and the application of this subpart to the contract are subject to negotiation.

9.507-2 Contract clause.

(a) If, as a condition of award, the contractor's eligibility for future prime contract or subcontract awards will be restricted or the contractor must agree to some other restraint, the solicitation must contain a proposed clause that specifies both the nature and duration of the proposed restraint. The contracting officer must include the clause in the contract, first negotiating the clause's final terms with the successful offeror, if it is appropriate to do so (see 9.506(d)).

(b) The restraint imposed by a clause must be limited to a fixed term of reasonable duration, sufficient to avoid the circumstance of unfair competitive advantage or potential bias. This period varies. It might end, for example, when the first production contract using the contractor's specifications or work statement is awarded, or it might extend through the entire life of a system for which the contractor has performed systems engineering and technical direction. In every case, the restriction must specify termination by a specific date or upon the occurrence of an identifiable event.

9.508 Examples.

The examples in paragraphs (a) through (i) of this section illustrate situations in which questions concerning organizational conflicts of interest may arise. They are not all inclusive, but are intended to help the contracting officer apply the general rules in 9.505 to individual contract situations.

(a) Company A agrees to provide systems engineering and technical direction for the Navy on the powerplant for a group of submarines (*i.e.,* turbines, drive shafts, propellers, etc.). Company A should not be allowed to supply any powerplant components. Company A can, however, supply components of the submarine unrelated to the powerplant (*e.g.,* fire control, navigation, etc.). In this example, the system is the powerplant, not the submarine, and the ban on supplying components is limited to those for the system only.

(b) Company A is the systems engineering and technical direction contractor for system X. After some progress, but before completion, the system is canceled. Later, system Y is developed to achieve the same purposes as system X, but in

a fundamentally different fashion. Company B is the systems engineering and technical direction contractor for system Y. Company A may supply system Y or its components.

(c) Company A develops new electronic equipment and, as a result of this development, prepares specifications. Company A may supply the equipment.

(d) XYZ Tool Company and PQR Machinery Company, representing the American Tool Institute, work under Government supervision and control to refine specifications or to clarify the requirements of a specific acquisition. These companies may supply the item.

(e) Before an acquisition for information technology is conducted, Company A is awarded a contract to prepare data system specifications and equipment performance criteria to be used as the basis for the equipment competition. Since the specifications are the basis for selection of commercial hardware, a potential conflict of interest exists. Company A should be excluded from the initial follow-on information technology hardware acquisition.

(f) Company A receives a contract to define the detailed performance characteristics an agency will require for purchasing rocket fuels. Company A has not developed the particular fuels. When the definition contract is awarded, it is clear to both parties that the agency will use the performance characteristics arrived at to choose competitively a contractor to develop or produce the fuels. Company A may not be awarded this follow-on contract.

(g) Company A receives a contract to prepare a detailed plan for scientific and technical training of an agency's personnel. It suggests a curriculum that the agency endorses and incorporates in its request for proposals to institutions to establish and conduct the training. Company A may not be awarded a contract to conduct the training.

(h) Company A is selected to study the use of lasers in communications. The agency intends to ask that firms doing research in the field make proprietary information available to Company A. The contract must require Company A to—

(1) Enter into agreements with these firms to protect any proprietary information they provide; and

(2) Refrain from using the information in supplying lasers to the Government or for any purpose other than that for which it was intended.

(i) An agency that regulates an industry wishes to develop a system for evaluating and processing license applications. Contractor X helps develop the system and process the applications. Contractor X should be prohibited from acting as a consultant to any of the applicants during its period of performance and for a reasonable period thereafter.

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PART 10 - MARKET RESEARCH

Sec.

10.000 Scope of part.
10.001 Market research requirements.
10.002 Clause.

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10.000 Scope of part.

This part prescribes minimum requirements for conducting market research before procuring supplies and services. See section 887 of Public Law 114-92(41 U.S.C. 1703 note), 41 U.S.C. 3306(a)(1), 41 U.S.C. 3307, and 10 U.S.C. 3453.

10.001 Market research requirements.

(a) Agencies must describe their legitimate needs.

(b) Agencies must conduct market research appropriate to the circumstances before—

(1) Developing new requirements documents;

(2) Soliciting offers for acquisitions with an estimated value over the simplified acquisition threshold; or

(3) Awarding a task or delivery order over the simplified acquisition threshold.

(c) Agencies should engage in responsible and constructive exchanges with industry. Agencies may use different strategies and methods to gather information, so long as they comply with existing law and regulation and do not provide an unfair competitive advantage to particular firms or violate the procurement integrity requirements (see 3.104).

(d) When conducting market research, agencies must not ask potential sources to submit more than the minimum information necessary to make the determinations required in paragraph (f).

(e) Agencies must document the results of market research in a manner that suits the acquisition's size and complexity.

(f) Agencies must procure commercial products and commercial services to the maximum extent practicable. Using the results of market research, agencies will determine, in the following order of priority, whether—

(1) A commercial product or commercial service on an existing governmentwide contract can meet the agency's requirements;

(2) The requirements could be modified so the agency could use an existing governmentwide contract;

(3) A commercial product or commercial service is available from another source;

(4) A commercial product or commercial service could be modified to meet the agency's requirements; or

(5) The requirement can only be satisfied by a nondevelopmental item.

10.002 Clause.

The contracting officer must insert the clause at 52.210-1, Market Research, in solicitations and contracts for noncommercial acquisitions over $7.5 million. This policy was established in 10 U.S.C. 3453(c).

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PART 11 - DESCRIBING AGENCY NEEDS

Sec.

Subpart 11.1 - Preaward

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11.101 Definitions.
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11.201 Voluntary consensus standards.
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11.400 Scope.
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11.500 Scope of subpart.
11.501 Definitions.
11.502 General.
11.503 Procedures.
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Subpart 11.1 - Preaward

11.100 Scope of part.

This part establishes standards for describing agency needs.

11.101 Definitions.

As used in this part-

Reconditioned means restored to the original normal operating condition by readjustments and material replacement.

Remanufactured means factory rebuilt to original specifications.

11.102 Policy.

(a) In fulfilling requirements of 10 U.S.C. 3206(a), 10 U.S.C. 3453, 41 U.S.C. 3306(a), and 41 U.S.C.3307, agencies shall —

(1) Specify needs using market research to–

(i) Promote full and open competition (see part 6), or maximum practicable competition when using simplified acquisition procedures, with due regard to the nature of the supplies or services to be acquired; and

(ii) Only include restrictive provisions to the extent necessary to satisfy the needs of the agency or as authorized by law.

(2) To the maximum extent practicable, ensure that acquisition officials-

(i) State requirements with respect to an acquisition of supplies or services in terms of-

(A) Functions to be performed;

(B) Performance required; or

(C) Essential physical characteristics;

(ii) Define requirements in terms that enable and encourage offerors to supply commercial products or commercial services or, to the extent that commercial products suitable to meet the agency's needs are not available, nondevelopmental items, in response to the agency solicitations;

(iii) Provide offerors of commercial products, commercial services, and nondevelopmental items an opportunity to compete in any acquisition to fill such requirements;

(iv) Require prime contractors and subcontractors at all tiers under the agency contracts to incorporate commercial products, commercial services, or nondevelopmental items as components of items supplied to the agency; and

(v) Modify requirements in appropriate cases to ensure that the requirements can be met by commercial products or commercial services or, to the extent that commercial products suitable to meet the agency's needs are not available, nondevelopmental items.

(b) The Metric Conversion Act of 1975, as amended by the Omnibus Trade and Competitiveness Act of 1988 (15 U.S.C. 205a, et seq.), designates the metric system of measurement as the preferred system of weights and measures for United States trade and commerce, unless such use is impracticable or is likely to cause significant inefficiencies or loss of markets to United States firms.

(c) To the extent practicable and consistent with subpart 9.5, potential offerors should be given an opportunity to comment on agency requirements or to recommend application and tailoring of requirements documents and alternative approaches. Requiring agencies should apply specifications, standards, and related documents initially for guidance only, making final decisions on the application and tailoring of these documents as a product of the design and development process. Requiring agencies should not dictate detailed design solutions prematurely (see 7.101 and 7.105(a)(8)).

(d) (1) Agencies shall procure sustainable products in accordance with subpart 23.1.

(2) Unless it is not practicable (see 23.102(a)) or an exception or exemption applies (see 23.105 and 23.106, respectively), agencies shall incorporate the use of sustainable products when—

(i) Developing, reviewing, or revising Federal and military specifications, product descriptions (including commercial item descriptions) and standards;

(ii) Describing Government requirements for products and services; and

(iii) Developing source-selection factors.

(e) Some or all of the performance levels or performance specifications in a solicitation may be identified as targets rather than as fixed or minimum requirements.

(f) In accordance with section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), the contracting officer shall obtain from the requiring activity the requirement documents, which must identify—

(1) The needs of current and future users with disabilities to determine how–

(i) Users with disabilities will perform the functions supported by the information and communication technology (ICT);

(ii) The ICT will be developed, installed, configured and maintained to support users with disabilities;

(2) The applicable ICT accessibility standards (see subpart 39.2); and

(3) Any ICT accessibility standards that cannot be met due to an exception or an exemption for any component or portion of the product (see 7.105(b)(5)(iv), 39.204, and 39.205).

(g) Agencies shall not include in a solicitation a requirement that prohibits an offeror from allowing its employees to telecommute unless the contracting officer executes a written determination in accordance with FAR 7.108(a).

Subpart 11.2 - Selecting and Developing Requirements Documents

11.201 Voluntary consensus standards.

In accordance with OMB Circular A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities," and Section 12(d) of the National Technology Transfer and Advancement Act of 1995, Pub. L. 104-113 (15 U.S.C. 272 note), agencies must use voluntary consensus standards, when they exist, in lieu of Government-unique standards, except where inconsistent with law or otherwise impractical. The private sector manages and administers voluntary consensus standards. Such standards are not mandated by law (*e.g.*, industry standards such as ISO 9000, and IEEE 1680).

11.202 Standardization program.

Agencies shall select existing requirements documents or develop new requirements documents that meet the needs of the agency in accordance with the guidance contained in the Federal Standardization Manual, FSPM-0001; for DoD components, DoD Manual 4120.24, Defense Standardization Program (DSP) Procedures; and for IT standards and guidance, the Federal Information Processing Standards Publications (FIPS PUBS).

11.203 Market acceptance.

(a) 41 U.S.C. 3307(e) provides that, in accordance with agency procedures, the head of an agency may, under appropriate circumstances, require offerors to demonstrate that the items offered—

(1) Have either–

(i) Achieved commercial market acceptance; or

(ii) Been satisfactorily supplied to an agency under current or recent contracts for the same or similar requirements; and

(2) Otherwise meet the item description, specifications, or other criteria prescribed in the public notice and solicitation.

(b) In developing criteria for demonstrating that an item has achieved commercial market acceptance, the contracting officer shall ensure the criteria in the solicitation—

(1) Reflect the minimum need of the agency and are reasonably related to the demonstration of an item's acceptability to meet the agency's minimum need; and

(2) Consider the entire relevant commercial market, including small business concerns.

11.204 Items peculiar to one manufacturer.

Agency requirements shall not be written to require a particular brand name, product, or a feature of a product, peculiar to one manufacturer, thereby precluding consideration of a product manufactured by another company, unless—

(a) (1) The particular brand name, product, or feature is essential to the Government's requirements, and market research indicates other companies' similar products, or products lacking the particular feature, do not meet the agency's needs or cannot be modified to meet the agency's minimum needs;

(2) (i) The authority to contract without providing for full and open competition is supported by the required justifications and approvals (see 6.302-1); or

(ii) The basis for not providing for maximum practicable competition is documented in the file (see 13.106-1(b)) or justified (see 13.501) when the acquisition is awarded using simplified acquisition procedures.

(3) The documentation or justification is posted for acquisitions over $25,000. (See 5.102(a)(6).)

(b) For multiple award schedule orders, see 8.405-6.

(c) For orders under indefinite-quantity contracts, see 16.505(a)(4).

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Subpart 11.3 - Acceptable Material

11.301 Policy.

(a) (1) When acquiring products other than commercial products as defined in 2.101, agencies must require offerors to identify used, reconditioned, or remanufactured supplies; or unused former Government surplus property proposed for use under the contract. These supplies or property may not be used in contract performance unless authorized by the contracting officer.

(2) When acquiring commercial products, the contracting officer must consider the customary practices in the industry for the product being acquired. The contracting officer may require offerors to provide information on used, reconditioned, or remanufactured supplies, or unused former Government surplus property proposed for use under the contract. The request for the information must be included in the solicitation, and to the maximum extent practicable must be limited to information or standards consistent with normal commercial practices.

(b) (1) When the contracting officer needs additional information to determine whether supplies meet minimum recovered material or biobased standards stated in the solicitation, the contracting officer may require offerors to submit additional information on the recycled or biobased content or related standards. The request for the information must be included in the solicitation. When acquiring commercial products, limit the information to the maximum extent practicable to that available under normal commercial practices.

(2) For biobased products, agencies may not require, as a condition of purchase of such products, the vendor or manufacturer to provide more data than would typically be provided by other business entities offering products for sale to the agency, other than data confirming the biobased content of a product (see 7 CFR 3201.8).

11.302 Contract clause.

Insert the clause at 52.211-5, Material Requirements, in solicitations and contracts for supplies that are not commercial products.

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Subpart 11.4 - Liquidated Damages

11.400 Scope.

(a) This subpart prescribes policies and procedures for using liquidated damages clauses in solicitations and contracts for supplies, services, research and development, and construction.

(b) This subpart does not apply to liquidated damages-

(1) For subcontracting plans (see 19.109);

(2) Related to the Contract Work Hours and Safety Standards statute (see subpart 22.3); or

(3) Related to paid sick leave for Federal contractors (see subpart 22.21).

11.401 Policy.

(a) The contracting officer must consider the potential impact on pricing, competition, and contract administration before using a liquidated damages clause. Use liquidated damages clauses only when—

(1) The time of delivery or timely performance is so important that the Government may reasonably expect to suffer damage if the delivery or performance is delinquent; and

(2) The extent or amount of such damage would be difficult or impossible to estimate accurately or prove.

(b) Liquidated damages are not punitive and are not negative performance incentives (see 16.403-2). Liquidated damages are used to compensate the Government for probable damages. Therefore, the liquidated damages rate must be a reasonable forecast of just compensation for the harm that is caused by late delivery or untimely performance of the particular contract. Use a maximum amount or a maximum period for assessing liquidated damages if these limits reflect the maximum probable damage to the Government. Also, the contracting officer may use more than one liquidated damages rate when the contracting officer expects the probable damage to the Government to change over the contract period of performance.

(c) The contracting officer must take all reasonable steps to mitigate liquidated damages. If the contract contains a liquidated damages clause and the contracting officer is considering terminating the contract for default, the contracting officer should seek expeditiously to obtain performance by the contractor or terminate the contract and repurchase (see subpart 49.4). Prompt contracting officer action will prevent excessive loss to defaulting contractors and protect the interests of the Government.

(d) The head of the agency may reduce or waive the amount of liquidated damages assessed under a contract, if the Commissioner, Financial Management Service, or designee approves (see Treasury Order 145-10).

11.402 Procedures.

(a) Include the applicable liquidated damages clause and liquidated damages rates in solicitations when the contract will contain liquidated damages provisions.

(b) Construction contracts with liquidated damages provisions must describe the rate(s) of liquidated damages assessed per day of delay. The rate(s) should include the estimated daily cost of Government inspection and superintendence. The rate(s) should also include an amount for other expected expenses associated with delayed completion such as—

(1) Renting substitute property; or

(2) Paying additional allowance for living quarters.

11.403 Contract clauses.

(a) Use the clause at 52.211-11, Liquidated Damages-Supplies, Services, or Research and Development, in fixed-price solicitations and contracts for supplies, services, or research and development when the contracting officer determines that liquidated damages are appropriate.

(b) Use the clause at 52.211-12, Liquidated Damages-Construction, in solicitations and contracts for construction, other than cost-plus-fixed-fee, when the contracting officer determines that liquidated damages are appropriate. If the contract specifies more than one completion date for separate parts or stages of the work, revise paragraph (a) of the clause to state the amount of liquidated damages for delay of each separate part or stage of the work.

(c) Use the clause at 52.211-13, Time Extensions, in solicitations and contracts for construction that use the clause at 52.211-12, Liquidated Damages-Construction, when that clause has been revised as provided in paragraph (b) of this section.

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Subpart 11.5 - Priorities and Allocations

11.500 Scope of subpart.

This subpart implements the Defense Priorities and Allocations System (DPAS), a Department of Commerce regulation in support of approved national defense, emergency preparedness, and energy programs (see 15 CFR part 700).

11.501 Definitions.

As used in this subpart—

Approved program means a program determined in writing as necessary or appropriate for priorities and allocations support to promote the national defense by the Secretary of Defense, the Secretary of Energy, or the Secretary of Homeland Security, under the authority of the Defense Production Act and Executive Order 13603, or the Selective Service Act and Executive Order 12742.

Delegate Agency means a Government agency authorized by delegation from the Department of Commerce to place priority ratings on contracts or orders needed to support approved programs.

National defense means programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Such term includes emergency preparedness activities conducted pursuant to Title VI of The Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.) and critical infrastructure protection and restoration.(50 U.S.C. 4552).

Rated order means a prime contract, a subcontract, or a purchase order in support of an approved program issued in accordance with the provisions of the DPAS regulation (15 CFR part 700).

11.502 General.

(a) Under Title I of the Defense Production Act of 1950 (50 U.S.C. 4501), the President is authorized to require preferential acceptance and performance of contracts and orders supporting certain approved national defense and energy programs and to allocate materials, services, and facilities in such a manner as to promote these approved programs.

(b) The President delegated the priorities and allocations authorities of the Defense Production Act in Executive Order 13603. As part of that delegation, the President designated the Secretary of Commerce to administer the DPAS. For more information, check the DPAS website at:https://www.bis.doc.gov/index.php/other-areas/strategic-industries-and-economic-security-sies/defense-priorities-a-allocations-system-program-dpas.

11.503 Procedures.

(a) There are two levels of priority for rated orders established by the DPAS, identified by the rating symbols “DO” and “DX”. 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 and unrated orders (see 15 CFR 700.11). The DPAS regulation contains provisions concerning the elements of a rated order (see 15 CFR 700.12); acceptance and rejection of rated orders (see 15 CFR 700.13); preferential scheduling (see 15 CFR 700.14); extension of priority ratings (flowdown) (see 15 CFR 700.15); changes or cancellations of priority ratings and rated orders (see 15 CFR 700.16); use of rated orders (see 15 CFR 700.17); and limitations on placing rated orders (see 15 CFR 700.18).

(b) The Delegate Agencies have been given authority by the Department of Commerce to place rated orders in support of approved programs (see Schedule I of the DPAS). Other U.S. Government agencies, Canada, and foreign nations may apply for priority rating authority.

(c) Rated orders shall be placed in accordance with the provisions of the DPAS.

(d) Agency heads shall ensure compliance with the DPAS by contracting activities within their agencies.

(e) Agency heads shall provide contracting activities with specific guidance on the issuance of rated orders in support of approved agency programs, including the general limitations and jurisdictional limitations on placing rated orders (see 15 CFR 700.18 and Executive Order 13603).

(f) Contracting officers shall follow agency procedural instructions concerning the use of rated orders in support of approved agency programs.

(g) Contracting officers, contractors, or subcontractors at any tier, that experience difficulty placing rated orders, obtaining timely delivery under rated orders, locating a contractor or supplier to fill a rated order, ensuring that rated orders receive preferential treatment by contractors or suppliers, or require rating authority for items not automatically ratable under the DPAS, should promptly seek special priorities assistance in accordance with agency procedures (see 15 CFR 700.50—700.55 and 700.80).

(h) The Department of Commerce may take specific official actions (Ratings Authorizations, Directives, Letters of Understanding, Administrative Subpoenas, Demands for Information, and Inspection Authorizations) to implement or enforce the provisions of the DPAS (see 15 CFR 700.60-700.71).

(i) Contracting officers shall report promptly any violations of the DPAS in accordance with agency procedures to the Office of Strategic Industries and Economic Security, U.S. Department of Commerce, Room 3876, Washington, DC 20230, Ref: DPAS; telephone: (202) 482-3634 or email DPAS@bis.doc.gov.

11.504 Solicitation provision and contract clause.

(a) Contracting officers shall 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 to be awarded will be a rated order.

(b) Contracting officers shall insert the clause at 52.211-15, Defense Priority and Allocation Requirements, in contracts that are rated orders.

PART 12 - ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

Sec.

12.000 Scope.
12.001 Applicability.

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12.101 Preference.
12.102 Restricting competition.
12.103 Small business.
12.104 Contract type.
12.105 Quality requirements.
12.106 Technical data.
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12.109 Cost Accounting Standards.

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12.201 Solicitation procedures.
12.201-1 Simplified procedures.
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12.202 Publicizing.
12.203 Evaluation.
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12.205 Solicitation provisions and contract clauses.

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12.303 Cancellations.
12.304 Terminations.

Subpart 12.4 - Micro-purchases

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12.402 Purchase guidelines.
12.403 Methods.

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12.000 Scope.

This part provides policies and procedures to streamline the acquisition of commercial products, including commercially available off-the-shelf (COTS) items (a subset of commercial products), and commercial services in accordance with 41 U.S.C. 1906, 1907, and 3307 and 10 U.S.C. 3451-3453. It also implements the simplified procedures authorized by 41 U.S.C. 1901-1903, 1905, and 3305.

12.001 Applicability.

(a) Acquisitions of commercial products or commercial services are subject to other parts of the FAR. This part takes precedence when there is an inconsistency.

(b) Agencies may treat any acquisition of supplies or services that, as determined by the head of the agency, are to be used to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack, as an acquisition of commercial products or commercial services. However, if the contract is awarded on a sole-source basis for an amount greater than $25 million, the contract is not exempt from Cost Accounting Standards (CAS) (see 48 CFR chapter 99) or certified cost or pricing data requirements (see part 15).

(c) The $9 million ceiling for the use of simplified procedures (see 12.201-1) is increased to $15 million if the head of the agency determines that the supplies or services are to be used to—

(1) Support a contingency operation;

(2) Facilitate the defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack (including acquisitions treated as commercial products or commercial services according to paragraph (b));

(3) Support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance; or

(4) Support response to an emergency or major disaster.

(d) Do not divide requirements, the aggregate value of which exceeds a threshold identified in this subpart, merely to permit use of a specific procedure.

(e) Go to https://www.acquisition.gov/inapplicablelaws for the lists of laws that do not apply to contracts for the acquisition of commercial products or commercial services, acquisitions of COTS items, and acquisitions valued at or below the simplified acquisition threshold (SAT) (41 U.S.C. 1905 through 1907).

Subpart 12.1 - Presolicitation

12.101 Preference.

(a) Agencies must acquire commercial products or commercial services when the agency determines that they are available to meet the agency's needs (see part 10).

(b) Require prime contractors and subcontractors at all tiers to incorporate, to the maximum extent practicable, commercial products, commercial services, or nondevelopmental items as components of items supplied to the agency.

12.102 Restricting competition.

Document decisions to restrict competition, including the use of brand-name descriptions without allowing for "equal" products, as follows:

(a) For acquisitions valued at or below the simplified acquisition threshold (SAT), document the decision that only one source is available and the basis for the decision.

(b) For acquisitions valued over the SAT, prepare a written justification and obtain approval of the justification as described in 6.104. Cite the following statutory authority, as applicable:

Table 12-1 — Authority citations for restricting competition.

Procedures	Value	Statutory authority
12.201-1, Simplified procedures	> SAT, ≤ $9 million	41 U.S.C. 1901
12.201-1, Simplified procedures, for acquisition described at 12.001(c)	> $9 million, ≤ $15 million	41 U.S.C. 1901 and 1903
12.201-2, Other procedures	> $9 million (> $15 million for acquisitions described at 12.001(c))	One of the statutory authorities cited in 6.103, as appropriate

12.103 Small business.

See part 19 for small business set-aside requirements. When the acquisition is set aside under any of the small business programs, include the North American Industry Classification System (NAICS) code and small business size standard in the solicitation.

12.104 Contract type.

(a) *Preference for fixed-price contracts*. To the maximum extent practicable, use firm-fixed-price or fixed-price with economic price adjustment contract types to procure commercial products or commercial services. Follow the procedures in part 16 to use these contract types.

(b) *Time-and-materials or labor-hour contracts*. A time-and-materials or labor-hour contract may be used for commercial services that are procured on a competitive basis, if the services are commonly sold to the general public using these types of contracts.

(1) To use this contract type, the contracting officer must—

(i) Execute a determination and findings (D&F) that a firm-fixed-price or fixed-price with economic price adjustment is not suitable; and

(ii) Obtain approval of a justification in accordance with 16.104, if applicable;

(iii) Include in the contract a ceiling price that the contractor exceeds at its own risk.

(2) Any increase to the ceiling price must be supported by a determination that doing so is in the best interest of the procuring agency.

(c) *Indefinite-delivery contracts*.

(1) Indefinite-delivery contracts may be used when—

(i) Prices are established based on a firm-fixed-price or fixed-price with economic price adjustment; or

(ii) Rates are established for commercial services acquired on a time-and-materials or labor-hour basis.

(2) If rates are established on a time-and-materials or labor-hour basis, then to the maximum extent practicable, structure the contract to allow issuance of orders on a firm-fixed-price or fixed-price with economic price adjustment basis.

(i) Orders placed on a time-and-materials or labor-hour basis are subject to the requirements in paragraph (b) of this section.

(ii) If the contract only allows for orders on a time-and-materials or labor-hour basis, the D&F described in paragraph (b)(1) of this section is required only for the basic contract. It must explain why providing for an alternative firm-fixed-price or fixed-price with economic price adjustment pricing structure for orders is not practicable, and an official one level above the contracting officer must approve it.

(d) *Prohibition on use of cost-reimbursement contracts*. Do not use any cost-reimbursement contract type to procure commercial products or commercial services.

12.105 Quality requirements.

(a) *Quality assurance*. To the maximum extent practicable, allow a contractor under a commercial products acquisition to use its existing quality assurance system to inspect or test commercial products before the contractor presents the products to the Government for acceptance. Rely on the contractor to accomplish all inspection and testing needed to ensure that commercial services conform to contract requirements before the contractor presents the services to the Government.

(b) *Warranties*. To the maximum extent practicable, take advantage of commercial warranties, including extended warranties, and use those warranties for the repair and replacement of commercial products and commercial services.

12.106 Technical data.

Presume that data delivered under a contract for commercial products was developed exclusively at private expense. Acquire only the technical data and the rights in that data customarily provided to the public with a commercial product or process. When a contract for commercial products requires the delivery of technical data, see part 27 for provisions and clauses to delineate rights in the technical data.

12.107 Computer software.

(a) Commercial computer software or commercial computer software documentation must be acquired under licenses customarily provided to the public to the extent such licenses are consistent with Federal law and otherwise satisfy the Government's needs. Generally, offerors and contractors must not be required to—

(1) Furnish technical information related to commercial computer software or commercial computer software documentation that is not customarily provided to the public; or

(2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose commercial computer software or commercial computer software documentation except as mutually agreed to by the parties.

(b) With regard to commercial computer software and commercial computer software documentation, the Government should have only those rights specified in the license contained in any addendum to the contract. For additional guidance regarding the use and negotiation of license agreements for commercial computer software, see part 27.

12.108 Contract financing.

Government financing may be offered if buyer financing is a customary market practice for a commercial product or commercial service. See part 32 for contract financing policies and procedures.

12.109 Cost Accounting Standards.

CAS do not apply to contracts or subcontracts for the acquisition of commercial products or commercial services, except as provided in 12.001(c).

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Subpart 12.2 - Solicitation, Evaluation, and Award

12.200 Applicability.

(a) If commercial products or commercial services that meet agency needs are available from any priority source identified in part 8, including existing contracts awarded for Governmentwide use (e.g., the Federal Supply Schedules and Governmentwide acquisition contracts), procure the commercial products or commercial services from that source. If not, use the streamlined procedures for solicitation, evaluation, and award in this subpart.

(b) When using the procedures in this subpart to acquire construction, comply with the requirements in part 36 for construction contracts and subpart 22.4 on labor standards for contracts involving construction.

12.201 Solicitation procedures.

12.201-1 Simplified procedures.

(a) *Requirement*. For acquisitions valued up to $9 million, issue a request for quotations (RFQ) followed by a purchase order.

(b) *Legal effect of quotations*.

(1) Neither a quotation nor the purchase order issued by the Government in response to a quotation form a binding contract. The purchase order is the Government's offer to a supplier to buy certain products or services upon specified terms and conditions.

(2) A binding contract is formed when the supplier accepts the Government's offer, either by written acceptance of the purchase order or substantial performance of the purchase order. The contracting officer may request that the contractor provide written acceptance of the order.

(c) *Method*. To promote competition to the maximum extent practicable—

(1) Normally, post RFQs in the Governmentwide Point of Entry (GPE). Use the Standard Form (SF) SF 1449, Solicitation/Contract/Order for Commercial Products and Commercial Services; or SF 18, Request for Quotations; or similar agency form or automated format. For acquisitions greater than the SAT, combine the presolicitation notice and the RFQ according to 12.202(b).

(2) For acquisitions at or below the SAT, the contracting officer may choose to solicit quotations directly from suppliers. When soliciting directly-

(i) Post a presolicitation notice in the GPE according to subpart 5.1, unless an exception in 5.101(b) applies;

(ii) Solicit quotations from at least three sources; and

(iii) Whenever practicable, solicit quotations from two sources not included in the previous solicitation.

(d) *Innovation*. In line with 1.102, Guiding principles for the System, agencies are encouraged to use additional innovative approaches to the maximum extent practicable when soliciting quotations and issuing purchase orders to—

(1) Reduce administrative costs and lead time;

(2) Improve opportunities for small business concerns;

(3) Promote efficiency and economy in contracting; and

(4) Avoid unnecessary burdens for agencies and contractors.

(e) *Other flexibilities*. The following are examples of flexibilities that may be leveraged when using simplified procedures:

(1) *Standing price quotation*. Instead of soliciting new quotations for each purchase (see 12.201-1(c)(2)), a contracting officer may rely upon standing price quotations, as long as the contracting officer validates before award that the pricing is current and reasonable.

(2) *Unpriced purchase order*. An unpriced purchase order is an order for supplies or services, the price of which is not established at the time of issuance of the order.

(i) An unpriced purchase order may be used only when it is impractical to obtain pricing in advance of issuance of the purchase order. Examples of such situations include:

(A) Repairs to equipment requiring disassembly to determine the nature and extent of repairs;

(B) Material available from only one source and for which cost cannot readily be established; or

(C) Supplies or services for which prices are known to be competitive, but exact prices are not known (*e.g.*, miscellaneous repair parts, maintenance agreements).

(ii) When issuing an unpriced purchase order, include-

(A) A realistic monetary limitation (either for each line item or for the total order) that is an obligation subject to adjustment once a firm price is established; and

(B) The following statement:

This is a firm order ONLY if your price does not exceed the maximum line item or total price in the Schedule. Submit invoices to the Contracting Officer. If you cannot perform in exact accordance with this order, Withhold Performance, and notify the Contracting Officer immediately, giving your quotation.

(iii) Follow up on each order to ensure timely pricing. Review the invoice price and, if the price is reasonable (see 12.204(a)), process the invoice for payment.

(3) *Blanket purchase agreement*. A blanket purchase agreement (BPA) is a method of filling anticipated repetitive needs for supplies or services by establishing "charge accounts" with qualified sources of supply. The Government is only obligated to the extent that authorized orders are placed under BPAs.

(i) BPAs may be established with-

(A) More than one supplier for supplies or services of the same type to provide maximum practicable competition; or

(B) A single firm from which numerous individual purchases at or below the simplified acquisition threshold will likely be made in a given period.

(ii) If, for a particular purchase greater than the micro-purchase threshold, there is an insufficient number of BPAs to ensure maximum practicable competition, the contracting officer shall-

(A) Solicit quotations from other sources and make the purchase as appropriate; and

(B) If practical, establish additional BPAs to facilitate future purchases if recurring requirements for the same or similar supplies or services seem likely and qualified sources are willing to accept BPAs.

(iii) The existence of a BPA does not justify soliciting from only one source or avoiding small business set-asides. The requirements in 12.102 and 12.103 apply to each order under the BPA.

(iv) The BPA must include-

(A) A statement that the supplier will furnish supplies or services, described in general terms, if and when requested by authorized individuals during a specified period and within a stipulated aggregate amount, if any.

(B) A statement that the Government is obligated only to the extent of authorized purchases actually made under the BPA.

(C) The dollar limitation for each individual purchase under the BPA, which may not exceed the threshold for use of simplified procedures at 12.201-1(a) (including the increased threshold at 12.001(c).

(D) A list of individuals authorized to place orders or make purchases under the BPA.

(E) Information that must be included in delivery or shipment documentation.

(F) Instructions for proper invoicing under the BPA (e.g., process for periodic billings).

(G) Any clauses that may be applicable to purchases under the BPA (see 12.205(b)).

(v) Review BPAs at least annually to ensure that authorized procedures are being followed. Maintain awareness of changes in market conditions, sources of supply, and other pertinent factors that may warrant making new agreements with different suppliers or modifying existing agreements.

12.201-2 Other procedures.

For acquisitions valued at greater than $9 million, use the procedures in this subpart in conjunction with the procedures in part 15 for requests for proposals (RFPs) or part 14 for invitations for bids (IFBs), as appropriate. Use of an RFP is the preferred method because it includes consideration of past performance when evaluating offers (see 12.203(a)(2)).

12.202 Publicizing.

(a) Publicize in accordance with part 5.

(b) To reduce the time required to solicit and award contracts for acquisitions valued over the SAT, combine the presolicitation notice and solicitation notice required by part 5.

(1) *Format*. Select the “Combined Synopsis/Solicitation” format in the GPE, and include the following information:

(i) In the “Description” section, include the following statements:

This is a combined synopsis/solicitation for commercial products or commercial services prepared in accordance with part 12. This announcement constitutes the only solicitation. Offers are being requested and a separate written solicitation will not be issued.

Solicitation number [insert solicitation number] is issued as a *[insert request for quotation (RFQ), request for proposal (RFP), or invitation for bid (IFB)]* for *[provide a brief description of the requirement]*.

This acquisition *[is/is not]* set-aside for small business concerns. This solicitation incorporates provisions and clauses by reference. The full text of provisions and clauses may be accessed electronically at www.acquisition.gov.

[If applicable, insert a statement regarding the Defense Priorities and Allocations System (DPAS) and assigned rating.]

(ii) A list of line-item number(s) and items, quantities, and units of measure (including option(s), if applicable).

(iii) Description of requirements for the items to be acquired, including documentation supporting any brand name descriptions (see 12.102).

(iv) Date(s) and place(s) of delivery and acceptance and f.o.b. point (see part 47).

(v) A list of solicitation provisions that apply to the acquisition (see 12.205(a)).

(vi) A list of contract clauses that apply to the acquisition (see 12.205(b)).

(vii) The date, time, and place for receipt of offer and point of contact.

(viii) Any other additional information required by 5.101(c).

(2) *Response times*. Set a response time that gives offerors a reasonable opportunity to respond, unless the acquisition is subject to the minimum time period for acquisitions covered by the World Trade Organization Government Procurement Agreement or a Free Trade Agreement (see subpart 5.2 and part 25).

12.203 Evaluation.

(a) Factors. For most acquisitions of commercial products or commercial services, evaluation factors need not be more detailed than technical (capability of the products or services offered to meet the agency's needs), price, and past performance.

(1) Technical. Evaluate technical based on how well the proposed products or services meet the Government's requirement. Predetermined subfactors are not required.

(2) Past performance. Past performance should be an important evaluation factor for award. Consider past performance information from a wide variety of sources both inside and outside the Government. This may include reviewing performance information reported to the Contractor Performance Assessment Reporting System, as well as other sources of information. For some commercial products or services, such as emerging technology, this should include consideration of commercial market experience. Contracting officers may consider an offeror's experience as a subcontractor.

(3) Price. Evaluate prices inclusive of transportation charges from the shipping point of the supplier to the delivery destination. Obtain prompt payment discounts to the maximum extent practicable, but do not include such discounts when evaluating the prices of quotations or offers.

(b) Basis for award. In the solicitation, notify potential quoters or offerors of the basis on which the agency will make the award decision. See 12.205(a)(2) on use of the solicitation provision at 52.212-2 for this purpose.

(c) Evaluation process. Ensure that quotations and offers can be evaluated in an efficient and minimally burdensome fashion.

(1) Timely quotations and offers. Consider all quotations or offers that are timely received. Exercise good business judgment in deciding whether or not to accept a quotation or offer received after the due date or time (see 52.212-1(c)).

(2) Quotations. The contracting officer has broad discretion in establishing how quotations will be evaluated. For example, the contracting officer may perform a comparative evaluation of quotations. The evaluation procedures are not subject to part 15 or 14. Contracting officers are not required to have evaluation plans, score quotations, or establish a competitive range before communicating with quoters or soliciting revised quotations.

(3) Offers. Follow the procedures in part 15 when evaluating proposals and the procedures in part 14 when opening bids. When using the procedures in part 15, do so in conjunction with the procedures in this section. Follow the procedures in part 36 when acquiring construction as a commercial service.

12.204 Award.

(a) *Price reasonableness*. The contracting officer must determine the price to be fair and reasonable. Whenever possible, base price reasonableness on competitive quotations or offers. For offers using the procedures in 12.201-2, see parts 15 and 14 for additional documentation requirements.

(b) *Documentation*.

(1) When using simplified procedures (see 12.201-1), include in the contract file a written description of the procedures used in awarding the contract and the number of quotations received.

(2) When using other procedures (see 12.201-2), document the award as required by part 15 or 14, as applicable.

(c) *Forms and format*. Agencies may use the following standard and optional forms or a similar agency form or automated format that conforms with the form to the maximum extent practicable.

(1) *Issuing purchase orders*. Issue purchase orders or blanket purchase agreement orders on the SF 1449 or the Optional Form (OF) 347, Order for Supplies or Services, and the OF 336, Continuation Sheet.

(2) *Awarding contracts*. Use the SF 1449 or the forms prescribed in part 14, 15, or 36, as applicable, when awarding contracts using the procedures in those parts. Use the Uniform Contract Format, but complete only those sections that are necessary.

12.205 Solicitation provisions and contract clauses.

(a) *Required provisions*.

(1) Include the provision at 52.212-1, Instructions to Offerors—Commercial Products and Commercial Services, in solicitations for commercial products and commercial services. This provision may be tailored to reflect customary commercial practice, except the paragraph on Debriefings, which is required by statute.

(2) Include the provision at 52.212-2, Evaluation—Commercial Products and Commercial Services, when using the procedures in 12.201-2. This provision may also be used when using the simplified procedures at 12.201-1. This provision should be tailored for the acquisition and must include all evaluation factors and criteria for award.

(3) Include the following provisions, if applicable based on the provision prescription:

Table 12-2 — Provisions to include as prescribed.

Number	Title	Source
52.203-11	Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions	Statute
52.203-18	Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements or Statements-Representation	Statute
52.204-7	System for Award Management—Registration	Statute
52.204-7 with Alt I	System for Award Management—Registration, with Alternate I	Statute
52.204-90	Offeror Identification	Statute
52.207-6	Solicitation of Offers from Small Business Concerns and Small Business Teaming Arrangements or Joint Ventures (Multiple-Award Contracts)	Statute
52.209-12	Certification Regarding Tax Matters	Statute
52.219-2	Equal Low Bids	Statute
52.222-18	Certification Regarding Knowledge of Child Labor for Listed End Products	E.O.
52.222-48	Exemption from Application of the Service Contract Labor Standards for Maintenance, Calibration, or Repair of Certain Equipment–Certification	Other
52.222-52	Exemption from Application of the Service Contract Labor Standards for Certain Services-Certification	Other

Number	Title	Source
52.222-56	Certification Regarding Trafficking in Persons Compliance Plan	Statute
52.223-4	Recovered Material Certification	Statute
52.225-2	Buy American Certificate	Statute
52.225-4	Buy American-Free Trade Agreements-Israeli Trade Act Certificate	Statute
52.225-6	Trade Agreements-Certificate	Statute
52.225-20	Prohibition on Conducting Restricted Business Operations in Sudan-Certification	Statute
52.225-25	Prohibition on Contracting with Entities Engaging in Certain Activities or Transactions Relating to Iran-Representation and Certifications	Statute
52.226-3	Disaster or Emergency Area Representation	Statute
52.229-11	Tax on Certain Foreign Procurements—Notice and Representation	Statute
52.240-90	Security Prohibitions and Exclusions Representations and Certifications	Statute

(4) The solicitation provision at 52.204-90 is used in lieu of the solicitation provision at 52.204-7 if the solicitation will not require offerors to be registered in the System for Award Management (see policy at 4.203-2). When 52.204-90 is used, also include the individual provisions listed in paragraph (c)(1) of 52.204-7, System for Award Management—Registration, in the solicitation as applicable based on the provision prescriptions (see 4.208(c)).

(b) *Required clauses*.

(1) Include the clause at 52.212-4, Terms and Conditions—Commercial Products and Commercial Services, in solicitations and contracts for commercial products and commercial services.

(i) Use the clause with its Alternate I when expecting to award a time-and-materials or labor-hour contract or when expecting that orders will include time-and-material line items.

(ii) This clause may be tailored to reflect customary commercial practice, with the exception of the following paragraphs that implement statute: Assignments, Disputes, Payment, Invoice, Compliance with laws unique to Government contracts, Unauthorized obligations, and Comptroller General examination of records.

(iii) Remove the paragraph on Comptroller General examination of records if the agency head has waived this requirement according to the procedures for waivers of right to examination of records in part 25.

(2) Include the clauses in the following table in solicitations and contracts, if applicable based on the clause prescription:

Table 12-3 — Clauses to include as prescribed.

Number	Title	Source
52.203-6 with Alt I	Restrictions on Subcontractor Sales to the Government	Statute
52.203-13	Contractor Code of Business Ethics and Conduct	Statute

Number	Title	Source
52.203-17	Contractor Employee Whistleblower Rights	Statute
52.203-19	Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements	Statute
52.204-9	Personal Identity Verification of Contractor Personnel	Other
52.204-13	System for Award Management—Maintenance	Statute
52.204-91	Contractor identification	Other
52.209-6	Protecting the Government's Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment	Statute
52.209-9	Updates of Publicly Available Information Regarding Responsibility Matters	Statute
52.209-10	Prohibition on Contracting with Inverted Domestic Corporations	Statute
52.219-4	Notice of Price Evaluation Preference for HUBZone Small Business Concerns	Statute
52.219-6	Notice of Total Small Business Set-Aside	Statute
52.219-6 with Alt I	Notice of Total Small Business Set-Aside, with Alternate I	Statute
52.219-8	Utilization of Small Business Concerns	Statute
52.219-9	Small Business Subcontracting Plan	Statute
52.219-9 with Alt I	Small Business Subcontracting Plan, with Alternate I	Statute
52.219-9 with Alt II	Small Business Subcontracting Plan, with Alternate II	Statute
52.219-9 with Alt III	Small Business Subcontracting Plan, with Alternate III	Statute
52.219-9 with Alt IV	Small Business Subcontracting Plan, with Alternate IV	Statute
52.219-14	Limitations on Subcontracting	Statute
52.219-16	Liquidated Damages—Subcontracting Plan	Statute
52.219-33	Nonmanufacturer Rule	Statute

Number	Title	Source
52.222-3	Convict Labor	EO
52.222-19	Child Labor—Cooperation with Authorities and Remedies	EO
52.222-35	Equal Opportunity for Veterans	Statute
52.222-35 with Alt I	Equal Opportunity for Veterans, with Alternate I	Statute
52.222-36	Equal Opportunity for Workers with Disabilities	Statute
52.222-36 with Alt I	Equal Opportunity for Workers with Disabilities, with Alternate I	Statute
52.222-37	Employment Reports on Veterans	Statute
52.222-40	Notification of Employee Rights Under the National Labor Relations Act	EO
52.222-41	Service Contract Labor Standards	Statute
52.222-42	Statement of Equivalent Rates for Federal Hires	Statute
52.222-43	Fair Labor Standards Act and Service Contract Labor Standards-Price Adjustment (Multiple Year and Option Contracts)	Statute
52.222-44	Fair Labor Standards Act and Service Contract Labor Standards-Price Adjustment	Statute
52.222-50	Combating Trafficking in Persons	Statute
52.222-50 with Alt I	Combating Trafficking in Persons, with its Alternate I	Statute
52.222-51	Exemption from Application of the Service Contract Labor Standards to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements	Other
52.222-53	Exemption from Application of the Service Contract Labor Standards to Contracts for Certain Services—Requirements	Other
52.222-54	Employment Eligibility Verification	EO
52.222-62	Paid Sick Leave Under Executive Order 13706	EO
52.222-90	Addressing DEI Discrimination by Federal Contractors	E.O.

Number	Title	Source
52.223-9	Estimate of Percentage of Recovered Material Content for EPA-Designated Items	Statute
52.223-9 with Alt I	Estimate of Percentage of Recovered Material Content for EPA-Designated Items, with Alternate I	Statute
52.223-11	Ozone-Depleting Substances and High Global Warming Potential Hydrofluorocarbons	Statute
52.223-12	Maintenance	Statute
52.223-20	Aerosols	Statute
52.223-21	Foams	Statute
52.223-23	Sustainable Products and Services	Statute
52.224-3	Privacy Training	Statute
52.224-3 with Alt I	Privacy Training, with Alternate I	Statute
52.225-1	Buy American-Supplies	Statute
52.225-1 with Alt I	Buy American-Supplies, with Alternate I	Statute
52.225-3	Buy American-Free Trade Agreements-Israeli Trade Act	Statute
52.225-3 with Alt II	Buy American-Free Trade Agreements-Israeli Trade Act, with Alternate II	Statute
52.225-3 with Alt III	Buy American-Free Trade Agreements-Israeli Trade Act, with Alternate III	Statute
52.225-3 with Alt IV	Buy American-Free Trade Agreements-Israeli Trade Act, with Alternate IV	Statute
52.225-5	Trade Agreements	Statute
52.225-19	Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States	Other
52.225-26	Contractors Performing Private Security Functions Outside the United States	Statute
52.226-4	Notice of Disaster or Emergency Area Set-Aside	Statute
52.226-5	Restrictions on Subcontracting Outside Disaster or Emergency Area	Statute

Number	Title	Source
52.226-8	Encouraging Contractor Policies to Ban Text Messaging While Driving	EO
52.229-12	Tax on Certain Foreign Procurements	Statute
52.232-29	Terms for Financing of Commercial Products and Commercial Services	Statute
52.232-30	Installment Payments of Commercial Products and Commercial Services	Statute
52.232-33	Payment by Electronic Funds Transfer —System for Award Management	Statute
52.232-34	Payment by Electronic Funds Transfer —Other than System for Award Management	Statute
52.232-36	Payment by Third Party	Statute
52.232-40	Providing Accelerated Payments to Small Business Subcontractors	Statute
52.232-9X	52.232-9X, Fast Payment Procedure	Statute
52.233-3	Protest After Award	Statute
52.233-4	Applicable Law for Breach of Contract Claim	Statute
52.240-91	Security Prohibitions and Exclusions	Statute
52.240-91 with Alt I	Security Prohibitions and Exclusions, with Alternate I	Statute
52.240-92	Security Requirements	Other
52.240-92 with Alt II	Security Requirements with Alternate II	Other
52.240-93	Basic Safeguarding of Covered Contractor Information Systems	Statute
52.244-6	Subcontracts for Commercial Products and Commercial Services	Statute
52.247-64	Preference for Privately Owned U.S.-Flag Commercial Vessels	Statute
52.247-64 with Alt I	Preference for Privately Owned U.S.-Flag Commercial Vessels, with Alternate I	Statute
52.247-64 with Alt II	Preference for Privately Owned U.S.-Flag Commercial Vessels, with Alternate II	Statute

(c) *Discretionary*. Include the following provisions and clauses, as needed:

Table 12-4 — Provisions and clauses to include as needed.

Part	Provisions and clauses prescribed for use…
16	In certain contract types (see 12.104)
17	When including options
27	When necessary to delineate rights in certain types of data (see 12.106)
36	In construction contracts
45	When the contractor will use Government property in performance of the contract

(d) *Waivers and deviations*.

(1) *Waivers*. Agencies may waive or tailor provisions and clauses authorized for use in acquisitions for commercial products or commercial services if—

(i) The provision or clause does not implement statute or Executive order;

(ii) The contracting officer determines the content to be inconsistent with customary commercial practice; and

(iii) (A) For individual acquisitions, the head of the contracting activity approves the waiver or tailoring; or

(B) For a class of acquisitions, the senior procurement executive approves the waiver or tailoring.

(2) *Deviations*.

(i) Do not include other provisions or clauses in solicitation or contract for commercial products or commercial services, unless the agency issues an individual or class deviation according to part 1.

(ii) A deviation is not required when an agency supplement to the FAR directs that the contracting officer include a provision or clause in acquisitions of commercial products or commercial services.

(3) *Notifications*. Provide copies of approved class waivers or tailoring or class deviations to the Chair of the Civilian Agency Acquisition Council (for civilian agencies) or the Director of the Defense Acquisition Regulations System (for defense departments and agencies).

Subpart 12.3 - Postaward

12.301 Notifications.

(a) *Posting requirements*.

(1) Comply with the award notice posting requirements in subpart 5.3.

(2) Make the justifications required by 12.102(b) for acquisitions valued over the SAT publicly available in accordance with 6.301.

(b) Explanations for unsuccessful quoters. When using the simplified procedures at 12.201-1, upon request, provide a brief explanation of the award decision that explains why the unsuccessful quoter was not selected. If an award notice was not required to be posted to the GPE, also provide the information that would be included in an award notice (see 5.301(c)).

(c) Notifications and debriefings of unsuccessful offerors. When using the procedures in 12.201-2, follow the procedures in part 15 or 14 for notification of unsuccessful offerors and debriefings, as appropriate. When providing a debriefing, include the information listed at 52.212-1(e).

12.302 Subcontracts.

See requirements for subcontracts for commercial products and commercial services in part 44.

12.303 Cancellations.

(a) The Government may withdraw, amend, or cancel purchase orders by written notice to the supplier at any time before acceptance of the order occurs (see 12.201-1(b)).

(b) If the supplier did not accept the purchase order in writing, request that the supplier provide written acceptance of the cancellation.

(c) If the contractor does not accept the cancellation or claims that costs were incurred as a result of the contractor beginning performance under the purchase order, follow the procedures at 12.304 to terminate the purchase order.

12.304 Terminations.

(a) General. Follow the procedures in this section and the termination paragraphs of the clause at 52.212-4, when terminating contracts for commercial products or commercial services. Do not use the procedures in part 49.

(b) *Termination for cause*.

(1) Before terminating a contract for cause, send a cure notice to the contractor, unless the reason for the termination is late delivery.

(2) When a termination for cause is appropriate, send the contractor a written notification regarding the termination. At a minimum, this notification must include—

(i) A statement that the contract is terminated for cause;

(ii) The reasons for the termination;

(iii) Which remedies the Government intends to seek or give a date by which the Government will inform the contractor of the remedy; and

(iv) A statement that the notice constitutes a final decision of the contracting officer, and that the contractor has the right to appeal under the Disputes clause.

(3) Follow the procedures in part 42 to report termination information to the Federal Awardee Performance and Integrity Information System.

(c) Termination for the Government’s convenience. When terminating for the Government’s convenience, the parties should mutually agree upon the requirements of the termination proposal. Balance the Government’s need to obtain sufficient documentation to support payment to the contractor against the goal of having a simple and expeditious settlement.

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Subpart 12.4 - Micro-purchases

12.401 General.

(a) Agency heads are encouraged to delegate micro-purchase authority (see part 1).

(b) Micro-purchases do not require written provisions or clauses. This paragraph takes precedence over any other FAR requirement to the contrary but does not prohibit the use of any clause.

(c) The security prohibitions and exclusions addressed at subpart 40.2 apply to micro-purchases, unless an exception applies or waiver is granted according to that subpart. However, the provisions and clauses in that subpart are not used for micro-purchases.

(d) Paragraph (s) , Unauthorized Obligations, of the clause at 52.212-4, Terms and Conditions—Commercial Products and Commercial Services, automatically applies to any micro-purchase, including those made with the Governmentwide commercial purchase card. This clause prevents violations of the Anti-Deficiency Act (31 U.S.C. 1341).

12.402 Purchase guidelines.

(a) To the extent practicable, distribute micro-purchases equitably among qualified suppliers.

(b) Micro-purchases may be awarded without soliciting competitive quotations if the contracting officer or individual appointed in accordance with 1.403-2(b) considers the price to be reasonable.

(c) The administrative cost of verifying the reasonableness of the price for purchases may more than offset potential savings from detecting instances of overpricing. Therefore, action to verify price reasonableness need only be taken if there is —

(1) A lack of understanding of competitive pricing; or

(2) Reason to suspect that a price is not reasonable.

(d) If the contracting officer solicited competitive quotations and made award to a supplier that did not provide the lowest quote, documentation of the award must include identification of the suppliers solicited and a brief explanation of the award decision.

12.403 Methods.

(a) Use the following methods as the primary means of making micro-purchases:

(1) *The Governmentwide commercial purchase card*. The Governmentwide commercial purchase card is authorized for use in making purchases of supplies, services, or construction. Contracting officers and other individuals designated according to part 1 may use the Governmentwide commercial purchase card. The card may be used only for purchases authorized by law or regulation.

(2) *Purchase orders*. Purchase orders (including orders against blanket purchase agreements) may be used to make micro-purchases. See 12.203(d)(1).

(b) The SF 44, Purchase Order-Invoice-Voucher, is a multipurpose pocket-size purchase order form designed primarily for on-the-spot, over-the-counter purchases of supplies and nonpersonal services while away from the purchasing office or at isolated activities. Contracting officers may use it in limited circumstances and only when advantageous to the Government if all of the following conditions are satisfied:

(1) An agency authorizes use of the SF 44.

(2) The amount of the purchase is at or below the micro-purchase threshold or higher dollar thresholds established by an agency for purchases made under unusual and compelling urgency or in support of contingency operations.

(3) The supplies or services are immediately available, and one delivery and one payment will be made.

(4) Its use is determined to be more economical and efficient than use of the Governmentwide commercial purchase card.

(c) Imprest funds and third-party drafts may be used to acquire supplies or services if an agency receives authorization from the Department of Treasury to use these methods and the purchases are made in accordance with Part IV of the Treasury Financial Manual for Guidance of Departments and Agencies. An imprest fund transaction shall not exceed $500 or such other limits as have been approved by the agency head. A third-party draft transaction shall not exceed $2,500, unless authorized at a higher level in accordance with Treasury restrictions.

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PART 13 - SIMPLIFIED PROCEDURES FOR NONCOMMERCIAL ACQUISITIONS

Sec.

13.000 Scope of part.
13.001 Applicability.

Subpart 13.1 - Presolicitation

13.101 Competition.
13.102 Small business.
13.103 Quality assurance

Subpart 13.2 - Solicitation, Evaluation, and Award

13.201 Procedures.
13.202 Evaluation.
13.203 Award.
13.204 Contract clauses.

Subpart 13.3 - Postaward

13.301 Notifications.
13.302 Cancellations and terminations.
13.303 Contract financing and payments.

Subpart 13.4 - Micro-purchases

13.401 General.

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13.000 Scope of part.

This part implements simplified procedures for the acquisition of noncommercial products and services valued at or below the simplified acquisition threshold (SAT) in accordance with 41 U.S.C. 1901-1903, 1905, and 3305.

13.001 Applicability.

(a) The procedures in this part may be used only if—

(1) There are no commercial products or commercial services that can satisfy the agency's needs (see part 12); and

(2) The supplies or services are not available from a required source (see part 8).

(b) Follow the procedures in this part when procuring noncommercial products and services valued at greater than the micro-purchase threshold (MPT) but at or below the SAT, except

(1) When procuring architect-engineering services, follow the short selection process at 36.602-5;

(2) When procuring construction as a noncommercial service, comply with the requirements in part 36 for construction contracts and subpart 22.4 on labor standards for contracts involving construction; and

(3) When procuring research and development, use the procedures in this part in conjunction with the procedures in part 35, as appropriate.

(c) Do not divide requirements, the aggregate value of which exceeds the SAT, merely to permit use of the procedures in this part.

(d) Go to https://www.acquisition.gov/inapplicablelaws for the lists of laws that do not apply to acquisitions valued at or below the SAT (41 U.S.C. 1905).

Subpart 13.1 - Presolicitation

13.101 Competition.

(a) Agencies must promote competition to the maximum extent practicable when procuring noncommercial products and services valued at or below the SAT.

(b) Contracting officers may solicit from a single source based on a determination and findings (see subpart 1.5) that only one source is reasonably available (e.g., urgency, exclusive licensing agreements, brand-name or industrial mobilization).

13.102 Small business.

Acquisitions of supplies or services that have an anticipated dollar value above the MPT, but at or below the SAT, must be set aside for small business concerns (see part 19).

13.103 Quality assurance

Generally, inspection and acceptance should be at destination. Inspection at the supplier's location should be specified only if required by 46.404.

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Subpart 13.2 - Solicitation, Evaluation, and Award

13.201 Procedures.

Follow the simplified procedures at 12.201-1 for issuing requests for quotations (RFQs). Agencies are encouraged to use additional innovative approaches and may leverage the other flexibilities identified in that section; however, if using blanket purchase agreements (BPAs), the maximum value of each individual purchase under a BPA may not exceed the SAT.

13.202 Evaluation.

Follow the procedures in 12.203 when establishing evaluation factors and a process to evaluate quotations in an efficient and minimally burdensome manner. Notify potential quoters of the basis on which the agency will make the award decision. Exercise good business judgment in deciding whether or not to accept a quotation received after the due date or time.

13.203 Award.

(a) *Price reasonableness*. The contracting officer must determine the price to be fair and reasonable. Whenever possible, base price reasonableness on competitive quotations.

(b) *Documentation*. Include in the contract file a written description of the procedures used in awarding the purchase order and the number of quotations received.

(c) *Forms and format*. Use the Optional Form (OF) 347, Order for Supplies or Services; the OF 336, Continuation Sheet, or OF 348, Order for Supplies and Services Schedule—Continuation; or similar agency forms or automated formats to the maximum extent practicable.

13.204 Contract clauses.

(a) Include clauses prescribed elsewhere in the FAR in purchase orders for noncommercial supplies or services valued at or below the SAT as required or applicable based on the clause prescriptions.

(b) Contracting officers may use the clause at 52.213-4, Terms and Conditions—Simplified Acquisitions (Noncommercial), to provide a streamlined set of terms and conditions for inspection/acceptance, excusable delays, terminations, and warranties. This clause is either used in lieu of similar clauses prescribed for these purposes or tailored to incorporate only some of the streamlined terms and conditions, as necessary.

(c) Do not use part 12 clauses (*i.e.*, 52.212-1, 52.212-2, or 52.212-4) in noncommercial acquisitions.

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Subpart 13.3 - Postaward

13.301 Notifications.

Comply with the award notice posting requirements in subpart 5.3. Upon request, provide a brief explanation of the award decision that explains why the unsuccessful quoter was not selected. If an award notice was not required to be posted to the Government point of entry, also provide the information that would be included in an award notice (see 5.301(c)).

13.302 Cancellations and terminations.

(a) The Government may withdraw, amend, or cancel purchase orders by written notice to the supplier at any time before acceptance of the order occurs (see 12.201-1(b)).

(b) If the supplier did not accept the purchase order in writing, request that the supplier provide written acceptance of the cancellation.

(c) If the contractor does not accept the cancellation or claims that costs were incurred as a result of the contractor beginning performance under the purchase order, follow the procedures in part 49 or 52.213-4 to terminate the purchase order.

13.303 Contract financing and payments.

(a) Unless agency regulations permit otherwise, do not provide financing for purchases valued at or below the SAT.

(b) See part 32 for payment procedures, including the option to use fast payment procedures.

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Subpart 13.4 - Micro-purchases

13.401 General.

(a) Follow the procedure in 12.4 when making purchases valued at or below the MPT.

(b) While micro-purchases do not require written provision or clauses, the clause at 52.232-39, Unenforceability of Unauthorized Obligations, automatically applies to any micro-purchase, including those made with the Governmentwide commercial purchase card. This clause prevents violations of the Anti-Deficiency Act (31 U.S.C. 1341).

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PART 14 - SEALED BIDDING

Sec.

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Subpart 14.2 - Presolicitation

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14.202 Uniform contract format.
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14.202-2 Part II Contract clauses.
14.202-3 Part III Documents, exhibits, and other attachments.
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14.203 Requirements.
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14.307 Award.
14.308 Award of equal low bids.
14.309 Information to bidders.
14.309-1 Award of unclassified contracts.
14.309-2 Award of classified contracts.

Subpart 14.4 - Postaward.

14.401 Mistakes after award.
14.402 Pricing modifications.

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14.000 Scope of part.

This part prescribes (a) the basic requirements of contracting for supplies and services (including construction) by sealed bidding, (b) the information to be included in the invitation for bids (IFB), (c) procedures concerning the submission of bids, (d) requirements for opening, evaluating bids, awarding contracts, and (e) procedures for two-step sealed bidding.

Subpart 14.1 - General

(a) Sealed bidding is a method of contracting that employs competitive bids, public opening of bids, and awards.

(b) Use sealed bidding whenever the conditions in 6.101(b) are met.

(c) The contracting officer must use firm-fixed-price contracts when using sealed bidding or fixed-price contracts with economic price adjustment clauses when some flexibility is necessary and feasible.

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Subpart 14.2 - Presolicitation

14.201 Preparation of invitations for bids.

14.201-1 Format.

(a) Contracting officers must prepare invitation for bids and contracts using parts I, II, III, and IV of the uniform contract format (see part 15) to the maximum practicable extent.

(b) The uniform contract format is not required when contracting for—

(1) Construction (see part 36);

(2) Shipbuilding (including design, construction, and conversion), ship overhaul, and ship repair;

(3) Subsistence items;

(4) Supplies or services requiring special contract forms prescribed elsewhere in this regulation that are inconsistent with the uniform contract format; or

(5) Firm-fixed-price or fixed-price with economic price adjustment acquisitions that use the simplified contract format.

(c) (1) The contracting officer may use the simplified contract format in lieu of the uniform contract format.

(2) The contracting officer has flexibility in preparation and organization of the simplified contract format. The following format should be used to the maximum extent practical:

(i) Use Standard Form (SF) 1447, Solicitation/Contract, as the first page of the IFB.

(ii) Include the following for each line item:

(A) Line item number.

(B) Description of supplies or services, or data sufficient to identify the requirement.

(C) Quantity and unit of issue.

(D) Unit price and amount.

(E) Packaging and marking requirements.

(F) Inspection and acceptance, quality assurance, and reliability requirements.

(G) Place of delivery, performance and delivery dates, period of performance, and f.o.b. point.

(H) Other item-peculiar information as necessary (e.g., individual fund citations).

(iii) Include the clauses required by this regulation. Additional clauses must be incorporated only when necessary to the particular acquisition.

(iv) List of documents and attachments (include if necessary).

(v) Representations and instructions:

(A) Insert the IFB provisions that require representations, certifications, or the submission of other information by offerors.

(B) Insert the IFB provisions required by 14.207. Include any other information/instructions necessary to guide offerors.

(C) Insert all price related evaluation factors and any significant price related subfactors for award.

(D) Upon award, the contracting officer must retain the representations and instructions in the contract file.

14.202 Uniform contract format.

14.202-1 Part I Schedule.

The contracting officer must prepare the Schedule as follows:

(a) *Section A, Solicitation/contract form*. (1) For sealed bidding the SF 33 or the SF 1447 may be used. When the SF 1447 is used as the IFB document, insert the information in subdivisions (a)(2)(i) and (a)(2)(iv) of this section in block 9 of the SF 1447.

(2) If the SF 33 or the SF 1447 are not used, include the following on the first page of the invitation for bids:

(i) Name, address, and location of issuing activity, including room and building where bids must be submitted.

(ii) Invitation for bids number.

(iii) Date of issuance.

(iv) Time specified for receipt of bids.

(v) Number of pages.

(vi) Requisition or other purchase authority.

(vii) Requirement for a bidder to provide its name and complete address, including street, city, county, State, and ZIP code.

(viii) A statement that bidders should include in the bid the address to which payment should be mailed, if that address is different from that of the bidder.

(b) *Section B, Supplies or services and prices*.

(1) See 15.108-1(b)

(2) Optional Form 336 (OF 336), Continuation Sheet, may be used.

(c) Section C, Description/specifications. (see 15.108-1(c)).

(d) Section D, Packaging and marking (see 15.108-1(d)).

(e) Section E, Inspection and acceptance (see 15.108-1(e)).

(f) Section F, Deliveries or performance (see 15.108-1(f)).

(g) Section G, Contract administration data (see 15.108-1(g)).

(h) Section H, Special contract requirements (see 15.108-1(h)).

14.202-2 Part II Contract clauses.

Section I, Contract clauses (see 15.108-2).

14.202-3 Part III Documents, exhibits, and other attachments.

Section J, List of documents, exhibits, and other attachments (see 15.108-3).

14.202-4 Part IV Representations and instructions.

The contracting officer must prepare the representations and instructions as follows:

(a) Section K, Representations, certifications, and other statements of bidders (see 15.108-4(a)).

(b) Section L, Instructions, conditions, and notices to bidders (see 15.108-4(b)). The contracting officer must include the time and place for bid openings.

(c) Section M, Evaluation factors for award (see 15.108-4(c)).

14.203 Requirements.

(a) An IFB must clearly, accurately, and completely describe the Government requirements.

(b) Restrictive specifications or requirements that might unduly limit the number of bidders are prohibited.

(c) Include all documents and information (whether attached or incorporated by reference) prospective bidders will need for the purpose of bidding.

(d) The contracting officer must state in the invitation for bids that bids will be evaluated without discussions (see 52.214-10 and, for construction contracts, 52.214-19).

(e) When considering establishing qualification requirements, see and follow subpart 9.2.

14.204 Economic purchase quantities (supplies).

Contracting officers must comply with the economic purchase quantity planning requirements for supplies in part 7. See part 7 for instructions regarding use of the provision at 52.207-4, Economic Purchase Quantity—Supplies, and for guidance on handling responses to that provision.

14.205 Bid samples.

(a) The contracting officer must not require bidders to furnish bid samples unless—

(1) Characteristics of the product cannot be described adequately in the specification or purchase description;

(2) Necessary to determine the responsiveness of the bid. Do not use samples to determine a bidder's ability to produce the required items; and

(3) Products must be suitable from the standpoint of balance, facility of use, general “feel”, color, pattern, or other characteristics that cannot be described adequately in the specification.

(b) If the contracting officer requires bid samples, the IFB must state—

(1) The number and, if appropriate, size, and description of the bid samples required; and

(2) List all the characteristics for which the bid samples will be examined.

(c) (1) Contracting officers may waive bid sample requirements when a bidder offers a product previously or currently contracted for or tested by the Government and found to comply with specification requirements conforming in every material respect with those in the current invitation for bids. (See 14.207(j)(2)).

(2) Where samples required by a Federal, Military, or other formal specification are not considered necessary and a waiver of the sample requirements of the specification is, include a statement in the invitation that notwithstanding the requirements of the specification, samples are not required.

(d) Bid samples furnished with a bid that are not required by the invitation generally will not be considered as qualifying the bid and will be disregarded. However, the bid sample will not be disregarded if it is clear from the bid or accompanying papers that the bidder's intention was to qualify the bid. If the qualification does not conform to the IFB, see 14.306-3(d).

(e) (1) Return samples that are not destroyed in testing to bidders at their request and expense, unless otherwise specified in the invitation.

(2) Request disposition instructions from bidders.

(3) Samples are ordinarily returned collect to the address from which received if disposition instructions are not received within 30 days. Small items may be returned by mail, postage prepaid.

(4) Transmit samples that are intended for inspection purposes in connection with deliveries to the inspecting activity concerned, with instructions to retain the sample until completion of the contract or until disposition instructions are furnished.

(5) Where samples are consumed or their usefulness is impaired by tests, dispose as scrap unless the bidder requests their return.

14.206 Descriptive literature.

(a) Contracting officers must not require bidders to furnish descriptive literature unless it is needed before award to determine whether the products offered meet the specification and to establish exactly what the bidder proposes to furnish.

(b) The contracting officer must document in the contract file the justification why product acceptability cannot be determined without the submission of descriptive literature, except when the contract specifications require submission.

(c) (1) If the invitation will require descriptive literature, the IFB must clearly state—

(i) What descriptive literature the bidders must furnish;

(ii) The purpose for requiring the literature;

(iii) The extent of its consideration in the evaluation of bids; and

(iv) The rules that will apply if a bidder fails to furnish the literature before bid opening or if the literature provided does not comply with the requirements of the invitation.

(2) If bidders must furnish descriptive literature, see 14.207(k).

(d) (1) The contracting officer may waive the requirement for descriptive literature if—

(i) The bidder states in the bid that the product being offered is the same as a product previously or currently being furnished to the contracting activity; and

(ii) The contracting officer determines that the product offered complies with the specification requirements of the current invitation for bids. When the contracting officer waives the requirement, see 14.207(k)(2).

(2) When descriptive literature is not necessary and a waiver of literature requirements of a specification has been authorized, the contracting officer must include a statement in the invitation that, despite the requirements of the specifications, descriptive literature is not required.

(3) If the IFB provides for a waiver, a bidder may submit a bid on the basis of either the descriptive literature furnished with the bid or a previously furnished product. If the bid is submitted on one basis, the bidder may not have it considered on the other basis after bids are opened.

(e) If descriptive literature is furnished when it is not required by the invitation for bids, follow the procedures at 14.205(d).

14.207 Solicitation Provisions.

(a) The provisions prescribed in this section apply to preparation and submission of bids in general. See other FAR parts for provisions and clauses related to specific acquisition requirements.

(b) Insert in all invitations for bids the provisions at—

(1) 52.214-3, Amendments to Invitations for Bids; and

(2) 52.214-4, False Statements in Bids.

(3) 52.214-5, Submission of Bids.

(4) 52.214-6, Explanation to Prospective Bidders.

(5) 52.214-7, Late Submissions, Modifications, and Withdrawals of Bids.

(c) Insert in all invitations for bids, except those for construction, the provision at 52.214-10, Contract Award-Sealed Bidding.

(d) Insert in invitations for bids to which the uniform contract format applies, the provision at 52.214-12, Preparation of Bids.

(e) Insert the provision at 52.214-14, Place of Performance—Sealed Bidding, in invitations for bids except those in which the place of performance is specified by the Government.

(f) Insert the provision at 52.214-15, Period for Acceptance of Bids, in invitations for bids (IFB's) that are not issued on SF 33 or SF 1447 except IFB's—

(1) For construction work or

(2) In which the Government specifies a minimum acceptance period.

(g) Insert the provision at 52.214-16, Minimum Bid Acceptance Period, in invitations for bids, except for construction, if the contracting officer determines that a minimum acceptance period must be specified.

(h) Insert the provision at 52.214-18, Preparation of Bids—Construction, in invitations for bids for construction work.

(i) Insert the provision at 52.214-19, Contract Award—Sealed Bidding—Construction, in all invitations for bids for construction work.

(j) (1) Insert the provision at 52.214-20, Bid Samples, in invitations for bids if bid samples are required.

(2) If it appears that the conditions in 14.205(c)(1) will apply and the contracting officer anticipates granting waivers and—

(i) If the nature of the required product does not necessitate limiting the grant of a waiver to a product produced at the same plant in which the product previously acquired or tested was produced, use the provision with its Alternate I; or

(ii) If the nature of the required product necessitates limiting the grant of a waiver to a product produced at the same plant in which the product previously acquired or tested was produced, use the provision with its Alternate II.

(3) See 14.205(c)(2) regarding waiving the requirement for all bidders.

(k) (1) Insert the provision at 52.214-21, Descriptive Literature, in invitations for bids if—

(i) Descriptive literature is required to evaluate the technical acceptability of an offered product and

(ii) The required information will not be readily available unless it is submitted by bidders.

(2) Use the basic clause with its Alternate I if the possibility exists that the contracting officer may waive the requirement for furnishing descriptive literature for a bidder offering a previously supplied product that meets specification requirements of the current IFB.

(3) See 14.206(d)(2) regarding waiving the requirement for all bidders.

(l) Insert the provision at 52.214-22, Evaluation of Bids for Multiple Awards, in invitations for bids if the contracting officer determines that multiple awards might be made if doing so is economically advantageous to the Government.

(m) Insert the provision at 52.214-23, Late Submissions, Modifications, Revisions, and Withdrawals of Technical Proposals under Two-Step Sealed Bidding, in solicitations for technical proposals in step one of two-step sealed bidding.

(n) Insert the provision at 52.214-24, Multiple Technical Proposals, in solicitations for technical proposals in step one of two-step sealed bidding if the contracting officer permits the submission of multiple technical proposals.

(o) Insert the provision at 52.214-25, Step Two of Two-Step Sealed Bidding, in invitations for bids issued under step two of two-step sealed bidding.

(p) Insert the provision at 52.214-34, Submission of Offers in the English Language, in solicitations that include any of the clauses prescribed in part 25. It may be included in other solicitations when the contracting officer decides that it is necessary.

(q) Insert the provision at 52.214-35, Submission of Offers in U.S. Currency, in solicitations that include any of the clauses prescribed in part 25, unless the contracting officer includes the clause at 52.225-17, Evaluation of Foreign Currency Offers, as prescribed in part 25. It may be included in other solicitations when the contracting officer decides that it is necessary.

14.208 Contract clauses.

(a) Insert the clause at 52.214-26, Audit and Records-Sealed Bidding, in solicitations and contracts if the contract amount is expected to exceed the threshold at part 15 for submission of certified cost or pricing data.

(b) (1) Insert the clause at 52.214-27, Price Reduction for Defective Certified Cost or Pricing Data—Modifications—Sealed Bidding, in solicitations and contracts if the contract amount is expected to exceed the threshold for submission of certified cost or pricing data at part 15.

(2) In exceptional cases, the head of the contracting activity may waive the requirement for inclusion of the clause in a contract with a foreign government or agency of that government. The authorizations for the waiver and the reasons for granting it must be in writing.

(c) Insert the clause at 52.214-28, Subcontractor Certified Cost or Pricing Data—Modifications—Sealed Bidding, in solicitations and contracts if the contract amount is expected to exceed the threshold for submission of certified cost or pricing data at part 15; or

(1) Upon request of a contractor in connection with a prime contract entered into before July 1, 2018, the contracting officer must modify the contract without requiring consideration to replace clause 52.214-28, Subcontractor Certified Cost or Pricing Data—Modifications—Sealed Bidding, with its Alternate I.

(2) In exceptional cases, the head of the contracting activity may waive the requirement for inclusion of the clause in a contract with a foreign government or agency of that government. The authorizations for the waiver and the reasons for granting it must be in writing.

(d) Insert the clause at 52.214-29, Order of Precedence—Sealed Bidding, in solicitations and contracts to which the uniform contract format applies.

14.209 Soliciting bids.

(a) See subpart 5.1 for presolicitation notices.

(b) See subpart 5.2 for publicizing the IFB.

(c) The contracting officer must specify in the IFB whether bids will be accepted by paper submission, or electronic transmission method, or both.

(d) If the IFB has been issued and it becomes necessary to make changes in quantity, specifications, delivery schedules, opening dates, etc., or to make a correction, such changes must be accomplished by amendment of the IFB using Standard Form 30, Amendment of Solicitation/ Modification of Contract. Amendments must—

(1) Be issued before the time set for bid opening;

(2) If determined necessary by the contracting officer, consider the amount of time remaining until bid opening and the need for an extension to the bid opening date;

(3) Be published in the GPE, if the IFB was published in the GPE, as a solicitation amendment;

(4) If applicable, be displayed in the bid room;

(5) Provide all prospective bidders equal access to the amendment providing the information necessary to submit bids; and

(6) Require acknowledgment of each amendment within each bidder's bid.

(e) When electronic bids are specified, the contracting officer must include in the IFB the acceptable methods and the necessary information that allows bidders to submit bids that are compatible with Government systems.

(f) When a contracting office is located in the United States, any IFB sent to a prospective bidder located outside the United States must be sent by electronic data interchange or air mail if security classification permits.

(g) (1) The master IFB is provided to potential sources who are requested to retain it for continued and repetitive use.

(2) Subsequent individual IFB must reference the date of the current master IFB and identify any changes.

(3) When using a master IFB the contracting officer must—

(i) Make available copies of the master IFB on request; and

(ii) Provide the cognizant contract administration activity a current copy of the master IFB.

(h) Retain records of invitations for bids and records of bids as a record of each invitation a contracting office issues and each abstract or record of bids. The file for each invitation must show the—

(1) Distribution that was made;

(2) Date the invitation was issued; and

(3) Names and addresses of prospective bidders who requested the invitation and were not included on the original IFB list must be added to the list and made a part of the record.

(i) See 15.101 and 15.201 for policy on the release of acquisition information before and after the issuance of the IFB.

(j) An IFB may be cancelled by the contracting officer when clearly in the public interest; e.g.,

(1) Where there is no longer a requirement for the supplies or services; or

(2) Where amendments to the IFB would be of such magnitude that a new IFB is desirable.

(k) If an IFB is cancelled prior to the date and time specified in 14.301, the contracting officer must—

(1) Identify the IFB number and short title or subject matter;

(2) Briefly explain the reason for the cancellation; and

(3) Where appropriate, assure prospective bidders that they will be given an opportunity to bid on any resolicitation of bids or any future requirements for the type of supplies or services involved. Cancellations must be recorded in accordance with 14.303(g).

14.210 Submission of Bids.

(a) Allow prospective bidders a reasonable time to prepare and submit bids in response to all invitations, consistent with the needs of the Government.

(b) Provide at least 30 calendar days when a synopsis is required (see subpart 5.1).

(c) Require bidders to submit sealed bids to be opened publicly at the time and place stated in the IFB.

14.211 Two-step sealed bidding.

14.211-1 General.

Two-step sealed bidding is a combination of competitive procedures designed to obtain the benefits of sealed bidding when adequate specifications are not available. An objective is to permit the development of a sufficiently descriptive and not unduly restrictive statement of the Government's requirements, including an adequate technical data package, so that subsequent acquisitions may use conventional sealed bidding methods. This two-step method is especially useful in acquisitions requiring technical proposals, particularly those for complex items.

(a) Step one consists of the request for submission of technical proposals, evaluation, and (if necessary) discussion of a technical proposal. No pricing is submitted with step one. The objective is to determine the acceptability of the supplies or services offered. As used in this context, the word technical has a broad connotation and includes, among other things, the engineering approach, special manufacturing processes, and special testing techniques. It is the proper step for clarification of questions relating to technical requirements. Conformity to the technical requirements is resolved in this step, but not responsibility as defined in 9.

(b) Step two involves the submission of sealed priced bids by those who submitted acceptable technical proposals in step one. Bids submitted in step two are evaluated and the awards made in accordance with subpart 14.3.

14.211-2 Conditions for use.

(a) Unless other factors require the use of sealed bidding, the contracting officer may use two-step sealed bidding rather than negotiation when all of the following conditions are present:

(1) Available specifications or purchase descriptions are not definite or complete or may be too restrictive without technical evaluation, and any necessary discussion, of the technical aspects of the requirement to ensure mutual understanding between each source and the Government.

(2) Definite criteria exist for evaluating technical proposals.

(3) More than one technically qualified source is expected to be available.

(4) There is sufficient time to use the two-step method.

(5) The contracting officer intends to award a firm-fixed-price contract or a fixed-price contract with economic price adjustment.

(b) None of the following precludes the use of two-step sealed bidding:

(1) Multi-year contracting.

(2) Government property to be made available to the successful bidder.

(3) A total small business set-aside (see part 19).

(4) The use of a set-aside or price evaluation preference for HUBZone small business concerns (see part 19).

(5) The use of a set-aside for service-disabled veteran-owned small business concerns (see part 19).

(6) The use of a set-aside for economically disadvantaged women-owned small business concerns and women-owned small business concerns eligible under the Women-Owned Small Business Program (see part 19).

(7) A first or subsequent production quantity is being acquired under a performance specification.

14.211-3 Procedures.

(a) *Step one*.

(1) Synopsize requests for technical proposals in accordance with Part 5. The request must include, as a minimum, the following:

(i) A description of the supplies or services required.

(ii) A statement of intent to use the two-step method.

(iii) The requirements of the technical proposal.

(iv) The evaluation criteria, to include all factors and any significant subfactors.

(v) A statement that the technical proposals must not include prices or pricing information.

(vi) The date, or date and hour, by which the technical proposal must be received (see 14.210).

(vii) A statement that, in the second step—

(A) The contracting officer will consider awards based upon bids that have acceptable technical proposals, either initially or as a result of discussions; and

(B) Each technical proposal must be based on the bidder's own technical proposals.

(viii) A statement that—

(A) Bidders should submit technical proposals that are acceptable without additional explanation or information;

(B) The Government may make a final determination regarding a technical proposal's acceptability solely on the basis as submitted; and

(C) The Government may proceed with the second step without requesting further information from any bidder; however, the Government may request additional information from bidders of bids that it considers reasonably susceptible of being made acceptable and may discuss bids with their bidders.

(ix) A statement that a notice of unacceptability will be forwarded to the bidder upon completion of the technical proposal evaluation and final determination of unacceptability.

(x) A statement either that each bidder may only submit one technical proposal or, if authorized, multiple technical proposals. When specifications permit different technical approaches, it is generally in the Government's interest to authorize multiple technical proposals. If multiple technical proposals are authorized, see 14.207(n).

(2) Include information on delivery or performance requirements that may assist bidders in determining whether or not to submit a technical proposal. Indicate that the information is not binding on the Government and that the invitation issued under step two will include actual delivery or performance requirements.

(3) Upon receipt, the contracting officer must—

(i) Safeguard technical proposals against disclosure to unauthorized persons;

(ii) Accept and handle data marked in accordance with part 15 and 27; and

(iii) Remove any reference to price or cost.

(4) The contracting officer must establish a time period for evaluating technical proposals. The period may vary with the complexity and number of technical proposals involved. However, the evaluation should be completed quickly.

(5) (i) Base evaluations on the criteria in the request for proposals but not consideration of responsibility as defined in part 9. Categorize technical proposals as—

(A) Acceptable;

(B) Reasonably susceptible of being made acceptable; or

(C) Unacceptable.

(ii) Categorize any proposal that modifies, or fails to conform to the essential requirements or specifications of, the request for technical proposals as unacceptable.

(6) (i) The contracting officer may proceed directly with step two if there are sufficient acceptable proposals to ensure adequate price competition under step two, and if further time, effort and delay to make additional technical proposals acceptable and thereby increase competition would not be in Government's interest. If this is not the case, the contracting officer must request bidders whose technical proposals may be made acceptable to submit additional clarifying or supplementing information. The contracting officer must identify the nature of the deficiencies in the technical proposal or the nature of the additional information required. The contracting officer may also arrange discussions for this purpose. Do not discuss a technical proposal with any bidder other than the submitter.

(ii) When requesting additional information, the contracting officer must establish an appropriate time for bidders to conclude discussions, if any, submit all additional information, and incorporate such additional information as part of their technical proposals. The contracting officer may extend the due date for such submissions at their discretion. If the additional information is incorporated into a technical proposal within the established time, and the contracting officer determines that the technical proposal is acceptable, the contracting officer will update its category to acceptable.

(7) When a technical proposal is found unacceptable (either initially or after clarification), the contracting officer must promptly notify the bidder of the basis of the determination and that a revision of the technical proposal will not be considered. Upon written request, the contracting officer must debrief unsuccessful bidders (see part 15).

(8) Late technical proposals are governed by part 15.

(9) If it is necessary to discontinue two-step sealed bidding, the contracting officer must include a statement of the facts and circumstances in the contract file. The contracting officer must notify each bidder in writing. When step one results in no acceptable technical proposals or only one acceptable technical proposal, the acquisition may be continued by negotiation.

(b) *Step two.*

(1) Follow sealed bidding procedures except that invitations for bids in step two must—

(i) Be issued only to those bidders that submitted acceptable technical proposals in step one;

(ii) Include the provision prescribed in 14.207(o);

(iii) Clearly state that the bidder must comply with the specifications and the bidder's technical proposal; and

(iv) Not be synopsized through the Governmentwide point of entry (GPE) as an acquisition opportunity nor publicly posted.

(2) List the names of firms that submitted acceptable proposals in step one through the GPE for the benefit of prospective subcontractors (see 5.201).

Subpart 14.3 - Evaluation and award

14.301 Submission, modification, or withdrawal of bids.

(a) Bidders are responsible for submitting bids, and any modifications or withdrawals not later than the exact time set for opening of bids. If no time is specified in the IFB, the time for receipt is 4:30 p.m., local time, for the designated Government office on the date that bids are due.

(b) Bids may be modified or withdrawn by any method authorized by the IFB.

(c) The receiving official receiving a paper bid submission, modification or withdrawal must—

(1) Write on the envelope—

(i) The date and time of receipt and by whom; and

(ii) The invitation for bid number; and

(2) Sign the envelope.

(3) Not disclose bid information before the time set for bid opening. See part 3 for requirements for protecting information including access to and disclosure thereof.

(d) A bidder or its authorized representative may withdraw a paper bid submission in person if, before the exact time set for opening of bids, the identity of the persons requesting withdrawal is established and that person signs a receipt for the bid.

(e) A bidder may withdraw an electronically submitted bid if notice is received in the office designated in the IFB not later than the exact time set for opening of bids. Upon withdrawal of an electronically transmitted bid, the data received must not be viewed and, to the maximum extent practical, must be purged from primary and backup data storage systems.

(f) (1) Any bid, modification, or withdrawal of a bid received at the Government office designated in the IFB after the exact time specified for receipt of bids is “late” and will not be considered unless—

(i) It is received before award is made; and

(ii) The contracting officer determines that accepting the late bid would not unduly delay the acquisition; and—

(A) If it was transmitted through an electronic commerce method authorized by the IFB, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of bids; or

(B) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of bids and was under the Government's control prior to the time set for receipt of bids.

(2) The contracting officer will consider and may accept, a late modification of an otherwise successful bid, that makes its terms more favorable to the Government, at any time it is received.

(g) Acceptable evidence to establish the time of receipt at the Government installation includes the time/date stamp of that installation on the bid wrapper, other documentary evidence of receipt maintained by the installation, or oral testimony or statements of Government personnel.

(h) If an emergency or unanticipated event interrupts normal Government processes so that bids cannot be received at the Government office designated for receipt of bids by the exact time specified in the IFB, and urgent Government requirements preclude amendment of the bid opening date, the time specified for receipt of bids will be deemed to be extended to the same time of day specified in the IFB on the first work day on which normal Government processes resume.

(i) The contracting officer must promptly notify any bidder if its bid, modification, or withdrawal was received late, and must inform the bidder whether its bid will be considered, unless contract award is imminent, and the notices prescribed in 14.309 would suffice.

(j) Late bids and modifications that are not considered must be held unopened, unless opened for identification, until after award and then retained with other unsuccessful bids. However, any bid bond or guarantee must be returned.

(k) If available, the following must be included in the contract files for each late bid, modification, or withdrawal:

(1) The date and hour of receipt.

(2) A statement, with supporting rationale, regarding whether the bid was considered for award.

(3) The envelope, wrapper, or other evidence of the date of receipt.

14.302 Receipt of an unreadable electronic bid.

If a bid received at the Government facility by electronic data interchange is unreadable to the degree that conformance to the essential requirements of the invitation for bids cannot be ascertained, the contracting officer must immediately notify the bidder that the bid will be rejected unless the bidder provides clear and convincing evidence—

(a) Of the content of the bid as originally submitted; and

(b) That the unreadable condition of the bid was caused by Government software or hardware error, malfunction, or other Government mishandling.

14.303 Bid opening.

(a) All bids (including modifications) received before the time set for the opening of bids must be secured in a locked bid box, a safe, or in a secure restricted-access electronic bid box (i.e., secure password protected file folder on a controlled access Government computer network).

(b) The bid opening officer must inform those present at the public bid opening that the time set for the opening of bids has arrived.

(c) (1) The bid opening officer must personally and publicly open all bids received before the exact time set for opening of bids and if practical, read the bids aloud to all present.

(2) The public may not attend bid openings for classified acquisitions. No public record must be made of bids or bid prices received in response to classified invitations for bids.

(d) The contracting officer may postpone the public bid opening if the contracting officer determines in writing there is reason to believe—

(1) An important segment of bidders has been delayed in the mail;

(2) That there are delays in the communications system specified for transmission of bids;

(3) That circumstances beyond the control of the bidders have delayed their timely submission, (e.g., flood, fire, accident, weather, strikes, or Government equipment blackout or malfunction); or

(4) That emergency or unanticipated events has interrupted normal Governmental processes so that the scheduled opening of bids is impractical.

(e) Publicly post a determination to postpone a bid opening under paragraph (d) of this section. If practical before issuance of a formal amendment of the invitation, communicate the determination to the prospective bidders likely to attend the scheduled bid opening.

(f) In the case of paragraph (d)(4) of this section, and when urgent Government requirements preclude amendment of the IFB, the time specified for opening of bids will be deemed to be extended to the same time of day specified in the IFB on the first workday on which normal Government processes resume. In such cases, the time of actual bid opening must be deemed to be the time set for bid opening for the purpose of determining “late bids” under section 14.301. A note should be made on the abstract of bids or otherwise added to the file explaining the circumstances of the postponement.

(g) The bid opening officer must complete and certify the accuracy of the Standard Form 1409, Abstract of Offers, or Optional Form 1419, Abstract of Offers—Construction (or automated equivalent) as soon after bid opening as practicable. Where bid items are too numerous to warrant complete recording of all bids, abstract entries for individual bids may be limited to item numbers and bid prices. The contracting activity may use the extra columns and SF 1410, Abstract of Offers —Continuation, and OF 1419A, Abstract of Offers—Construction, Continuation Sheet, to label and record such information as necessary.

(h) Abstracts of offers for unclassified acquisitions must be available for public inspection

14.304 Mistakes in bids.

14.304-1 General.

(a) After the opening of bids, contracting officers must examine all bids for mistakes.

(b) The authority to permit correction of bids is limited to bids that, as submitted, are responsive to the invitation. The authority does not permit correction of bids to make them responsive.

(c) If the contracting officer identifies an apparent mistake or has reason to believe that a mistake exists the contracting officer must request the bidder verify its bid, calling attention to the suspected mistake.

(d) If the bidder asserts a mistake in its bid, the matter must be processed in accordance with section 14.304. Such actions must be taken before award.

14.304-2 Apparent clerical mistakes.

The contracting officer may correct any clerical mistake, apparent on its face in the bid, before award. The contracting officer first must obtain from the bidder a verification of the bid intended. Examples of apparent mistakes are obvious—

(a) Misplacement of a decimal point;

(b) Incorrect discounts (for example, 1 percent 10 days, 2 percent 20 days, 5 percent 30 days);

(c) Reversal of the price f.o.b. destination and price f.o.b. origin; and
(d) Mistake in designation of unit.

14.304-3 Other mistakes disclosed before award.

(a) A bidder may request in writing permission from the contracting officer to correct a mistake after providing clear and convincing evidence that establishes both the existence of the mistake, and the bid actually intended.

(1) If the contracting officer accepts the clear and convincing evidence and the correction does not cause the bidder to outbid other lower bids, the contracting officer may allow the correction.

(2) If the correction causes the bidder to outbid one or more otherwise lower bids, the head of the agency may make a determination to permit the correction only if the mistake and intended bid are obvious from the final bid documents.

(b) If a bidder requests permission to withdraw a bid rather than correct it, the evidence is clear and convincing both as to the existence of a mistake and as to the bid actually intended, and the bid, both as uncorrected and as corrected, is the lowest received, the head of the agency may make a determination to correct the bid and not permit its withdrawal.

(c) If, under paragraph (a) or (b) of this section—

(1) The evidence of a mistake is clear and convincing only as to the mistake but not as to the intended bid, or

(2) The evidence reasonably supports the existence of a mistake but is not clear and convincing, an official above the contracting officer, unless otherwise provided by agency procedures, may make a determination permitting the bidder to withdraw the bid.

(d) If the evidence does not warrant a determination under paragraph (a), (b), or (c) above, the head of the agency may make a determination that the bid be neither withdrawn nor corrected.

(e) Heads of agencies may delegate their authority to make the determinations under paragraphs (a), (b), (c), and (d) of this section to a central authority, or a limited number of authorities as necessary, in their agencies, without power of redelegation.

(f) Before issuance of the determinations in this section, legal counsel within the respective agency must provide concurrence.

(g) Process Government suspected or alleged mistakes in bids as follows:

(1) A mere statement by the administrative officials that they are satisfied that an error was made is insufficient.

(2) The contracting officer must immediately request that the bidder verify its bid.

(i) Actions taken to verify bids must be sufficient to reasonably assure the contracting officer that the bid as confirmed is without error, or to elicit the allegation of a mistake by the bidder.

(ii) To assure that the bidder will be put on notice of a suspected mistake by the contracting officer, the bidder should be advised as appropriate—

(A) That its bid is so much lower than the other bids or the Government's estimate as to indicate a possibility of error;

(B) Of important or unusual characteristics of the specifications;

(C) Of changes in requirements from previous purchases of a similar item; or

(D) Of any other information, proper for disclosure, that leads the contracting officer to believe that there is a mistake in bid.

(3) If the bid is verified, the contracting officer must consider the bid as originally submitted.

(4) If the time for acceptance of bids is likely to expire before a decision can be made, the contracting officer must request all bidders whose bids may become eligible for award to extend the time for acceptance of their bids.

(5) If the bidder whose bid is believed erroneous does not (or cannot) grant an extension of time, the bid must be considered as originally submitted (but see paragraph (8) below).

(6) If the bidder alleges a mistake, the contracting officer must advise the bidder to make a written request to withdraw or modify the bid. The request must be supported by statements (sworn statements, if possible) and must include all pertinent evidence such as the bidder’s file copy of the bid, the original worksheets and other data used in preparing the bid, subcontractors’ quotations, if any, published price lists, and any other evidence that establishes the existence of the error, the manner in which it occurred, and the bid actually intended.

(7) When the bidder furnishes evidence supporting an alleged mistake, the contracting officer must refer the case to the appropriate authority together with the following data:

(i) A signed copy of the bid involved.

(ii) A copy of the invitation for bids and any specifications or drawings relevant to the alleged mistake.

(iii) An abstract or record of the bids received.

(iv) The bidder's written request to withdraw or modify the bid, together with the bidder's written statement and supporting evidence.

(v) A written statement by the contracting officer providing—

(A) A description of the supplies or services involved;

(B) The expiration date of the bid in question and of the other bids submitted;

(C) Specific information as to how and when the mistake was alleged;

(D) A summary of the evidence submitted by the bidder;

(E) In the event only one bid was received, a quotation of the most recent contract price for the supplies or services involved or, in the absence of a recent comparable contract, the contracting officer's estimate of a fair price for the supplies or services;

(F) Any additional pertinent evidence; and

(G) A recommendation to consider the bid as submitted or to authorize the bidder to withdraw or modify its bid.

(8) Where the bidder fails or refuses to furnish evidence in support of a suspected or alleged mistake, the contracting officer must consider the bid as submitted unless—

(i) The amount of the bid is so far out of line with the amounts of other bids received, or with the amount estimated by the agency or determined by the contracting officer to be reasonable; or

(ii) There are other indications of error which are so clear, as to reasonably justify the conclusion that acceptance of the bid would be unfair to the bidder or to other bona fide bidders. The contracting officer must document all attempts made to obtain the information required and the action taken with respect to the correct the bid.

(h) Each agency must maintain records of all determinations made in accordance with this section, the facts involved, and the action taken in each case. Include copies of all such determinations in the file.

(i) Nothing contained in this section prevents an agency from submitting doubtful cases to the Comptroller General for advance decision.

14.305 Cancellation of invitations after opening.

(a) Unless there is a compelling reason to reject all bids and cancel the invitation after the opening, the contracting officer must award to the responsible bidder who submitted the lowest responsive bid.

(b) Invitations may be cancelled after opening when, consistent with paragraph (a) above and, the agency head determines in writing that—

(1) Inadequate or ambiguous specifications were cited in the invitation;

(2) Specifications have been revised;

(3) The supplies or services being contracted for are no longer required;

(4) The invitation did not provide for consideration of all factors of cost to the Government, such as cost of transporting Government-furnished property to bidders' plants;

(5) Bids received indicate that the needs of the Government can be satisfied by a less expensive article differing from that for which the bids were invited;

(6) All otherwise acceptable bids received are at unreasonable prices, or only one bid is received and the contracting officer cannot determine the reasonableness of the bid price;

(7) The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith (see part 3 for reports to be made to the Department of Justice);

(8) No responsive bid has been received from a responsible bidder;

(9) A cost comparison as prescribed in OMB Circular A-76 shows that performance by the Government is more economical; or

(10) For other reasons, cancellation is clearly in the public's interest.

(c) If award is delayed beyond the bidders' acceptance periods, the contracting officer should request bidders extend in writing the bid acceptance period (with consent of sureties, if any) in order to avoid the need for resoliciting.

(d) Under some circumstances, completion of the acquisition after cancellation of the invitation for bids may be appropriate.

(1) If the invitation for bids has been cancelled for the reasons specified in paragraphs (b)(6) through (8) of this section, and the agency head has authorized, in the determination in paragraph (b) of this section, the completion of the acquisition through negotiation, the contracting officer must proceed in accordance with paragraph (e) of this section.

(2) If the invitation for bids has been cancelled for the reasons specified in paragraphs (b) (1), (2), (4), (5), or (10) of this section, or for the reasons in paragraphs (b) (6), (7), or (8) of this section and completion through negotiation is not authorized under paragraph (d)(1) of this section, the contracting officer must proceed with a new acquisition.

(e) When the agency head has determined, in accordance with paragraph (d)(1) of this section, that an invitation for bids should be canceled and that use of negotiation is in the Government's interest, the contracting officer may negotiate (in accordance with part 15, as appropriate) and make award without issuing a new IFB provided—

(1) Each responsible bidder in the sealed bid acquisition has been given notice that negotiations will be conducted and has been given an opportunity to participate in negotiations; and

(2) The award is made to the responsible bidder offering the lowest negotiated price.

14.306 Evaluation.

14.306-1 Responsiveness of bids.

(a) To be considered for award, a bid must comply in all material respects with the invitation for bids.

(b) Bids must be filled out, executed, and submitted in accordance with the instructions in the invitation. If a bidder uses its own bid form or a letter to submit a bid, the bid may be considered only if—

(1) The bidder accepts all the terms and conditions of the invitation; and

(2) Award on the bid would result in a binding contract with terms and conditions that do not vary from the terms and conditions of the invitation.

(c) Bids submitted by electronic commerce may be considered only if the electronic commerce method was specifically stipulated or permitted by the IFB.

(d) If any sample fails to conform to the characteristics listed in the invitation, the respective bid will be rejected as nonresponsive.

14.306-2 Responsible bidder—reasonableness of price.

(a) Prior to award, the contracting officer must determine that—

(1) The apparent awardee(s) is responsible (see subpart 9.1); and

(2) The prices offered are reasonable and not materially unbalanced.

(b) The price analysis techniques in part 15 should be used as guidelines for determining reasonableness and if prices offered are materially unbalanced.

(c) In each case the determination must be made in the light of all prevailing circumstances. Particular care must be taken in cases where only a single bid is received.

14.306-3 Rejection of individual bids.

(a) Bids that fail to conform to the basic requirements of the invitation for bids must be rejected.

(b) Bids that do not conform to the requirements must be rejected unless the invitation authorized the submission of alternate bids and the supplies offered as alternates meet the requirements specified in the invitation.

(c) Bids that fail to conform to the delivery schedule or permissible alternates stated in the invitation must be rejected.

(d) Bids must be rejected if the bidder imposes conditions that would modify requirements of the invitation or limit the bidder's liability to the Government. For example, bids must be rejected in which the bidder—

(1) Protects against future changes in conditions, such as increased costs, if total possible costs to the Government cannot be determined;

(2) Fails to state a price and indicates that price will be the price in effect at time of delivery;

(3) States a price but qualifies it as being subject to the price in effect at time of delivery;

(4) When not authorized by the invitation, conditions or qualifies a bid by stipulating that it is to be considered only if, before date of award, the bidder receives (or does not receive) award under a separate IFB;

(5) Requires the Government to determine that the bidder's product meets applicable Government specifications; or

(6) Limits rights of the Government under any contract clause.

(e) A low bidder may be requested to delete objectionable conditions from a bid provided the conditions do not go to the substance, as distinguished from the form, of the bid, or work an injustice on other bidders. A condition goes to the substance of a bid where it affects price, quantity, quality, or delivery of the items offered.

(f) The contracting officer may reject any bid if they determine in writing that it is unreasonable as to the total price of the bid or the prices for individual line items as well.

(g) The contracting officer may reject any bid if the prices for any line items or subline items are materially unbalanced (see part 15).

(h) The contracting officer must reject any bid received from a person or concern that is suspended, debarred, proposed for debarment, or declared ineligible as of the bid opening date unless determined in writing that there is a compelling reason for such action (see subpart 9.4).

(i) Reject low bids received from concerns determined to be not responsible pursuant to part 9, unless received from a small business concern (see part 19 with respect to certificates of competency).

(j) Reject a bid when a bid guarantee is required and a bidder fails to furnish the guarantee in accordance with the requirements of the invitation for bids, except as otherwise provided in part 28.

(k) Preserve the originals of all rejected bids, and any written findings with respect to such rejections with the contract file.

(l) After submitting a bid, if all of a bidder's assets or that part related to the bid are transferred during the period between the bid opening and the award, the transferee may not be able to take over the bid. Accordingly, the contracting officer must reject the bid unless the transfer is effected by merger, operation of law, or other means not barred by 41 U.S.C. 6305 or 31 U.S.C. 3727.

14.306-4 Rejection of all bids.

When it is determined necessary to reject all bids, the contracting officer must notify each bidder that all bids have been rejected and provide the reason for such action.

14.306-5 Restrictions on disclosure of descriptive literature.

When a bid is accompanied by descriptive literature, and the bidder imposes a restriction that prevents the public disclosure of such literature, the restriction may render the bid nonresponsive. The restriction renders the bid nonresponsive if it prohibits the disclosure of sufficient information to permit competing bidders to know the essential nature and type of the products offered or those elements of the bid that relate to quantity, price, and delivery terms. The provisions of this paragraph do not apply to unsolicited descriptive literature submitted by a bidder if such literature does not qualify the bid.

14.306-6 All or none qualifications.

Unless the IFB provides otherwise, a bid may be responsive notwithstanding that the bidder specifies that award will be accepted only on all, or a specified group, of the items. Contracting officers must not permit bidders to withdraw or modify all or none qualifications after bid opening since such qualifications are substantive and affect the rights of other bidders.

14.306-7 Minor informalities or irregularities in bids.

A minor informality or irregularity is merely a matter of form and not of substance or some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired. The contracting officer either must give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the advantage of the Government. Examples of minor informalities or irregularities include failure of a bidder to—

(a) Return the number of copies of signed bids required by the invitation;

(b) Furnish required information concerning the number of its employees;

(c) Sign its bid, but only if—

(1) The unsigned bid is accompanied by other material indicating the bidder's intention to be bound by the unsigned bid (such as the submission of a bid guarantee or a letter signed by the bidder, with the bid, referring to and clearly identifying the bid itself); or

(2) The firm submitting a bid has formally adopted or authorized, before the date set for opening of bids, the execution of documents by written, printed, or stamped signature and submits evidence of such authorization and the bid carries such a signature;

(d) Acknowledge receipt of an amendment to an invitation for bids, but only if—

(1) The bid received clearly indicates that the bidder received the amendment, such as where the amendment added another item to the invitation and the bidder submitted a bid on the item; or

(2) The amendment involves only a matter of form or has either no effect or merely a negligible effect on price, quantity, quality, or delivery of the item bid upon; and

(e) Execute the representations with respect to Equal Opportunity and Affirmative Action Programs, as set forth in the clauses at 52.222-22, Previous Contracts and Compliance Reports, and 52.222-25, Affirmative Action Compliance.

14.306-8 Prompt payment discounts.

Prompt payment discounts must not be considered in the evaluation of bids.

14.306-9 Economic price adjustment.

(a) Bidder proposed economic price adjustment.

(1) When an IFB does not contain an economic price adjustment clause but a bidder proposes one with a ceiling that the price will not exceed, the contracting officer must evaluate the bid on the basis of the maximum possible economic price adjustment of the quoted base price.

(2) If the bid is eligible for award, the contracting officer must request the bidder to agree to the inclusion in the award of an approved economic price adjustment clause (see part 16) that is subject to the same ceiling. If the bidder will not agree to an approved clause, the contracting officer may award based on the bid as originally submitted.

(3) Reject bids that contain economic price adjustments with no ceiling unless a clear basis for evaluation exists.

(b) (1) When an invitation contains a Government proposed economic price adjustment clause and no bidder takes exception to the provisions, the contracting officer must evaluate bids on the basis of the quoted prices without the allowable economic price adjustment being added.

(2) Reject a bid as nonresponsive if a bidder increases the maximum percentage of economic price adjustment stipulated in the invitation or limits the downward economic price adjustment provisions of the invitation.

(3) Reject a bid as nonresponsive if a bid indicates deletion of the economic price adjustment clause because the downward economic price adjustment provisions are thereby limited.

(4) When a bidder decreases the maximum percentage of economic price adjustment stipulated in the invitation, the contracting officer must evaluate the bid at the base price on an equal basis with bids that do not reduce the stipulated ceiling. However, after evaluation, if the bidder offering the lower ceiling is in a position to receive the award, the award must reflect the lower ceiling.

14.307 Award.

(a) The contracting officer must make a contract award—

(1) By written or electronic notice,

(2) Within the time for acceptance specified in the bid or an extension, and

(3) To that responsible bidder whose bid, conforming to the invitation, will be most advantageous to the Government, considering only price and the price-related factors included in the invitation.

(b) When more than one award results from any single invitation for bids, separate award documents must be executed.

(c) When an award is made to a bidder for less than all of the items that may be awarded to that bidder and additional items are being withheld for subsequent award, the invitation to bid and award document must state that the Government may make subsequent awards for those additional items within the bid acceptance period.

(d) All provisions of the invitation for bids, including any acceptable additions or changes made by a bidder in the bid, must be clearly and accurately set forth (either expressly or by reference) in the award document.

(e) (1) Award is generally made by using the Award portion of Standard Form (SF) 33, Solicitation, Offer, and Award, or SF 1447, Solicitation/Contract (see 53.214). If an offer on an SF 33 leads to further changes, the resulting contract must be prepared as a bilateral document on SF 26, Award/Contract.

(2) Use of the Award portion of SF 33, SF 26, or SF 1447, does not preclude the additional use of informal documents, including electronic communications, as notices of awards.

(3) Do not physically include Part IV in the contract. Award by acceptance of a bid on the award portion of Standard Form 33, Solicitation Offer and Award (SF 33), Standard Form 26, Award/Contract (SF 26), or Standard Form 1447, Solicitation/Contract (SF 1447), incorporates Section K, Representations, certifications, and other statements of bidders, in the resultant contract even though not physically attached.

(f) Any discount offered will form a part of the award and will be taken by the payment center if payment is made within the discount period specified by the bidder.

(1) As an alternative to indicating a discount in conjunction with the offer, bidders may prefer to offer discounts on individual invoices.

(2) See part 32, which prescribes the contract clause at 52.232-8, Discounts for Prompt Payment.

14.308 Award of equal low bids.

(a) Award contracts in the following order of priority when two or more low bids are equal in all respects:

(1) Small business concerns that are also labor surplus area concerns.

(2) Other small business concerns.

(3) Other business concerns.

(b) If two or more bidders remain equally eligible after application of paragraph (a) above, the contracting officer must conduct a drawing, limited to those bidders. If time permits, give the bidders involved an opportunity to attend the drawing. The drawing must be witnessed by at least three persons, and the contract file must contain the names and addresses of the witnesses and the person supervising the drawing.

(c) When an award is to be made by using the priorities under this section, the contracting officer must include a written agreement in the contract that the contractor will perform, or cause to be performed, the contract in accordance with the circumstances justifying the priority used to break the tie or select bids for a drawing by lot.

14.309 Information to bidders.

14.309-1 Award of unclassified contracts.

(a) The contracting officer must as a minimum (subject to any restrictions in part 9)—

(1) Notify each unsuccessful bidder in writing or electronically within three days after contract award, that its bid was not accepted. "Day," for purposes of the notification process, means calendar day, except that the period will run until a day which is not a Saturday, Sunday, or legal holiday; and

(2) When award is made to other than a low bidder, state the reason for rejection in the notice to each of the unsuccessful low bidders.

(b) For acquisitions covered by the World Trade Organization Government Procurement Agreement or a Free Trade Agreement (see part 25), agencies must include in notices given unsuccessful bidders from World Trade Organization Government Procurement Agreement or Free Trade Agreement countries—

(1) The dollar amount of the successful bid; and

(2) The name and address of the successful bidder.

14.309-2 Award of classified contracts.

In addition to 14.309-1, if classified information was furnished or created in connection with the IFB, the contracting officer must advise the unsuccessful bidders, including any who did not bid, to take disposition action in accordance with agency procedures. The contracting officer may provide the name of the successful bidder and the contract price to unsuccessful bidders upon request. Information regarding a classified award must not be provided by telephone.

Subpart 14.4 - Postaward.

14.401 Mistakes after award.

If a contractor's discovery and request for correction of a mistake in bid is not made until after the award, it must be processed under the procedures of part 33 and the following:

(a) When a mistake in a contractor's bid is not discovered until after award, correct the mistake by contract modification if it would be favorable to the Government without changing the essential requirements of the specifications.

(b) In addition to the cases contemplated in paragraph (a) of this section or as otherwise authorized by law, agencies are authorized to make a determination—

(1) To rescind a contract;

(2) To reform a contract to—

(i) Delete the items involved in the mistake; or

(ii) Increase the price if the contract price, as corrected, does not exceed that of the next lowest acceptable bid under the original invitation for bids; or

(3) That no change will be made in the contract as awarded, if the evidence does not warrant a determination under paragraphs (1) or (2).

(c) Make determinations under paragraphs (b)(1) and (2) on the basis of clear and convincing evidence that a mistake in bid was made. In addition, it must be clear that the mistake was—

(1) Mutual, or

(2) If unilaterally made by the contractor, so apparent as to have charged the contracting officer with notice of the probability of the mistake.

(d) Each proposed determination must be coordinated with legal counsel in accordance with agency procedures.

(e) Process mistakes alleged or disclosed after award as follows:

(1) The contracting officer must request the contractor to support the alleged mistake by submission of written statements and pertinent evidence, such as—

(i) The contractor's file copy of the bid,

(ii) The contractor's original worksheets and other data used in preparing the bid,

(iii) Subcontractors' and suppliers' quotations, if any,

(iv) Published price lists, and

(v) Any other evidence that will serve to establish the mistake, the manner in which the mistake occurred, and the bid actually intended.

(2) The case file concerning an alleged mistake must contain the following:

(i) All evidence furnished by the contractor in support of the alleged mistake.

(ii) A signed statement by the contracting officer—

(A) Describing the supplies or services involved;

(B) Specifying how and when the mistake was alleged or disclosed;

(C) Summarizing the evidence submitted by the contractor and any additional evidence considered pertinent;

(D) Quoting, in cases where only one bid was received, the most recent contract price for the supplies or services involved, or in the absence of a recent comparable contract, the contracting officer's estimate of a fair price for the supplies or services and the basis for the estimate;

(E) Setting forth the contracting officer's opinion whether a bona fide mistake was made and whether the contracting officer was, or should have been, on constructive notice of the mistake before the award, together with the reasons for, or data in support of, such opinion;

(F) Setting forth the course of action with respect to the alleged mistake that the contracting officer considers proper on the basis of the evidence, and if other than a change in contract price is recommended, the manner by which the supplies or services will otherwise be acquired; and

(G) Disclosing the status of performance and payments under the contract, including contemplated performance and payments.

(iii) A signed copy of the bid involved.

(iv) A copy of the invitation for bids and any specifications or drawings relevant to the alleged mistake.

(v) An abstract of written record of the bids received.

(vi) A written request by the contractor to reform or rescind the contract, and copies of all other relevant correspondence between the contracting officer and the contractor concerning the alleged mistake.

(vii) A copy of the contract and any related change orders or supplemental agreements.

(f) Each agency must include in the contract file a record of—

(1) All determinations made in accordance with this 14.401;

(2) the facts involved, and

(3) the action taken in each case.

14.402 Pricing modifications.

See part 15 for cost and price negotiation policies and procedures.

PART 15 - CONTRACTING BY NEGOTIATION

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15.000 Scope.

This part addresses policies and procedures used in competitive and noncompetitive negotiated acquisitions. These acquisition procedures provide an opportunity for back-and-forth negotiation between the Government and an offeror(s) upon receipt of a proposal submitted in response to a request for proposals (RFP).

15.001 Definitions.

As used in this part—

Deficiency is any part of an offer that does not conform to a material requirement of a RFP. A material requirement is one that affects price, quantity, quality, or delivery, or that the RFP requires to be met at the time of proposal submission.

Proposal modification is a change made to a proposal before the RFP 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 material elements of a proposal made after the RFP closing date, at the request of or as allowed by a contracting officer, as the result of negotiations.

Weakness means a flaw in the proposal that increases the risk of unsuccessful contract performance. A "significant weakness" in the proposal is a flaw that appreciably increases the risk of unsuccessful contract performance.

15.002 Types of negotiated acquisition.

(a) *Noncompetitive acquisitions.* Noncompetitive, or sole source, acquisition is a process whereby an award is made to a single vendor without soliciting offers from multiple sources. When using this acquisition strategy, agencies should remove unnecessary information and requirements from the request for proposal (RFP), including voluminous proposal preparation instructions and evaluation factors.

(b) *Competitive acquisitions.* Competitive acquisition is a process whereby an award is made after soliciting offers from multiple sources. When using this acquisition strategy, agencies should tailor the complexity of the RFP, evaluation, and source selection decision to the circumstances of the acquisition, while maintaining a process that promotes an impartial and comprehensive evaluation of proposals, leading to selection of the proposal representing the best value to the Government.

Subpart 15.1 - Presolicitation and Solicitation

15.100 Scope.

This subpart addresses policies and procedures for preparing requests for proposals (RFPs) and receiving proposals. RFPs are used in negotiated acquisitions to communicate Government requirements to prospective contractors and to request proposals.

15.101 Early exchanges with industry.

(a) *General*. Exchanges of information among all interested parties are encouraged and can occur at any time between the identification of a requirement through the receipt of proposals. These exchanges can improve both the Government's understanding of industry capabilities and the industry's understanding of the Government's needs. Any exchange of information must be consistent with procurement integrity requirements in part 3 and protected in accordance with part 24.

(b) *Draft RFPs*. Agencies are encouraged to release draft RFPs and conduct conferences with industry before issuing competitive RFPs.

(c) *Requests for Information*. Agencies are encouraged to release requests for information (RFI) when the Government does not currently intend to award a contract, but wants to obtain price, delivery, market, or capabilities information for planning purposes.

(1) There is no required format for RFIs.

(2) Responses to RFIs are not offers and cannot be accepted by the Government to form a binding contract.

(3) RFIs must state that–

(i) The Government does not intend to award a contract on the basis of the RFI or otherwise pay for the information requested; and

(ii) Responses will be treated as information only and not as a proposal.

(4) Information received in response to an RFI must be safeguarded adequately from unauthorized disclosure. Contracting officers should mark the information with date and time of receipt and provide the information to designated officials.

(d) *Mission needs and requirements*. General information on an agency's current or anticipated needs and requirements may be disclosed at any time. When information about a proposed acquisition is disclosed to one or more potential offerors and that information is necessary for the preparation of proposals, the information should be made available to the public as soon as practicable, but no later than the next general release of information, in order to avoid creating an unfair competitive advantage.

(e) *Advisory multistep process*. (1) Agencies may publish a notice that provides a general description of the scope or purpose of the acquisition and invites potential offerors to submit information that allows the Government to advise offerors about their potential to be viable competitors.

(2) When using this process, agencies must—

(i) Evaluate all responses in accordance with the criteria stated in the notice;

(ii) Advise each respondent in writing either that it will be invited to participate in the resultant acquisition or, based on the information submitted, that it is unlikely to be a viable competitor;

(iii) Advise respondents considered not to be viable competitors of the general basis for that opinion; and

(iv) Inform all respondents that, notwithstanding the advice provided by the Government in response to their submissions, they may participate in the resultant acquisition.

15.102 Structuring a request for proposals.

(a) *Method*. RFPs may be issued in writing or orally.

(b) *Format*. (1) *Requirement*. Contracting officers should prepare RFPs and resulting contracts using the uniform contract format at 15.109.

(i) Streamlined RFPs may be used in non-competitive acquisitions and other acquisitions in which a standard RFP would be unnecessarily lengthy.

(ii) Oral RFPs may be used when processing a written RFP would delay the acquisition of supplies or services to the detriment of the Government and an RFP is not required to be posted under part 5.

(2) *Exceptions*. Agencies do not need to use the uniform contract format for:

(i) Construction and architect-engineer contracts.

(ii) Subsistence contracts.

(iii) Supplies or services contracts requiring special contract formats prescribed elsewhere in this part that are inconsistent with the uniform contract format.

(iv) Streamlined RFPs.

(v) Contracts exempted by the agency head or designee.

(3) *Minimum content when not using the uniform contract format*. When the uniform contract format is not used, contracting officers must ensure—

(i) Competitive RFPs, at a minimum, describe the Government's requirement; any anticipated terms and conditions that will apply to the contract; the information required to be in the offeror's proposal; the factors and significant subfactors that will be used to evaluate the proposal and their relative importance, and one of the statements at 15.104(d).

(ii) Streamlined RFPs must be streamlined to remove unnecessary information and requirements and, at a minimum, contain the following:

(A) RFP number and date;

(B) Name, address, and telephone number of the contracting officer;

(C) Type of contract contemplated;

(D) Quantity, description, and required delivery dates for the item;

(E) Applicable certifications and representations;

(F) Anticipated contract terms and conditions;

(G) Proposal due date and time;

(H) Other relevant information; *e.g.*, incentives, variations in delivery schedule, cost proposal support, and data requirements; and

(I) For competitive streamlined RFPs, instructions to offerors and evaluation factors and significant subfactors in accordance with 15.104.

15.103 Developing a competitive source selection approach.

The goal of source selection is to select the proposal that represents the best value to the Government. To obtain best value, agencies use a range of approaches for evaluating competitive offers, where the importance of cost or price varies

relative to other factors such as technical merit and past performance. Agencies can obtain best value in competitive negotiated acquisitions by using any one or a combination of source selection approaches, including but not limited to the approaches mentioned in this section.

15.103-1 Tradeoff approach.

The tradeoff approach to source selection is appropriate when it may be in the Government's best interest to consider award to other than the lowest priced offeror or other than the highest technically rated offeror. This process permits tradeoffs among cost or price and non-cost or non-price factors. The anticipated benefits of a higher priced proposal must merit the additional cost.

15.103-2 Lowest price technically acceptable approach.

(a) *General*. The lowest price technically acceptable (LPTA) approach to source selection is appropriate when it is in the Government's best interest to award to the offeror that submits a technically acceptable proposal with the lowest evaluated price. This approach does not permit tradeoffs.

(b) *Required Information*. When using this approach, the RFP must—

(1) Identify the evaluation factors that establish the minimum requirements for acceptability; and

(2) Specify that the award will be made on the basis of the lowest evaluated price of proposals meeting or exceeding the requirements for acceptability.

(c) *Limitations.* Except for DoD, in accordance with section 880 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232, 41 U.S.C. 3701 Note)—

(1) The LPTA source selection approach must only be used when—

(i) The agency can comprehensively and clearly describe the minimum requirements in terms of performance objectives, measures, and standards that will be used to determine the acceptability of offers;

(ii) The agency would realize no, or minimal, value from a proposal that exceeds the minimum technical or performance requirements;

(iii) The agency believes the technical proposals will require no, or minimal, subjective judgment by the source selection authority as to the desirability of one offeror's proposal versus a competing proposal;

(iv) The agency has a high degree of confidence that reviewing the technical proposals of all offerors would not result in the identification of characteristics that could provide value or benefit to the agency;

(v) The agency determined that the lowest price reflects the total cost, including operation and support, of the product(s) or service(s) being acquired; and

(vi) The contracting officer documents the contract file describing the circumstances that justify the use of the LPTA source selection process.

(2) Contracting officers must avoid, to the maximum extent practicable, using the LPTA source selection process in the case of a procurement that is predominantly for the acquisition of—

(i) Information technology services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, audit or audit readiness services, health care services and records, telecommunications devices and services, or other knowledge-based professional services;

(ii) Personal protective equipment; or

(iii) Knowledge-based training or logistics services in contingency operations or other operations outside the United States.

15.103-3 Highest technically rated with a fair and reasonable price approach

(a) *General*.

(1) The highest technically rated with a fair and reasonable price approach to source selection is appropriate when the Government determines in advance that it would not be advantageous to consider tradeoffs between cost or price and non-cost or non-price factors; rather, the acquisition warrants paying any fair and reasonable price for the highest quality performance.

(2) In this approach, all proposals are evaluated based on the non-price factors outlined in the solicitation and the source selection authority determines the highest technically rated proposal. The price of the highest technically rated proposal is evaluated to determine if it is fair and reasonable in accordance with subpart 15.4.

(3) If the highest technically rated proposal's price is fair and reasonable, the proposal is selected for award. If the price is not fair and reasonable, the source selection authority must determine the next highest technically rated proposal and

evaluate whether the price is fair and reasonable in accordance with subpart 15.4. This process continues until a contract is awarded to the highest technically rated responsible offeror with a fair and reasonable price.

(b) *Required information*. When using this approach, the RFP must advise offerors that the Government will not consider tradeoffs between cost or price and non-cost or non-price factors, and that the highest technically rated proposal will be selected for award if it offers a fair and reasonable price.

15.103-4 Phased acquisition.

(a) Phased acquisitions break down complex or high-risk acquisitions into distinct parts for contract award. Instead of a single and comprehensive proposal and evaluation process, phased acquisitions are structured to make separate awards at distinct phases of the acquisition. This approach can reduce source selection timeframes and promote flexibility by permitting adjustments to the requirement between phases.

(b) When using a phased approach, the RFP must—

(1) Establish the phases for the acquisition; and

(2) Describe the process that will be used to evaluate proposals and any criteria offerors must meet to progress to the next phase in the RFP.

15.104 Establishing competitive evaluation factors and significant subfactors.

(a) *General.*A competitive award decision is based on evaluation factors and significant subfactors that are tailored to the acquisition. Evaluation factors and significant subfactors must represent the key areas of importance and emphasis to be considered in the source selection decision; and support meaningful differentiation between competing proposals. All factors and significant subfactors that will affect contract award and their relative importance must be stated clearly in the RFP (10 U.S.C. 3206(b)(1) and 41 U.S.C. 3306(b)(1)).

(b) *Required factors*. The evaluation factors and significant subfactors that apply to an acquisition and their relative importance are within the broad discretion of agency acquisition officials, subject to the following requirements:

(1) *Price or cost*.

(i) Price or cost to the Government must be evaluated in every competitive source selection (10 U.S.C. 3206(c)(1)(B) and41 U.S.C. 3306(c)(1)(B)). Proposed price reductions under an offeror's other contracts cannot be used as an evaluation factor.

(ii) In accordance with 10 U.S.C. 3206(c), for DoD, NASA, and the Coast Guard–

(A) Contracting officers may choose not to include price or cost as an evaluation factor for award when an RFP–

(1) Has an estimated value above the simplified acquisition threshold;

(2) Will result in multiple-award contracts that are for the same or similar services; and

(3) States that the Government intends to make an award to each and all qualifying offerors.

(B) If the contracting officer chooses not to include price or cost as an evaluation factor for the contract award, in accordance with paragraph (b)(1)(ii)(A) of this section, the contracting officer must consider price or cost as one of the factors in the selection decision for each order placed under the contract.

(C) The exception in paragraph (B)(1)(ii)(A) of this section must not apply to RFPs for multiple-award contracts that provide for sole source orders pursuant to section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

(2) *Quality*. The quality of the product or service must be evaluated in every competitive source selection through consideration of one or more non-cost evaluation factors such as past performance, compliance with RFP requirements, technical excellence, management capability, personnel qualifications, and prior experience ((10 U.S.C. 3206(c)(1)(A) and 41 U.S.C. 3306(c)(1)(A)).

(3) *Past performance*.

(i) Past performance must be evaluated in every competitive source selection, unless the contracting officer documents the reason past performance is not an appropriate evaluation factor for the acquisition. This evaluation is separate from the responsibility determination required under part 9.

(ii) The RFP must—

(A) Describe the general approach for evaluating past performance information, including evaluating offerors with no relevant performance history;

(B) Provide offerors an opportunity to: identify past or current contracts (including Federal, State, and local government, private sector, and other contracts) for efforts similar to the Government requirement, and provide information on problems encountered on the identified contracts and the offeror corrective actions; and

(iii) The RFP may describe the agency's approach to considering the currency and relevance, source, and context of the information to be requested.

(c) *Situational factors*. For competitive RFPs that are not set aside for small business concerns, involving consolidation or bundling, that offer a significant opportunity for subcontracting, the contracting officer must include—

(1) A factor to evaluate past performance indicating the extent to which the offeror attained applicable goals for small business participation under contracts that required subcontracting plans (15 U.S.C. 637(d)(4)(G)(ii)); and

(2) A factor to evaluate the proposed small business subcontracting participation in the subcontracting plan (15 U.S.C. 637(d)(4)(G)(i)).

(d) *Factor importance*. In addition to stating the relative importance of each evaluation factor, and unless the exception at paragraph (b)(1)(ii) of this section applies, the RFP must also state, at a minimum, whether all evaluation factors other than cost or price, when combined, are—

(1) Significantly more important than cost or price;

(2) Approximately equal to cost or price; or

(3) Significantly less important than cost or price (10 U.S.C. 3206(c)(1)(C) and 41 U.S.C. 3306(c)(1)(C)).

15.105 Other considerations.

15.105-1 Oral presentations.

(a) Oral presentations may be used as a substitute for requesting portions of a written proposal information from offerors. Information on an offeror's capability, past performance, work plans or approaches, staffing resources, transition plans, or sample tasks can be suitable for oral presentations.

(b) Oral presentations may occur at any time during the source selection process. When requesting oral presentations, the RFP must provide offerors with the necessary information to prepare and provide the presentation.

15.105-2 Negotiations disclosure.

Competitive RFPs must advise offerors whether the Government intends to evaluate proposals and award a contract with or without conducting negotiations with offerors whose proposals have been determined to be within the competitive range. FAR provision 52.215-1, Instructions to Offerors-Competitive Acquisition, and its Alternate I, contain this disclosure.

15.105-3 Limitation on tiered evaluations for multiple award contracts.

When soliciting for a multiple award contract, agencies must not create a tiered or cascading evaluation of small business offers, as described in 13 CFR 125.2, unless the agency has statutory authority to do so.

15.105-4 Request for cost or pricing data.

(a) *Required information*. In accordance with 15.402(a), contracting officers must state in the RFP—

(1) Whether certified cost or pricing data are required;

(2) That, in lieu of submitting certified cost or pricing data, the offeror may submit a request for exception from the requirement to submit certified cost or pricing data;

(3) Any requirement for data other than certified cost or pricing data; and

(4) The requirement for necessary preaward or postaward access to offeror's records.

(b) *Format for submission of data*.

(1) *Certified cost or pricing data*. Contracting officers may require submission of certified cost or pricing data in the format indicated in Table 15-1 at 15.408-2, specify an alternative format, or permit submission in the contractor's format, unless the data are required to be submitted on one of the termination forms specified in part 49.

(i) Offerors must describe any forward pricing rate agreements (FRPA) or other advanced agreements in each specific pricing proposal to which the rates apply and identify the latest cost or pricing data already submitted in accordance with the FPRA.

(ii) Data supporting FRPAs, other advanced agreements, or final indirect cost proposals must be submitted in a form acceptable to the contracting officer.

(2) *Data other than certified cost or pricing data*. Data may be submitted in the offeror's own format unless the contracting officer decides that use of a specific format is essential for evaluating and determining that the price is fair and reasonable and the format has been described in the RFP.

15.105-5 Make-or-buy decision.

(a) *General.* The Government may choose to review and agree on the offeror's make-or-buy program when necessary to ensure negotiation of reasonable contract prices, satisfactory performance, or implementation of socioeconomic policies.

(b) *Acquisitions requiring make-or-buy programs.*

(1) Contracting officers may require offerors to submit make-or-buy program plans for acquisitions requiring certified cost or pricing data whose estimated value is $20 million or more, except when the proposed contract is for research or development and, if prototypes or hardware are involved, no significant follow-on production is anticipated.

(2) Contracting officers may only require offerors to submit make-or-buy programs for acquisitions whose estimated value is under $20 million if the contracting officer—

(i) Determines that the information is necessary; and

(ii) Documents the reasons in the contract file.

(c) *RFP requirements.* When offerors must submit proposed make-or-buy programs, the RFP must include—

(1) A statement that the program and required supporting information must accompany the offer; and

(2) A description of factors to be used in evaluating the proposed program.

(d) *Required information from offerors.*

(1) The information required from an offeror about a make-or-buy program must—

(i) Be confined to those major items or work efforts that normally would require company management review of the make-or-buy decision because they are complex, costly, needed in large quantities, or require additional equipment or real property to produce;

(ii) Not include raw materials, products, commercial services, and off-the-shelf items, unless their potential impact on contract cost or schedule is critical; and,

(iii) Not include items or work efforts estimated to cost less than 1 percent of the total estimated contract price or any minimum dollar amount set by the agency.

(2) To support a make-or-buy program, the following information must be provided by an offeror in its proposal:

(i) A description of each major item or work effort.

(ii) Categorization of each major item or work effort as “must make,” “must buy, or “can either make or buy.”

(iii) For each item or work effort categorized as “can either make or buy,” a proposal either to “make” or to “buy.”

(iv) Reasons for categorizing items and work efforts as “must make” or “must buy,” and proposing to “make” or to “buy” those categorized as “can either make or buy.” The reasons must include the consideration given to the evaluation factors described in the RFP and must be in sufficient detail to permit the contracting officer to evaluate the categorization or proposal.

(v) Designation of the plant or division proposed to make each item or perform each work effort, and a statement as to whether the existing or proposed new facility is in or near a labor surplus area.

(vi) Identification of proposed subcontractors, if known, and their location and size status.

(vii) Any recommendations to defer make-or-buy decisions when categorization of some items or work efforts is impracticable at the time of submission.

(viii) Any other information the contracting officer requires in order to evaluate the program.

15.105-6 Should-cost review.

When a program should-cost review is planned in accordance with 15.405-4, the contracting officer should state this fact in the acquisition plan and in the RFP.

15.105-7 Unit prices.

To facilitate the analysis at 15.404-5, contracting officers must require offerers to identify in their proposals those items of supply that they will not manufacture or to which they will not contribute significant value when adequate price competition is not anticipated. This requirement does not apply to acquisitions for commercial products or commercial services.

15.106 Amending a request for proposal.

(a) *General*. When the Government changes its requirements or terms and conditions, the contracting officer must amend the RFP.

(1) Amendments issued before the established time and date for receipt of proposals must be issued to all parties receiving the RFP.

(2) Amendments issued after the established time and date for receipt of proposals must be issued to all offerors that have not been eliminated from the competition.

(b) *Content*. At a minimum, each amendment must include—

(1) The name and address of issuing activity;

(2) The RFP number and date;

(3) The amendment number and date;

(4) The number of pages in the amendment;

(5) A description of the change being made;

(6) The contracting officer's name and contact information; and

(7) The revised RFP closing date, if applicable.

(c) *Forms*. Prescribed forms are not required to amend RFPs described in this part. Agencies may use Standard Form (SF) 30, *Amendment of Solicitation/Modification of Contract*, and Optional Form (OF) 309, *Amendment of Solicitation*.

(d) *Oral notices*. Oral notices may be used when time is of the essence. Contracting officers should document the contract file and formalize the notice with a written amendment.

(e) *Requirement changes*.

(1) Contracting officers must amend the RFP if the Government is interested in a proposal that involves a departure from the stated requirements. The amendment should not reveal the alternate solution proposed or any other information that is entitled to protection.

(2) Contracting officers must cancel the RFP and issue a new one, regardless of the stage of the acquisition if an amendment—

(i) Is proposed after offers have been received, and

(ii) In the judgment of the contracting officer, based on market research or otherwise, has a requirement change that is so substantial it exceeds what prospective offerors reasonably could have anticipated as a change to the RFP, and additional sources likely would have submitted offers had the change been in the RFP.

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

(a) *Submission.* Offerors are responsible for submitting proposals, and any revisions or modifications, so as to reach the Government office designated in the RFP by the time specified in the RFP.

(1) *Method*. Offerors may use any transmission method authorized in the RFP.

(2) *Time*. If no time is specified in the RFP, the time for receipt is 4:30 p.m., local time, for the designated Government office on the date that proposals are due.

(b) *Late submission*. (1) *General*. Any proposal, modification, or revision, that is received at the designated Government office after the exact time specified for receipt of proposals is "late" and will not be considered, unless it is received before award is made, the contracting officer determines that accepting the late proposal would not unduly delay the acquisition, and —

(i) If it was transmitted through an electronic commerce method authorized by the RFP, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals;

(ii) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of proposals and was under the Government's control prior to the time set for receipt of proposals; or

(iii) It was the only proposal received.

(2) *Exception*. A late modification 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 by the contracting officer.

(3) *Proof of receipt*. Acceptable evidence to establish the time of receipt at the Government installation includes electronic timestamps, 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.

(4) *Notification*. Contracting officers must promptly notify any offeror if its proposal, modification, or revision was received late, and inform the offeror whether its proposal will be considered, unless contract award is imminent and the award notice at 15.207-2 will suffice.

(5) *Documentation*. (i) When available, the file for each late proposal, modification, revision, or withdrawal received must include the date and hour of receipt; a statement regarding whether the proposal was considered for award, with supporting rationale; and the envelope, wrapper, or other evidence of date of receipt.

(ii) Late proposals and modifications that are not considered must be held unopened, unless opened for identification, until after award and then retained with other unsuccessful proposals.

(c) *Interruption*. If proposals cannot be received at the Government office designated for receipt of proposals by the exact time specified in the RFP because an emergency or unanticipated event interrupts normal Government processes, and urgent Government requirements preclude amendment of the RFP closing date, the time specified for RFP will be deemed to be extended to the same time of day specified in the RFP on the first work day on which normal Government processes resume.

(d) *Withdrawal*. Proposals may be withdrawn by written notice at any time before award. A copy of withdrawn proposals should be retained in the contract file.

(1) Extra copies of the withdrawn proposals may be destroyed or returned to the offeror at the offeror's request. Extremely bulky proposals must only be returned at the offeror's request and expense.

(2) Oral proposals in response to oral RFPs may be withdrawn orally. Contracting officers must document the contract file when oral withdrawals are made.

15.108 Receiving proposals.

(a) *Marking*. When there is no electronic record, contracting officers must mark proposals with the date and time of receipt and provide them to the designated officials.

(b) *Handling*. Proposals should be safeguarded from unauthorized disclosure throughout the source selection process in accordance with part 3.

(c) *Unreadable proposals.* If any portion of a proposal submitted electronically is unreadable, contracting officers must immediately notify the offeror and permit the offeror to resubmit the unreadable portion of the proposal. Contracting officers must establish the method and time for resubmission after consultation with the offeror and document the file. For the purpose of determining timeliness under 15.107, the resubmission is considered as if it were received at the date and time of the original unreadable submission, provided the offeror complies with the time and format requirements established by the contracting officer for resubmission.

15.109 Uniform contract format.

RFPs using the uniform contract format should include Parts I, II, III, and IV. Upon award, contracting officers should not physically include Part IV in the resulting contract, but should retain it in the contract file. The representations and certifications in Part IV are incorporated by reference in the contract through FAR clauses 52.204-19, Incorporation by Reference of Representations and Certifications, and 52.212-4, Contract Terms and Conditions-Commercial Products and Commercial Services.

15.109-1 Part I - The Schedule.

(a) *Section A, Solicitation/contract form*.

(1) Prescribed forms are not required to prepare RFPs described in this part. Agencies may use Optional Form (OF) 308, *Solicitation and Offer-Negotiated Acquisition*, or Standard Form (SF) 33, *Solicitation, Offer and of Award*, to prepare RFPs.

(2) When other than OF 308 or SF 33 is used, include the following information on the first page of the RFP:

(i) Name, address, and location of issuing activity, including room and building where proposals or information must be submitted.

(ii) RFP number.

(iii) Date of issuance.

(iv) Closing date and time.

(v) Number of RFP pages.

(vi) Requisition or other purchase authority.

(vii) Brief description of item or service.

(viii) Requirement for the offeror to provide its name and complete address, including street, city, county, state, and zip code, and email address, if appropriate.

(ix) Offer expiration date.

(b) *Section B, Supplies or services and prices/costs.* Include a brief description of the supplies or services, including any incidental deliverables.

(c) *Section C, Description/specifications/requirements.* Include any description or specifications needed in addition to Section B.

(d) *Section D, Packaging and marking.* Include packaging, packing, preservation, and marking requirements, if any.

(e) *Section E, Inspection and acceptance.* Include inspection, acceptance, quality assurance, and reliability requirements.

(f) *Section F, Deliveries or performance.* Include the requirements for time, place, and method of delivery or performance.

(g) *Section G, Contract administration data.* Include any required accounting and appropriation data and any required contract administration information or instructions not included in other sections of the uniform contract format. Include a statement that the offeror should include the payment address in the proposal, if it is different from that shown for the offeror.

(h) *Section H, Special contract requirements.* Include a clear statement of any special contract requirements that are not included in Section I or in other sections of the uniform contract format.

15.109-2 Part II - Contract Clauses.

Section I, Contract clauses. Include the clauses required by law or by this part and any additional clauses expected to be included in any resulting contract, if these clauses are not required in any other section of the uniform contract format. An index may be inserted if this section's format is particularly complex.

15.109-3 Part III - List of Documents, Exhibits, and Other Attachments.

Section J, List of attachments. Include a list of the title, date, and number of pages for each attached document, exhibit, and other attachment. Cross references to material in other sections may be inserted, as appropriate.

15.109-4 Part IV - Representations and Instructions.

(a) *Section K, Representations, certifications, and other statements of offerors.* Include RFP provisions that require representations, certifications, or the submission of other information by offerors.

(b) *Section L, Instructions, conditions, and notices to offerors or respondents.* Include solicitation provisions and other information and instructions not required elsewhere to guide offerors in preparing proposals.

(1) Include the method(s) offerors may use to submit a proposal.

(2) Offerors may be instructed to submit proposals or information in a specific format or severable parts to facilitate evaluation. Agencies may also require the proposal to be further organized into sections (e.g., administrative, management, technical, past performance, and certified cost and pricing data or data other than certified cost and pricing data).

(c) *Section M, Evaluation factors for award.* Identify all significant factors and any significant subfactors that will be considered in awarding the contract, their relative importance, and one of the phrases in 15.104(d), as required.

15.110 Solicitation provisions and contract clauses.

(a) Insert the provision at 52.215-1, *Instructions to Offerors—Competitive Acquisition*, in all competitive RFPs where the Government intends to award a contract without negotiations.

(1) If the Government intends to make award after negotiating with offerors within the competitive range, use the provision with its *Alternate I.*

(2) If the Government would be willing to accept alternate proposals, alter the clause to add a paragraph (c)(9) substantially the same as *Alternate II.*

(b) (1) Insert the clause at 52.215-2, *Audit and Records-Negotiation* (10 U.S.C. 3841, 41 U.S.C. 4706, and Audit Requirements in the OMB Uniform Guidance at 2 CFR part 200, subpart F), in RFPs and contracts except those for—

(i) Acquisitions not exceeding the simplified acquisition threshold;

(ii) The acquisition of utility services at rates not exceeding those established to apply uniformly to the general public, plus any applicable reasonable connection charge; or

(iii) The acquisition of commercial products or commercial services exempted under 15.403-2.

(2) [Reserved]

(3) For cost-reimbursement contracts with State and local Governments, educational institutions, and other nonprofit organizations, use the clause with its *Alternate II.*

(4) When the head of the agency has waived the examination of records by the Comptroller General in accordance with part 25, use the clause with its *Alternate III.*

(c) [Reserved]

(d) [Reserved]

(e) [Reserved]

(f) Insert the provision at 52.215-6, *Place of Performance*, in RFPs, unless the place of performance is specified by the Government.

(g) [Reserved]

(h) Insert the clause at 52.215-8, *Order of Precedence—Uniform Contract Format*, in RFPs and contracts using the format at 15.108.

(i) Insert the clause at 52.215-9, *Changes or Additions to Make-or-Buy Program*, in RFPs and contracts when it is contemplated that a make-or-buy program will be incorporated in the contract. If a less economical "make" or "buy" categorization is selected for one or more items of significant value, the contracting officer must use the clause with—

(1) Its *Alternate I*, if a fixed-price incentive contract is contemplated; or

(2) Its *Alternate II*, if a cost-plus-incentive-fee contract is contemplated.

(j) Insert the clause at 52.215-10, *Price Reduction for Defective Certified Cost or Pricing Data*, in RFPs and contracts when it is contemplated that certified cost or pricing data will be required from the contractor or any subcontractor.

(k) Insert the clause at 52.215-11, *Price Reduction for Defective Certified Cost or Pricing Data—Modifications*, in RFPs and contracts when it is contemplated that certified cost or pricing data will be required from the contractor or any subcontractor for the pricing of contract modifications, and the clause prescribed in paragraph (j) of this section has not been included.

(l) Contracting officers must —

(1) Insert the clause at 52.215-12, *Subcontractor Certified Cost or Pricing Data*, in RFPs and contracts when the clause prescribed in paragraph (j) of this section is included; or

(2) Upon the request of a contractor that was required to submit certified cost or pricing data in connection with a prime contract entered into before July 1, 2018, modify the contract without requiring consideration, to replace clause 52.215-12, *Subcontractor Certified Cost or Pricing Data,* with its *Alternate I*.

(m) Contracting officers must—

(1) Insert the clause at 52.215-13, *Subcontractor Certified Cost or Pricing Data—Modifications*, in RFPs and contracts when the clause prescribed in paragraph (k) of this section is included; or

(2) Upon the request of a contractor that was required to submit certified cost or pricing data in connection with a prime contract entered into before July 1, 2018, modify the contract without requiring consideration, to replace clause 52.215-13, *Subcontractor Certified Cost or Pricing Data—Modifications*, with its *Alternate I*.

(n) (1) Insert the clause at 52.215-14, *Integrity of Unit Prices*, in RFPs and contracts except for—

(i) Acquisitions at or below the simplified acquisition threshold;

(ii) Construction or architect-engineer services under part 36;

(iii) Utility services under part 41;

(iv) Service contracts where supplies are not required;

(v) Acquisitions of commercial products and commercial services; and

(vi) Contracts for petroleum products.

(2) Use the clause with its *Alternate I* when contracting without adequate price competition or when prescribed by agency regulations.

(o) Insert the clause at 52.215-15, *Pension Adjustments and Asset Reversions*, in RFPs and contracts for which it is anticipated that certified cost or pricing data will be required or for which any preaward or postaward cost determinations will be subject to part 31.

(p) Insert the provision at 52.215-16, *Facilities Capital Cost of Money*, in RFPs expected to result in contracts that are subject to the cost principles for contracts with commercial organizations.

(q) Insert the clause at 52.215-17, *Waiver of Facilities Capital Cost of Money*, in the resulting contract if the prospective contractor does not propose facilities capital cost of money in its offer.

(r) Insert the clause at 52.215-18, *Reversion or Adjustment of Plans for Postretirement Benefits (PRB) Other Than Pensions*, in RFPs and contracts for which it is anticipated that certified cost or pricing data will be required or for which any preaward or postaward cost determinations will be subject to part 31.

(s) Insert the clause at 52.215-19, *Notification of Ownership Changes,* in RFPs and contracts for which it is contemplated that certified cost or pricing data will be required or for which any preaward or postaward cost determination will be subject to subpart 31.2.

(t) Considering the hierarchy at 15.403-1(a), insert the provision at 52.215-20, *Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data*, in RFPs if it is reasonably certain that certified cost or pricing data or data other than certified cost or pricing data will be required. This provision also provides instructions to offerors on how to request an exception from the requirement to submit certified cost or pricing data.

(1) Use the provision with its *Alternate I* to specify a format for certified cost or pricing data other than the format required by Table 15-1 at 15.408-2;

(2) Use the provision with its *Alternate II* if copies of the proposal are to be sent to the ACO and contract auditor;

(3) Use the provision with its *Alternate III* if submission via electronic media is required; and

(4) Replace the basic provision with its *Alternate IV* if certified cost or pricing data are not expected to be required because an exception may apply, but data other than certified cost or pricing data will be required as described in 15.403-1.

(u) Considering the hierarchy at 15.403-1(a), insert the clause at 52.215-21, *Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications*, in RFPs and contracts if it is reasonably certain that certified cost or pricing data or data other than certified cost or pricing data will be required for modifications. This clause also provides instructions to contractors on how to request an exception from the requirement to submit certified cost or pricing data.

(1) Use the clause with its *Alternate I* to specify a format for certified cost or pricing data other than the format required by Table 15-1 at 15.408-2;

(2) Use the clause with its *Alternate II* if copies of the proposal are to be sent to the ACO and contract auditor;

(3) Use the clause with its *Alternate III* if submission via electronic media is required; and

(4) Replace the basic clause with its *Alternate IV* if certified cost or pricing data are not expected to be required because an exception may apply, but data other than certified cost or pricing data will be required as described in 15.403-1.

(v) (1) Insert the provision at 52.215-22, *Limitations on Pass-Through Charges—Identification of Subcontract Effort*, in RFPs containing the clause at 52.215-23.

(2) (i) Except as provided in paragraph (v)(2)(ii) of this section, insert the clause 52.215-23, *Limitations on Pass-Through Charges*, in RFPs and contracts including task or delivery orders as follows:

(A) For civilian agencies, insert the clause when—

(1) The total estimated contract or order value exceeds the simplified acquisition threshold as defined in part 2; and

(2) The contemplated contract type is expected to be a cost-reimbursement type contract as defined in part 16; or

(B) For DoD, insert the clause when—

(1) The total estimated contract or order value exceeds the threshold for obtaining cost or pricing data in 15.403-3(a); and

(2) The contemplated contract type is expected to be any contract type except—

(i) A firm-fixed-price contract awarded on the basis of adequate price competition;

(ii) A fixed-price contract with economic price adjustment awarded on the basis of adequate price competition;

(iii) A firm-fixed-price contract for the acquisition of a commercial product or commercial service;

(iv) A fixed-price contract with economic price adjustment, for the acquisition of a commercial product or commercial service; or

(v) A fixed-price incentive contract awarded on the basis of adequate price competition.

(ii) The clause may be used when the total estimated contract or order value is below the thresholds identified in 15.110(v)(2)(i) and for any contract type, when the contracting officer determines that inclusion of the clause is appropriate.

(iii) Use the clause 52.215-23 with its *Alternate I* when the contracting officer determines that the prospective contractor has demonstrated that its functions provide added value to the contracting effort and there are no excessive pass-through charges.

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Subpart 15.2 - Evaluation and Award

15.200 Scope.

This subpart addresses policies and procedures for evaluating and negotiating competitive proposals and awarding contracts.

15.201 Source selection responsibilities.

(a) Agency heads are responsible for source selection. A contracting officer is designated as the source selection authority (SSA), unless the agency head appoints another individual for a particular acquisition or group of acquisitions.

(b) The SSA must—

(1) Establish an evaluation team tailored for the acquisition that includes appropriate contracting, legal, logistics, technical, and other expertise to ensure a comprehensive evaluation of proposals;

(2) Approve the source selection approach or acquisition plan, if applicable, before issuance of the request for proposal (RFP);

(3) Ensure consistency among the RFP requirements, notices to offerors, proposal preparation instructions, evaluation factors and subfactors, solicitation provisions or contract clauses, and data requirements;

(4) Ensure that proposals are evaluated based solely on the factors and subfactors contained in the RFP ((10 U.S.C. 3303(c) and 41 U.S.C. 3703(c));

(5) Consider the recommendations of advisory boards or panels, when applicable; and

(6) Select the offeror or offerors whose proposal is the best value to the Government (10 U.S.C. 3303(c) and 41 U.S.C. 3703(c)). The SSA may reject all proposals received in response to a RFP, if doing so is in the best interest of the Government.

(c) Contracting officers must—

(1) After release of a RFP, serve as the focal point for inquiries from actual or prospective offerors;

(2) After receipt of proposals, control communications with offerors;

(3) When negotiating noncompetitive proposals, evaluate the proposal and document the reasonableness of the offered prices in accordance with subpart 15.4; and

(4) Award the contract(s).

(d) *Limitations.* Government personnel involved in the acquisition must not engage in conduct that—

(1) Favors one offeror over another;

(2) Reveals an offeror's technical solution, including—

(i) Unique technology;

(ii) Innovative and unique uses of commercial products or commercial services; or

(iii) Any information that would compromise an offeror's intellectual property to another offeror;

(3) Reveals an offeror's price without that offeror's permission.

(4) Reveals the names of individuals providing information about an offeror's past performance; or

(5) Knowingly furnishes source selection information in violation of 3.104 and 41 U.S.C. 2102 and 2107.

15.202 Evaluating competitive proposals.

(a) *General*.

(1) Proposal evaluation is an assessment of the proposal and an offeror's ability to perform the prospective contract successfully. Agencies must evaluate each competitive proposal based solely on the factors and subfactors in the RFP.

(2) *Clarifications*.

(i) Clarifications are exchanges between the Government and offerors where offerors are given the opportunity to resolve minor or clerical errors or clarify certain aspects of their proposal. Clarifications can be used to enhance the Government’s understanding of a proposal, allow reasonable interpretation of a proposal, or facilitate the Government’s evaluation process.

(ii) Clarifications include, but are not limited to, addressing: ambiguities of the proposal; other concerns such as perceived deficiencies, weaknesses, errors, omissions, or mistakes; the relevance of an offeror's past performance information; and adverse past performance information to which the offeror has not previously had an opportunity to respond.

(iii) Clarifications do not permit offerors to revise their proposal and cannot be used to cure proposal deficiencies or material omissions or materially alter the technical or cost elements of the proposal. However, contracting officers may

request additional information or documentation provided the cost/price or other material elements of the proposal are unchanged.

(iv) Clarifications may occur, at the contracting officer's discretion, at any time after receipt of proposals through contract award. Contracting officers are not required to conduct clarifications with an offeror. If the contracting officer conducts clarifications with one or more offerors, it is not required to conduct clarifications with any other offeror.

(3) *Oral Presentations*. Contracting officers must maintain a record of oral presentations to document what the Government relied upon in making the source selection decision. The method and level of detail of the record (e.g., videotaping, audio tape recording, written record, Government notes, copies of offeror briefing slides or presentation notes) is at the discretion of the SSA. When an oral presentation includes information that the parties intend to include in the contract as material terms or conditions, the information must be put in writing and incorporated in the proposal and any resultant contract. Incorporation by reference of oral statements is not permitted.

(b) *Technical evaluation.*

(1) When using the lowest price technically acceptable (LPTA) approach, proposals are evaluated for technical acceptability only.

(2) When using the tradeoff approach, the evaluation must include-

(i) An assessment of each offeror's ability to accomplish the technical requirements; and

(ii) An evaluation of the relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation.

(3) If teleworking is not prohibited, agencies must not unfavorably evaluate an offer that includes telework unless the contracting officer executes a written determination in accordance with part 7.

(c) *Past performance evaluation.*

(1) *No past performance information.* An offeror without a record of relevant past performance or for whom information on past performance is not available may not be evaluated favorably or unfavorably on past performance.

(2) *LPTA source selection process*. If past performance is evaluated when using the LPTA source selection process, contracting officers must only determine if the performance is technically acceptable and not perform a comparative assessment of the information.

(3) *Considerations*. Evaluations should consider the following:

(i) The information provided by the offeror, as well as information obtained from any other sources.

(ii) The currency and relevance of the information, source of the information, context of the data, and general trends in contractor's performance. The SSA determines the relevance of similar past performance information.

(iii) Any information regarding predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the instant acquisition.

(iv) The past performance of the joint venture, when evaluating an offer from a joint venture. If the joint venture does not demonstrate past performance for award, the past performance of each party to the joint venture must be considered.

(4) *Small business*. When using the LPTA source selection approach and a small business would have been in contention for award, but their past performance is determined to be unacceptable, the matter must be referred to the SBA for a Certificate of Competency determination.

(d) *Cost or price evaluation*. Agencies must purchase supplies and services from responsible sources at fair and reasonable prices. Contracting officers are responsible for evaluating and documenting the reasonableness of the awarded price in accordance with subpart 15.4.

15.203 Competitive award without negotiation.

Contracting officers may make competitive awards without negotiations if the RFP states that the Government intends to evaluate proposals and make award without negotiation. If the RFP includes such a notice and the Government determines it is necessary to negotiate, the rationale for doing so must be documented in the contract file (10 U.S.C. 3303(a)(2) and 41 U.S.C. 3703(a)(2)).

15.204 Competitive award with negotiation.

15.204-1 Establishing a competitive range.

(a) *Competitive range*. A competitive range is the group of evaluated proposals that the contracting officer determines are best suited for further negotiation. Contracting officers must establish a competitive range if negotiations will occur after evaluating competitive proposals.

(b) *Narrowing the competitive range for efficiency*. When establishing the competitive range, contracting officers may determine that the number of most highly rated proposals that might otherwise be included 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 evaluated proposals (10 U.S.C. 3303 and 41 U.S.C. 3703).

(c) *Notice*. Written notice must be provided to unsuccessful offerors in accordance with 15.206-1(a).

15.204-2 Competitive negotiations.

(a) *General*. The scope and extent of negotiations are a matter of contracting officer judgment.

(b) *Requirement*.

(1) Contracting officers must—

(i) Negotiate with each responsible offeror within the competitive range; and

(ii) Tailor the negotiation to the offeror's proposal, but at a minimum, indicate to, or negotiate with, each offeror any deficiencies or significant weaknesses in the proposal.

(2) Contracting officers may further negotiate with an offeror, if necessary. Having further negotiations with a particular offeror does not obligate contracting officers to have further negotiations with any other offerors.

(3) Contracting officers may also negotiate other aspects of the offeror's proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award. Contracting officers are not required to negotiate every area where the proposal could be improved.

(4) When an RFP stated that evaluation credit would be given for technical solutions exceeding any mandatory minimums, contracting officers may negotiate with offerors for increased performance beyond any mandatory minimums, and suggest to offerors that have exceeded any mandatory minimums (in ways that are not integral to the design), that their proposals would be more competitive if the excesses were removed and the proposed price decreased.

(c) *Elimination from the competitive range*. A proposal must be eliminated from consideration for award when the contracting officer determines that a proposal should no longer be included in the competitive range. Written notice of this decision must be provided to unsuccessful offerors in accordance with 15.206-1(a).

(1) When a proposal is eliminated, no further revisions to the proposal can be accepted or considered.

(2) Contracting officers may eliminate a proposal from the competitive range at any time upon concluding that the offeror is unlikely to receive an award. Contracting officers are not required to have an additional negotiation with an offeror prior to taking such action.

(d) *Proposal revision*.

(1) When negotiations with an offeror are finished, and that offeror has not been eliminated from the competitive range, contracting officers must provide the offeror with—

(i) An opportunity to submit a proposal revision; and

(ii) A notice requiring the proposal revision in writing and stating that the Government intends to make award without obtaining further revisions.

(2) Each offeror with a proposal still within the competitive range must be given an equal amount of time within which to submit their proposal revision.

15.205 Source selection decision.

The source selection decision must represent the SSA's independent judgement and be based on a comparative assessment of proposals against all source selection criteria in the RFP. The source selection decision must be documented and include the rationale for any business judgments and tradeoffs made or relied on by the SSA, including benefits associated with additional costs. The documentation does not need to quantify the tradeoffs that led to the decision.

15.206 Preaward notices and debriefings.

(a) *Definition*. Day, as used in this section, has the meaning set forth at part 33.

(b) *Applicability*. Sections 15.206 through 15.206-2 apply to competitive proposals, except for those using the other competitive procedures described in subpart 6.1 for architect-engineer contracts and basic and applied research. The procedures for award notification, with reasonable modification, should be followed for contracts awarded using those other competitive procedures.

15.206-1 Preaward notices.

(a) *Notice of exclusion from competitive range*. Contracting officers must notify offerors promptly in writing when their proposals are excluded from the competitive range or otherwise eliminated from the competition. The notice must state the basis for the determination and that proposal revisions will not be considered. These offerors may request a debriefing in accordance with 15.206-2 and 15.301.

(b) *Notice of small business set-aside award.*

(1) When using a set-aside for small business, HUBZone, the Service-Disabled Veteran-Owned Small Business Program, or the Women-Owned Small Business Program, contracting officers must notify each offeror, in writing, prior to award and upon completion of negotiations and determinations of responsibility—

(i) Of the name and address of the apparently successful offeror; and

(ii) That the Government will not consider subsequent revisions of the offeror's proposal.

(2) This notice is in addition to any notice of exclusion from competitive range.

(3) This notice is not required when the contracting officer determines in writing that the urgency of the requirement necessitates award without delay or when the contract is entered into under the 8(a) program.

15.206-2 Preaward debriefing.

Offerors excluded from the competitive range or otherwise excluded from the competition before award may request a debriefing before award (10 U.S.C. 3305 and 41 U.S.C. 3705). The contracting officer should chair any debriefing held. Individuals who conducted evaluations must provide support.

(a) *Request timeframe*.

(1) Offerors may request a preaward debriefing by submitting a written request for debriefing to the contracting officer within 3 days after receipt of the notice of exclusion from the competition.

(2) At the offeror's request, this debriefing may be delayed until after award. If the debriefing is delayed until after award, it must include all information normally provided in a postaward debriefing. Debriefings delayed pursuant to this paragraph could affect the timeliness of any protest filed subsequent to the debriefing.

(3) If the offeror does not submit a timely request, the offeror need not be given either a preaward or a postaward debriefing. Offerors are entitled to no more than one debriefing for each proposal.

(b) *Method*. Debriefings may be done by any method acceptable to the contracting officer.

(c) *Content*.

(1) At a minimum, preaward debriefings must include—

(i) The agency's evaluation of significant elements in the offeror's proposal;

(ii) A summary of the rationale for eliminating the offeror from the competition; and

(iii) Reasonable responses to relevant questions about whether source selection procedures contained in the RFP, applicable regulations, and other applicable authorities were followed by the agency.

(2) A summary of the debriefing must be included in the contract file.

(d) *Nondisclosure*. Preaward debriefings must not disclose—

(1) The number of offerors;

(2) The identity of other offerors;

(3) The content of other offerors proposals;

(4) The ranking of other offerors;

(5) The evaluation of other offerors; or

(6) Any of the information prohibited in 15.301-1(d).

(e) *Delay until after award*. Contracting officers must make every effort to debrief the unsuccessful offeror as soon as practicable, but may refuse the request for a debriefing if, for compelling reasons, it is not in the best interests of the Government to conduct a debriefing at that time.

(1) The rationale for delaying the debriefing must be documented in the contract file.

(2) If the contracting officer delays the debriefing, it must be provided no later than the time postaward debriefings are provided under 15.301-1. In that event, the contracting officer must include the information at 15.301-1(c) in the debriefing.

15.207 Award.

15.207-1 Award to successful offeror.

(a) *General*. Contracting officers must award a contract to the successful offeror by furnishing the executed contract or other notice of the award to that offeror.

(b) *Award document*.

(1) Contracting officers may use OF 307, *Contract Award;* SF 26*, Award/Contract*; or SF 33, *Solicitation, Offer and Award*, to award negotiated contracts in which the signature of both parties on a single document is appropriate. Do not use Block 18 of SF 26.

(2) When not using the OF 307, SF26, or SF 33 to award the contract:

(i) The first page of the award document must include—

(A) The Government's acceptance statement from Block 15 of the OF 307, exclusive of the Item 3 reference language; and

(B) The contracting officer's name, signature, and date.

(ii) If the award document includes information that is different than the signed proposal, as amended by the offeror's written correspondence, the first page of the award document must include—

(A) The contractor's agreement statement from Block 14 of the OF 307; and

(B) The signature of the contractor's authorized representative.

15.207-2 Award notice.

(a) *Definition*. *Day*, as used in this subsection, has the meaning set forth at part 33.

(b) *Requirement.* Within 3 days after the date of contract award, contracting officers must provide written notification to each offeror whose proposal was in the competitive range but was not selected for award (10 U.S.C. 3304 and 41 U.S.C. 3704) or had not previously received a notice in accordance with 15.206-1(a). The notice must include—

(1) The number of offerors solicited;

(2) The number of proposals received;

(3) The name and address of each offeror receiving an award;

(4) The items, quantities, and any stated unit prices of each award.

(i) If the number of items or other factors makes listing any stated unit prices impracticable at that time, only the total contract price need be furnished in the notice.

(ii) The items, quantities, and any stated unit prices of each award must be made publicly available, upon request; and

(5) In general terms, the reason(s) the offeror's proposal was not accepted, unless the price information in paragraph (b)(4) of this section readily reveals the reason. An offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information must not be disclosed to any other offeror.

(c) *Requests for information*. Upon request, contracting officers must provide the information in paragraph (b) of this section to unsuccessful offerors that received a preaward notice of exclusion from the competitive range.

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Subpart 15.3 - Postaward

15.300 Scope.

This subpart addresses postaward actions and considerations for negotiated contracts. The procedures for postaward debriefings, protests, and mistakes do not apply to contracts awarded using the other competitive procedures described in subpart 6.1 for architect-engineer contracts and basic and applied research. The procedures for postaward debriefings, protests, and mistakes, with reasonable modification, should be followed for contracts awarded using those other competitive procedures.

15.301 Postaward debriefing of offerors.

Definition—

Day, as used in this section, has the meaning set forth at part 33.

15.301-1 Debriefing process.

The awardee and offerors that received the award notice at 15.207-2 may request a postaward debriefing after receiving a notice of contract award. Contracting officers must chair any debriefing held and individuals who conducted evaluations must provide support.

(a) *Request timeframe*.

(1) Offerors may request a postaward debriefing by submitting a written request for the debriefing to the contracting officer within 3 days after receipt of the award notice in accordance with 15.207-2. Such offerors must be debriefed and furnished the basis for the selection decision and contract award.

(2) To the maximum extent practicable, the debriefing should occur within 5 days after receipt of the written request. Offerors that requested a postaward debriefing in lieu of a preaward debriefing, or whose debriefing was delayed for compelling reasons beyond contract award, also should be debriefed within this time period.

(3) Untimely debriefing requests may be accommodated.

(4) An offeror that was notified of its exclusion from the competitive range is not entitled to a postaward debriefing if the offeror failed to submit a timely preaward debriefing request, however such a request may be accommodated.

(5) The deadlines for filing protests are not extended when the Government accommodates an untimely debriefing request or an offeror’s request to delay a preaward debriefing until after award. Preaward debriefings delayed pursuant to 15.206-2(a)(2) could affect the timeliness of any protest filed subsequent to the debriefing.

(b) *Method*. Debriefings may be done by any method acceptable to the contracting officer.

(c) *Content*.

(1) At a minimum, the debriefing information must include—

(i) The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;

(ii) The overall evaluated cost or price and technical rating of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror;

(iii) The overall ranking of all offerors, when any ranking was developed by the agency during the source selection;

(iv) A summary of the rationale for award;

(v) For acquisitions of commercial products, the make and model of the product to be delivered by the successful offeror;

(vi) Reasonable responses to relevant questions about whether source selection procedures contained in the request for proposals (RFP), applicable regulations, and other applicable authorities were followed by the agency;

(vii) For DoD contracts in excess of $10 million but not in excess of $100 million with a small business or nontraditional defense contractor (10 U.S.C. 3014), an option for the contractor to request disclosure of the agency's written source selection decision document, redacted to protect the confidential and proprietary information of other offerors for the contract award.

(viii) For award of a DoD contract in excess of $100 million, disclosure of the agency's written source selection decision document, redacted to protect the information of other offerors for the contract award, in accordance with paragraph (d) of this subsection.

(2) An official summary of the debriefing must be included in the contract file.

(d) *Nondisclosure*. The debriefing must not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors. Moreover, the debriefing must not reveal any information prohibited from disclosure by part 24 or exempt from release under the Freedom of Information Act (5 U.S.C. 552) including—

(1) Trade secrets;

(2) Privileged or confidential manufacturing processes and techniques;

(3) Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information; and

(4) The names of individuals providing reference information about an offeror's past performance.

15.301-2 Opportunity for follow-up questions.

If time permits, contracting officers may provide successful and unsuccessful offerors an opportunity to submit follow up questions after the postaward debriefing.

15.302 Protests against award.

(a) Protests against award in negotiated acquisitions must be handled in accordance with part 33. Use of agency protest procedures that incorporate the alternative dispute resolution provisions of Executive Order 12979 is encouraged for both preaward and postaward protests.

(b) If a protest causes the agency, within 1 year of contract award, to—

(1) Issue a new RFP on the protested contract award, contracting officers must provide the information in paragraph (c) of this section to all prospective offerors for the new RFP; or

(2) Issue a new request for revised proposals on the protested contract award, the contracting officer must provide the information in paragraph (c) of this section to offerors that were in the competitive range and are requested to submit revised proposals.

(c) The following information will be provided to appropriate parties:

(1) Information provided to unsuccessful offerors in any debriefings conducted on the original award regarding the successful offeror's proposal; and

(2) Other nonproprietary information that would have been provided to the original offerors.

15.303 Discovery of mistakes.

Mistakes in a contractor's proposal that are disclosed after award must be processed substantially in accordance with the procedures for mistakes in bids in part 14.

15.304 Defective certified cost or pricing data after award.

(a) (1) If, after award, certified cost or pricing data are found to be inaccurate, incomplete, or noncurrent as of the date of final agreement on price or an earlier date agreed upon by the parties given on the contractor's or subcontractor's Certificate of Current Cost or Pricing Data, the Government is entitled to a price adjustment, including profit or fee, of any significant amount by which the price was increased because of the defective data.

(i) This entitlement is ensured by including in the contract one of the clauses prescribed in 15.110(j) and (k), and is set forth in the clauses at 52.215-10, *Price Reduction for Defective Certified Cost or Pricing Data*, and 52.215-11, *Price Reduction for Defective Certified Cost or Pricing Data—Modifications*.

(ii) The clauses give the Government the right to a price adjustment for defects in certified cost or pricing data submitted by the contractor, a prospective subcontractor, or an actual subcontractor.

(2) In arriving at a price adjustment, contracting officers must consider the time by which the certified cost or pricing data became reasonably available to the contractor, and the extent to which the Government relied upon the defective data.

(3) The clauses referred to in paragraph (a)(1)(i) of this subsection recognize that the Government's right to a price adjustment is not affected by any of the following circumstances:

(i) The contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position;

(ii) The contracting officer should have known that the certified cost or pricing data in issue were defective even though the contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the contracting officer;

(iii) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under such contract; or

(iv) Certified cost or pricing data were required; however, the contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data relating to the contract.

(4) Subject to paragraphs (a)(5) and (6) of this subsection, contracting officers must allow an offset for any understated certified cost or pricing data submitted in support of price negotiations, up to the amount of the Government's claim for

overstated pricing data arising out of the same pricing action (e.g., the initial pricing of the same contract or the pricing of the same change order).

(5) An offset must be allowed only in an amount supported by the facts and if the contractor—

(i) Certifies to the contracting officer that, to the best of the contractor's knowledge and belief, the contractor is entitled to the offset in the amount requested; and

(ii) Proves that the certified cost or pricing data were available before the "as of" date specified on the Certificate of Current Cost or Pricing Data but were not submitted. Such offsets need not be in the same cost groupings (e.g., material, direct labor, or indirect costs).

(6) An offset must not be allowed if—

(i) The understated data were known by the contractor to be understated before the "as of" date specified on the Certificate of Current Cost or Pricing Data; or

(ii) The Government proves that the facts demonstrate that the price would not have increased in the amount to be offset even if the available data had been submitted before the "as of" date specified on the Certificate of Current Cost or Pricing Data.

(7) (i) In addition to the price adjustment, the Government is entitled to recovery of any overpayment plus interest on the overpayments. The Government is also entitled to penalty amounts on certain of these overpayments. Overpayment occurs only when payment is made for supplies or services accepted by the Government. Overpayments do not result from amounts paid for contract financing, as defined in part 32.

(ii) In calculating the interest amount due, contracting officers must—

(A) Determine the defective pricing amounts that have been overpaid to the contractor;

(B) Consider the date of each overpayment (the date of overpayment for this interest calculation must be the date payment was made for the related completed and accepted contract items; or for subcontract defective pricing, the date payment was made to the prime contractor, based on prime contract progress billings or deliveries, which included payments for a completed and accepted subcontract item); and

(C) Apply the underpayment interest rate(s) in effect for each quarter from the time of overpayment to the time of repayment, utilizing rate(s) prescribed by the Secretary of the Treasury under 26 U.S.C. 6621(a)(2).

(iii) In arriving at the amount due for penalties on contracts where the submission of defective certified cost or pricing data was a knowing submission, contracting officers must obtain an amount equal to the amount of overpayment made. Before taking any contractual actions concerning penalties, the contracting officer must obtain the advice of counsel.

(iv) In the demand letter, contracting officers must separately include—

(A) The repayment amount;

(B) The penalty amount (if any);

(C) The interest amount through a specified date; and

(D) A statement that interest will continue to accrue until repayment is made.

(b) If, after award, the contracting officer learns or suspects that the data furnished were not accurate, complete, and current, or were not adequately verified by the contractor as of the time of negotiation, the contracting officer must request an audit to evaluate the accuracy, completeness, and currency of the data. The Government may evaluate the profit-cost relationships only if the audit reveals that the data certified by the contractor were defective. Contracting officers must not reprice the contract solely because the profit was greater than forecast or because a contingency specified in the submission failed to materialize.

(c) For each advisory audit received based on a postaward review that indicates defective pricing, contracting officers must make a determination as to whether or not the data submitted were defective and relied upon. Before making such a determination, contracting officers should give the contractor an opportunity to support the accuracy, completeness, and currency of the data in question. Contracting officers must prepare a memorandum documenting both the determination and any corrective action taken as a result. Contracting officers must send one copy of this memorandum to the auditor and, if the contract has been assigned for administration, one copy to the administrative contracting officer (ACO). A copy of the memorandum or other notice of the contracting officer's determination must be provided to the contractor. When the contracting officer determines that the contractor submitted defective cost or pricing data, the contracting officer, in accordance with agency procedures, must ensure that information relating to the contracting officer's final determination is reported as part of the contractor's performance information in accordance with part 42. Agencies must ensure updated information that changes a contracting officer's prior final determination is reported into the FAPIIS module of Contractor Performance Assessment Reporting System (CPARS) in the event of a—

(1) Contracting officer's decision in accordance with the Contract Disputes statute;

(2) Board of Contract Appeals decision; or

(3) Court decision.

(d) If both the contractor and subcontractor submitted, and the contractor certified, or should have certified, cost or pricing data, the Government has the right, under the clauses at 52.215-10, *Price Reduction for Defective Certified Cost or Pricing Data*, and 52.215-11, *Price Reduction for Defective Certified Cost or Pricing Data—Modifications*, to reduce the prime contract price if it was significantly increased because a subcontractor submitted defective data. This right applies whether these data supported subcontract cost estimates or supported firm agreements between subcontractor and contractor.

(e) If Government audit discloses defective subcontractor certified cost or pricing data, the information necessary to support a reduction in prime contract and subcontract prices may be available only from the Government. To the extent necessary to secure a prime contract price reduction, contracting officers should make this information available to the prime contractor or appropriate subcontractors, upon request. If release of the information would compromise Government security or disclose trade secrets or confidential business information, the contracting officers must release it only under conditions that will protect it from improper disclosure. Information made available under this paragraph must be limited to that used as the basis for the prime contract price reduction. In order to afford an opportunity for corrective action, contracting officers should give the prime contractor reasonable advance notice before determining to reduce the prime contract price.

(1) When a prime contractor includes defective subcontract data in arriving at the price but later awards the subcontract to a lower priced subcontractor (or does not subcontract for the work), any adjustment in the prime contract price due to defective subcontract data is limited to the difference (plus applicable indirect cost and profit markups) between the subcontract price used for pricing the prime contract, and either the actual subcontract price or the actual cost to the contractor, if not subcontracted, provided the data on which the actual subcontract price is based are not themselves defective.

(2) Under cost-reimbursement contracts and under all fixed-price contracts except firm-fixed-price contracts and fixed-price contracts with economic price adjustment, payments to subcontractors that are higher than they would be had there been no defective subcontractor certified cost or pricing data must be the basis for disallowance or nonrecognition of costs under the clauses prescribed in 15.110(j) and (k). The Government has a continuing and direct financial interest in such payments that is unaffected by the initial agreement on prime contract price.

15.305 Estimating systems.

(a) Cognizant audit activities, when appropriate, must establish and manage regular programs for reviewing selected contractors' estimating systems or methods, in order to reduce the scope of reviews to be performed on individual proposals, expedite the negotiation process, and increase the reliability of proposals. The results of estimating system reviews must be documented in survey reports.

(b) Auditors must send a copy of the estimating system survey report and a copy of the official notice of corrective action required to each contracting office and contract administration office having substantial business with that contractor. Significant deficiencies not corrected by the contractor must be considered in subsequent proposal analyses and negotiations.

Subpart 15.4 - Contract Pricing

15.400 Scope of subpart.

This subpart contains cost and price negotiation policies and procedures for pricing negotiated prime contracts (including subcontracts) and contract modifications, including modifications to contracts awarded by sealed bidding.

15.401 Definitions.

As used in this subpart—

Price means cost plus any fee or profit applicable to the contract type.

Subcontract (except as used in 15.405-2) also includes a transfer of commercial products or commercial services between divisions, subsidiaries, or affiliates of a contractor or a subcontractor (10 U.S.C. 3701(2) and 41 U.S.C. 3501(a)(2)).

15.402 General.

(a) *Requirement for cost or pricing data*. In establishing the reasonableness of the offered prices, contracting officers must —

(1) Obtain certified cost or pricing data when required by 15.403-3, along with data other than certified cost or pricing data as necessary to establish a fair and reasonable price; or

(2) When certified cost or pricing data are not required by 15.403-3, obtain data other than certified cost or pricing data as necessary to establish a fair and reasonable price (10 U.S.C. 3705(a) and 41 U.S.C. 3505(a)).

(b) *Obtaining data*. Contracting officers must obtain the type and quantity of data necessary to establish a fair and reasonable price, but not more data than is needed. Contracting officers must require the submission of additional data sufficient for the contracting officer to support the determination of the fair and reasonable price, if the contracting officer cannot establish a fair and reasonable price from an analysis of the data obtained or submitted to date.

(c) *Independent Price*. Contracting officers must price each contract separately and independently and not—

(1) Consider proposed price reductions under other contracts;

(2) Consider losses or profits realized or anticipated under other contracts; or

(3) Include in a contract price any amount for a specified contingency, to the extent that the contract provides for a price adjustment based upon the occurrence of that contingency.

15.403 Obtaining cost or pricing data.

15.403-1 Data other than certified cost or pricing data.

(a) *Order of preference*. For acquisitions that do not require certified cost or pricing data, contracting officers must generally use the following order of preference to determine the type of data to require:

(1) No additional data from the offeror, when adequate price competition exists (see 15.403-2);

(2) Data related to prices (e.g., established catalog or market prices, sales to non-governmental and governmental entities), relying first on—

(i) Data available within the Government; then

(ii) Data obtained from sources other than the offeror; and then, if necessary,

(iii) Data obtained from the offeror; then,

(3) Cost data to the extent necessary for the contracting officer to determine a fair and reasonable price.

(b) *Requirement*.

(1) Contracting officers must require submission of data other than certified cost or pricing data to the extent necessary to determine a fair and reasonable price (10 U.S.C. 3705(a) and 41 U.S.C. 3505(a)). At a minimum, the data must include appropriate data on the prices at which the same item or similar items have previously been sold, adequate for determining the reasonableness of the price. This data is not required when price reasonableness is established through adequate price competition or prices set by law or regulation, unless paragraph (e) of this subsection applies.

(2) Contracting officers may require data other than certified cost or pricing data to determine the cost realism of competing offers or to evaluate competing approaches.

(c) *Data Requests*. When requesting data, contracting officers—

(1) Must use the contractor's format for data submission, but see 15.105-4(b)(2);

(2) Must ensure that data used to support price negotiations are sufficiently current to permit negotiation of a fair and reasonable price; and

(3) Should limit requests for updated data to the data that affect the adequacy of the proposal for negotiations (e.g., changes in price lists).

(d) *Refusals to submit data*. As specified in section 808 of the Strom Thurmond National Defense Authorization Act (NDAA) for Fiscal Year 1999 (Pub. L. 105-261), an offeror who does not comply with a requirement to submit data for a contract or subcontract in accordance with paragraph (a)(1) of this subsection is ineligible for award unless the head of the contracting activity (HCA) determines that it is in the best interest of the Government to make the award to that offeror, based on consideration of the following:

(1) The effort made to obtain the data.

(2) The need for the item or service.

(3) Increased cost or significant harm to the Government if award is not made.

(e) *Data when adequate price competition exists*. If adequate price competition exists, but there are unusual circumstances in which additional data are necessary to determine the reasonableness of price, contracting officers must obtain the additional data from sources other than the offeror, to the maximum extent practicable. In addition, contracting officers should request data to determine the cost realism of competing offers or to evaluate competing approaches.

(f) *Data for commercial products and commercial services*. When acquiring a commercial product or commercial service, contracting officers must—

(1) Use price analysis to determine whether the price is fair and reasonable;

(2) Require the offeror to submit data other than certified cost or pricing data when the contracting officer is unable to determine a price fair and reasonable after obtaining data from sources other than the offeror. This data may include history of sales to non-governmental and governmental entities, cost data, or any other information the contracting officer requires;

(3) Limit requests for sales data to data for the same or similar items during a relevant time period;

(4) To the maximum extent practicable, request data in the format regularly maintained by the offeror as part of its commercial operations;

(5) Not disclose outside the Government data obtained relating to commercial products or commercial services that is exempt from disclosure under part 24 or the Freedom of Information Act (5 U.S.C. 552(b)); and

(6) For services that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are of a type offered and sold competitively in substantial quantities in the commercial marketplace, see 15.403-2(c)(3)(ii).

15.403-2 Prohibitions on obtaining certified cost or pricing data.

(a) *At or below the simplified acquisition threshold*. Certified cost or pricing data must not be obtained for acquisitions at or below the simplified acquisition threshold.

(b) *Exceptions to certified cost or pricing data requirements*. Contracting officers must not require certified cost or pricing data to support any contracts, subcontracts, or modifications—

(1) When the contracting officer determines that prices agreed upon are based on adequate price competition (see standards in paragraph (c)(1) of this subsection);

(2) When the contracting officer determines that prices agreed upon are based on prices set by law or regulation (see standards in paragraph (c)(2) of this subsection);

(3) When a commercial product or commercial service is being acquired (see standards in paragraph (c)(3) of this subsection);

(4) When a waiver has been granted (see standards in paragraph (c)(4) of this subsection); or

(5) When modifying a contract or subcontract for commercial products or commercial services (see standards in paragraph (c)(3) of this subsection).

(c) *Standards for exceptions—*

(1) *Adequate price competition*.

(i) A price is based on adequate price competition when—

(A) Two or more responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement;

(B) Award will be made to the offeror whose proposal represents the best value where price is a substantial factor in source selection; and

(C) There is no finding that the price of the otherwise successful offeror is unreasonable. Any finding that the price is unreasonable must be supported by a statement of the facts and approved at a level above the contracting officer.

(ii) For agencies other than DoD, NASA, and the Coast Guard, a price is also based on adequate price competition when

(A) There was a reasonable expectation, based on market research or other assessment, that two or more responsible offerors, competing independently, would submit priced offers in response to the request for proposal's (RFP) expressed requirement, even though only one offer is received from a responsible offeror and if—

(1) Based on the offer received, the contracting officer can reasonably conclude that the offer was submitted with the expectation of competition, *e.g.*, circumstances indicate that—

(i) The offeror believed that at least one other offeror was capable of submitting a meaningful offer; and

(ii) The offeror had no reason to believe that other potential offerors did not intend to submit an offer; and

(2) The determination that the proposed price is based on adequate price competition and is reasonable has been approved at a level above the contracting officer; or

(B) Price analysis clearly demonstrates that the proposed price is reasonable in comparison with current or recent prices for the same or similar items, adjusted to reflect changes in market conditions, economic conditions, quantities, or terms and conditions under contracts that resulted from adequate price competition.

(2) *Prices set by law or regulation*. Pronouncements in the form of periodic rulings, reviews, or similar actions of a governmental body, or embodied in the laws, are sufficient to set a price.

(3) *Commercial products and commercial services*.

(i) Any acquisition that the contracting officer determines meets the commercial product or commercial service definition in 2.101, or any modification, as defined in paragraph (3)(i) of the commercial product definition, that does not change a commercial product to other than commercial, is exempt from the requirement for certified cost or pricing data. If the contracting officer determines that a product or service claimed to be commercial is not, and that no other exception or waiver for certified cost or pricing data applies, the contracting officer must require submission of certified cost or pricing data.

(ii) In accordance with section 41 U.S.C. 3501:

(A) When purchasing services that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are of a type offered and sold competitively in substantial quantities in the commercial marketplace, they may be considered commercial services (thus meeting the purpose of 41 U.S.C. chapter 35 and 10 U.S.C. chapter 271 for truth in negotiations) only if the contracting officer determines in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price of such services.

(B) In order to make this determination, contracting officers may request the offeror to submit prices paid for the same or similar commercial services under comparable terms and conditions by both Government and commercial customers; and

(C) If the contracting officer determines that the information described in paragraph (c)(3)(ii)(B) of this section is not sufficient to determine the reasonableness of price, other relevant information regarding the basis for price or cost, including information on labor costs, material costs and overhead rates may be requested.

(iii) The following requirements apply to minor modifications defined in paragraph (3)(ii) of the definition of a commercial product at 2.101 that do not change the commercial product to other than commercial:

(A) For acquisitions funded by any agency other than DoD, NASA, or Coast Guard, such modifications of a commercial product are exempt from the requirement for submission of certified cost or pricing data.

(B) For acquisitions funded by DoD, NASA, or Coast Guard, such modifications of a commercial product are exempt from the requirement for submission of certified cost or pricing data provided the total price of all such modifications under a particular contract action does not exceed the greater of the threshold for obtaining certified cost or pricing data in 15.403-3(a) or 5 percent of the total price of the contract at the time of contract award.

(C) For acquisitions funded by DoD, NASA, or Coast Guard such modifications of a commercial product are not exempt from the requirement for submission of certified cost or pricing data on the basis of the exemption provided for at 15.403-2(c)(3) if the total price of all such modifications under a particular contract action exceeds the greater of the threshold for obtaining certified cost or pricing data in 15.403-3(a) or 5 percent of the total price of the contract at the time of contract award.

(iv) Any acquisition for other than commercial products or services treated as commercial products or commercial services at 12.001(b), except sole source contracts greater than $25 million, is exempt from the requirements for certified cost or pricing data (41 U.S.C. 1903).

(4) *Waivers*.

(i) In exceptional cases, the HCA may, without power of delegation, waive the requirement for submission of certified cost or pricing data if the price can be determined to be fair and reasonable without submission of certified cost or pricing data. The authorization for the waiver and the supporting rationale must be in writing.

(ii) If the HCA has waived the requirement for submission of certified cost or pricing data, the contractor or higher-tier subcontractor to whom the waiver relates must be considered as having been required to provide certified cost or pricing data. Consequently, award of any lower-tier subcontract expected to exceed the certified cost or pricing data threshold requires the submission of certified cost or pricing data unless—

(A) An exception otherwise applies to the subcontract; or

(B) The waiver specifically includes the subcontract and the rationale supporting the waiver for that subcontract.

15.403-3 Certified cost or pricing data.

(a) *Threshold*. Unless an exception at 15.403-2 applies, contracting officers must obtain certified cost or pricing data when an action meets or exceeds the threshold of $2.5 million (for prime contracts awarded on or after July 1, 2018). The threshold is $950,000 for prime contracts awarded prior to July 1, 2018, unless otherwise stated in the contract. Contracting officers should consider requesting a waiver when the standards at 15.403-2(c)(4) can be met.

(b) *Actions requiring certified cost or pricing data*. Certified cost or pricing data are required before completing any of the following actions expected to exceed the current threshold or, in the case of existing contracts, the threshold specified in the existing contract:

(1) The award of any negotiated contract (except for undefinitized actions such as letter contracts).

(2) The award of a subcontract at any tier, if the contractor and each higher-tier subcontractor were required to furnish certified cost or pricing data.

(3) The modification of any sealed bid or negotiated contract (whether or not certified cost or pricing data were initially required) or any subcontract covered by paragraph (b)(2) of this subsection.

(i) Price adjustment amounts must consider both increases and decreases (*e.g.*, a $500,000 modification resulting from a reduction of $1,500,000 and an increase of $1,000,000 is a $2,500,000 pricing adjustment exceeding the $2,500,000 threshold). This requirement does not apply when unrelated and separately priced changes for which certified cost or pricing data would not otherwise be required are included for administrative convenience in the same modification.

(ii) Negotiated final pricing actions (*e.g.*, termination settlements and total final price agreements for fixed-price incentive and redeterminable contracts) are contract modifications requiring certified cost or pricing data if—

(A) The total final price agreement for such settlements or agreements exceeds the pertinent threshold set forth at paragraph (a) of this subsection; or

(B) The partial termination settlement plus the estimate to complete the continued portion of the contract exceeds the pertinent threshold set forth at paragraph (a) of this subsection.

(iii) Certified cost or pricing data are not required for modifications—

(A) Solely for overrun funding or interim billing price adjustments; or

(B) To exercise an option at the price established at contract award or initial negotiation.

(c) *Required documentation from offerors*. When certified cost or pricing data are required, contracting officers must require the contractor or prospective contractor to submit to the contracting officer (and to have any subcontractor or prospective subcontractor submit to the prime contractor or appropriate subcontractor tier) the following in support of any proposal:

(1) The certified cost or pricing data and data other than certified cost or pricing data required by the contracting officer to determine that the price is fair and reasonable.

(2) A *Certificate of Current Cost or Pricing Data*, in the format specified in 15.403-4, certifying that to the best of its knowledge and belief, the cost or pricing data were accurate, complete, and current as of the date of agreement on price or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price.

(d) *Inflation adjustments*. When a clause refers to the certified cost or pricing threshold and the threshold is adjusted for inflation pursuant to part 1, the changed threshold applies throughout the remaining term of the contract, unless there is another threshold adjustment.

(e) *Requests for certified data below the threshold*. Unless prohibited because an exception at 15.403-2 applies, the HCA without power of delegation, may authorize the contracting officer to obtain certified cost or pricing data for pricing actions below the pertinent threshold in paragraph (a) of this subsection, provided the action exceeds the simplified acquisition threshold. The HCA must justify the requirement for certified cost or pricing data and provide a written finding that certified cost or pricing data are necessary to determine whether the price is fair and reasonable and the facts supporting that finding.

(f) *Delayed exception*. If certified cost or pricing data are requested and submitted by an offeror, but an exception is later found to apply, the data must not be considered certified cost or pricing data and must not be certified in accordance with 15.403-4.

(g) *Foreign governments*. The requirements of this subsection also apply to contracts entered into by an agency on behalf of a foreign government.

15.403-4 Certificate of current cost or pricing data.

(a) When certified cost or pricing data are required, contracting officers must require the contractor to execute a Certificate of Current Cost or Pricing Data, using the format in this paragraph, and must include the executed certificate in the contract file.

Certificate of Current Cost or Pricing Data

This is to certify that, to the best of my knowledge and belief, the cost or pricing data (as defined in part 2 of the Federal Acquisition Regulation (FAR) and required under FAR subsection 15.403-3) submitted, either actually or by specific identification in writing, to the Contracting Officer or to the Contracting Officer's representative in support of ____* are accurate, complete, and current as of ____**. This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreements between the offeror and the Government that are part of the proposal.

Firm: _____

Signature: _____

Name: _____

Title: _____

Date of execution: _____***

* Identify the proposal, request for price adjustment, or other submission involved, giving the appropriate identifying number (e.g., RFP No.).

** Insert the day, month, and year when price negotiations were concluded and price agreement was reached or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price.

*** Insert the day, month, and year of signing, which should be as close as practicable to the date when the price negotiations were concluded and the contract price was agreed to.

(End of certificate)

(b) The certificate does not constitute a representation as to the accuracy of the contractor's judgment on the estimate of future costs or projections. It applies to the data upon which the judgment or estimate was based. This distinction between fact and judgment should be clearly understood. If the contractor had information reasonably available at the time of agreement showing that the negotiated price was not based on accurate, complete, and current data, the contractor's responsibility is not limited by any lack of personal knowledge of the information on the part of its negotiators.

(c) The contracting officer and contractor are encouraged to reach a prior agreement on criteria for establishing closing or cutoff dates when appropriate in order to minimize delays associated with proposal updates. Closing or cutoff dates should be included as part of the data submitted with the proposal and, before agreement on price, data should be updated by the contractor to the latest closing or cutoff dates for which the data are available. Use of cutoff dates coinciding with reports is acceptable, as certain data may not be reasonably available before normal periodic closing dates (e.g., actual indirect costs). Data within the contractor's or a subcontractor's organization on matters significant to contractor management and to the Government will be treated as reasonably available. What is significant depends upon the circumstances of each acquisition.

(d) Possession of a Certificate of Current Cost or Pricing Data is not a substitute for examining and analyzing the contractor's proposal.

15.404 Cost and/or price analysis.

(a) *General*. The objective of proposal analysis is to ensure that the final agreed-to price is fair and reasonable.

(1) Contracting officers are responsible for evaluating the reasonableness of the offered prices. The analytical techniques and procedures described in this section may be used, individually or in combination with others, to ensure that the final price is fair and reasonable. The complexity and circumstances of each acquisition should determine the level of detail of the analysis required.

(2) Price analysis must be used when certified cost or pricing data are not required. When a fair and reasonable price cannot be determined through price analysis alone, cost analysis may also be used to evaluate data other than certified cost or pricing data to determine cost reasonableness or cost realism.

(3) Cost analysis must be used when certified cost or pricing data are required. However, price analysis must be used to verify that the overall price offered is fair and reasonable.

(4) Cost realism must be used when contemplating the award of a cost-reimbursement contract.

(b) *Advice and assistance*. Contracting officers may request the advice and assistance of other experts to ensure that an appropriate analysis is performed. Recommendations or conclusions regarding the Government's review or analysis of an offeror's or contractor's proposal must not be disclosed to the offeror or contractor without the concurrence of the contracting officer.

(c) *Mistakes and discrepancies in data*. Any discrepancy or mistake of fact (such as duplications, omissions, and errors in computation) contained in the certified cost or pricing data or data other than certified cost or pricing data submitted in support of a proposal must be brought to the contracting officer's attention.

15.404-1 Price analysis.

(a) *General*. Price analysis is the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit.

(b) *Techniques*. The Government may use various price analysis techniques and procedures to ensure a fair and reasonable price, including, but not limited to, the following:

(1) Comparison of proposed prices received in response to the RFP.

(2) Comparison of the proposed prices to historical prices paid, whether by the Government or other than the Government, for the same or similar items. This method may be used for commercial products or commercial services including those "of a type" or when requiring minor modifications for commercial products.

(i) The prior price must be a valid basis for comparison. If there has been a significant time lapse between the last acquisition and the present one, if the terms and conditions of the acquisition are significantly different, or if the reasonableness of the prior price is uncertain, then the prior price may not be a valid basis for comparison.

(ii) The prior price must be adjusted to account for materially differing terms and conditions, quantities and market and economic factors. For similar items, the contracting officer must also adjust the prior price to account for material differences between the similar item and the item being procured.

(iii) Expert technical advice should be obtained when analyzing similar items, or commercial products or commercial services that are "of a type", or requiring minor modifications for commercial products, to ascertain the magnitude of changes required and to assist in pricing the required changes.

(3) Use of parametric estimating methods/application of rough yardsticks (such as dollars per pound or per horsepower, or other units) to highlight significant inconsistencies that warrant additional pricing inquiry.

(4) Comparison with competitive published price lists, published market prices of commodities, similar indexes, and discount or rebate arrangements.

(5) Comparison of proposed prices with independent Government cost estimates.

(6) Comparison of proposed prices with prices obtained through market research for the same or similar items.

(7) Analysis of data other than certified cost or pricing data provided by the offeror.

(c) *Preferred method of analysis*. The techniques at 15.404-1(b)(1) and (2) are the preferred methods for price analysis. However, if the contracting officer determines that information on competitive proposed prices or previous contract prices is not available or is insufficient to determine that the price is fair and reasonable, the contracting officer may use any of the remaining techniques as appropriate to the circumstances applicable to the acquisition.The fact that a price is included in a catalog does not, in and of itself, make it fair and reasonable.

(d) *Value analysis*. Value analysis can give insight into the relative worth of a product and the Government may use it in conjunction with the price analysis techniques listed in paragraph (b) of this section.

15.404-2 Cost analysis.

(a) *General*. Cost analysis is the review and evaluation of any separate cost elements and profit or fee in an offeror's or contractor's proposal, as needed to determine a fair and reasonable price or to determine cost realism, and the application of judgment to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency.

(b) *Techniques*. The Government may use various cost analysis techniques and procedures to ensure a fair and reasonable price, including, but not limited to, the following:

(1) Verification of cost data or pricing data and evaluation of cost elements, including—

(i) The necessity for, and reasonableness of, proposed costs, including allowances for contingencies;

(ii) Projection of the offeror's cost trends, on the basis of current and historical cost or pricing data;

(iii) Reasonableness of estimates generated by appropriately calibrated and validated parametric models or cost-estimating relationships; and

(iv) The application of audited or negotiated indirect cost rates, labor rates, and cost of money or other factors.

(2) Evaluating the effect of the offeror's current practices on future costs. In conducting this evaluation, contracting officers must ensure that the effects of inefficient or uneconomical past practices are not projected into the future. In pricing production of recently developed complex equipment, contracting officers should perform a trend analysis of basic labor and materials, even in periods of relative price stability.

(3) Comparison of costs proposed by the offeror for individual cost elements with—

(i) Actual costs previously incurred by the same offeror;

(ii) Previous cost estimates from the offeror or from other offerors for the same or similar items;

(iii) Other cost estimates received in response to the Government's request;

(iv) Independent Government cost estimates by technical personnel; and

(v) Forecasts of planned expenditures.

(4) Verification that the offeror's cost submissions are in accordance with the contract cost principles and procedures in part 31 and, when applicable, the requirements and procedures in 48 CFR chapter 99.

(5) Review to determine whether any cost data or pricing data, necessary to make the offeror's proposal suitable for negotiation, have not been either submitted or identified in writing by the offeror. If there are such data, contracting officers must attempt to obtain and use them in the negotiations or make satisfactory allowance for the incomplete data.

(6) Analysis of the results of any make-or-buy program reviews, in evaluating subcontract costs.

15.404-3 Cost realism analysis.

(a) *General*. Cost realism analysis is the process of independently reviewing and evaluating specific elements of each offeror's proposed cost estimate to determine whether the estimated proposed cost elements are realistic for the work to be performed; reflect a clear understanding of the requirements; and are consistent with the unique methods of performance and materials described in the offeror's technical proposal.

(b) *Probable Cost*. Cost realism analyses must be performed on cost-reimbursement contacts to determine the probable cost of performance for each offeror.

(1) The probable cost may differ from the proposed cost and should reflect the Government's best estimate of the cost of any contract that is most likely to result from the offeror's proposal. The probable cost must be used for purposes of evaluation to determine the best value.

(2) The probable cost is determined by adjusting each offeror's proposed cost, and fee when appropriate, to reflect any additions or reductions in cost elements to realistic levels based on the results of the cost realism analysis.

(c) *Competitive fixed-price-type contracts*. Cost realism analyses may also be used on competitive fixed-price incentive contracts or, in exceptional cases, on other competitive fixed-price-type contracts when new requirements may not be fully understood by competing offerors, there are quality concerns, or past experience indicates that contractors' proposed costs have resulted in quality or service shortfalls. Results of the analysis may be used in performance risk assessments and responsibility determinations. However, proposals must be evaluated using the criteria in the RFP, and the offered prices must not be adjusted as a result of the analysis.

15.404-4 Technical cost or price analysis.

(a) *Labor and materials*. At a minimum, the technical analysis must examine the types and quantities of material proposed and the need for the types and quantities of labor hours and the labor mix. Any other data that may be pertinent to an assessment of the offeror's ability to accomplish the technical requirements or to the cost or price analysis of the service or product being proposed should also be included in the analysis.

(b) *Technical assistance*. Contracting officers should request:

(1) Personnel having specialized knowledge, skills, experience, or capability in engineering, science, or management perform a technical analysis of the proposed types and quantities of materials, labor, processes, special tooling, equipment or real property, the reasonableness of scrap and spoilage, and other associated factors set forth in the proposal(s) in order to determine the need for and reasonableness of the proposed resources, assuming reasonable economy and efficiency.

(2) Technical assistance in evaluating pricing related to items that are “similar to” items being purchased, or commercial products or commercial services that are “of a type”, or requiring minor modifications for commercial products, to ascertain the magnitude of changes required and to assist in pricing the required changes.

15.404-5 Unit prices.

(a) *General*. Except when pricing an item on the basis of adequate price competition or catalog or market price, unit prices must reflect the intrinsic value of an item or service and be in proportion to an item's base cost (e.g., manufacturing or acquisition costs).

(b) *Price distortion*. (1) Except for the acquisition of commercial products, when offerors identify items of supply that they will not manufacture or to which they will not contribute significant value, the information must be used to determine whether the intrinsic value of an item has been distorted through application of overhead and whether such items should be considered for breakout.

(2) Any method of distributing costs to line items that distorts the unit prices must not be used. For example, distributing costs equally among line items is not acceptable except when there is little or no variation in base cost. (10 U.S.C. 3703(a)(1)(A) and 41 U.S.C. 3503(a)(1)(A)).

15.404-6 Unbalanced pricing.

(a) *General.* (1) Unbalanced pricing may increase performance risk and could result in payment of unreasonably high prices. Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more line items is significantly over or understated as indicated by the application of cost or price analysis techniques.

(2) The greatest risks associated with unbalanced pricing occur when—

(i) Startup work, mobilization, first articles, or first article testing are separate line items;

(ii) Base quantities and option quantities are separate line items; or

(iii) The evaluated price is the aggregate of estimated quantities to be ordered under separate line items of an indefinite-delivery contract.

(b) *Policy*. (1) All offers with separately priced line items or subline items must be analyzed to determine if the prices are unbalanced. If cost or price analysis techniques indicate that an offer is unbalanced, contracting officers must—

(i) Consider the risks to the Government associated with the unbalanced pricing in determining the competitive range and in making the source selection decision; and

(ii) Consider whether award of the contract will result in paying unreasonably high prices for contract performance.

(2) An offer may be rejected if the contracting officer determines that the lack of balance poses an unacceptable risk to the Government.

15.404-7 Review and justification of pass-through contracts.

(a) *Policy.* When an offeror informs the contracting officer, pursuant to clause 52.215-22, *Limitations on Pass-Through Charges-Identification of Subcontractor Effort*, that it intends to award subcontracts for more than 70 percent of the total cost of work to be performed under the contract, task or delivery order, the contracting officer must—

(1) Consider the availability of alternative contract vehicles and the feasibility of contracting directly with a subcontractor or subcontractors that will perform the bulk of the work. If such alternative approaches are selected, any resulting RFP must be issued in accordance with the competition requirements under FAR part 6;

(2) Make a written determination that the contracting approach selected is in the best interest of the Government; and

(3) Document the basis for such determination. (section 802 of the NDAA for FY 2013 (Pub. L. 112.239)).

(b) *Exemption*. Contract actions set aside for small business, 8(a), HUBZone, SDVOSB, and WOSB concerns are exempt from the requirements of this subsection (see section 1615 of the NDAA for FY 2014 (Pub. L. 113-66)).

15.404-8 Subcontract pricing considerations.

(a) *Policy*. Contracting officers are responsible for the determination of a fair and reasonable price for the prime contract, including subcontracting costs. To support this effort, the prime contractor or subcontractor must—

(1) Conduct appropriate cost or price analyses to establish the reasonableness of proposed subcontract prices;

(2) Include the results of these analyses in the price proposal; and

(3) When required by paragraph (b) of this subsection, submit subcontractor certified cost or pricing data to the Government as part of its own certified cost or pricing data.

(b) *Certified cost or pricing data*. Any contractor or subcontractor that is required to submit certified cost or pricing data also must obtain and analyze certified cost or pricing data before awarding any subcontract, purchase order, or modification expected to exceed the certified cost or pricing data threshold, unless an exception in 15.403-2 applies to that action.

(1) The contractor must submit, or cause to be submitted by the subcontractor(s), certified cost or pricing data to the Government for subcontracts that are the lower of either—

(i) $20 million or more; or

(ii) Both more than the pertinent certified cost or pricing data threshold and more than 10 percent of the prime contractor's proposed price, unless the contracting officer believes such submission is unnecessary.

(2) Contracting officers should require the contractor or subcontractor to submit to the Government (or cause submission of) subcontractor certified cost or pricing data below the thresholds in paragraph (b)(1) of this section and data other than certified cost or pricing data that the contracting officer considers necessary for adequately pricing the prime contract.

(3) Subcontractor certified cost or pricing data must be submitted in the format provided in Table 15-1 of 15.408-2 or the alternate format specified in the RFP.

(4) Subcontractor certified cost or pricing data must be current, accurate, and complete as of the date of price agreement, or, if applicable, an earlier date agreed upon by the parties and specified on the contractor's Certificate of Current Cost or Pricing Data. Contractors must update subcontractor's data, as appropriate, during source selection and negotiations.

(5) If there is more than one prospective subcontractor for any given work, the contractor need only submit to the Government certified cost or pricing data for the prospective subcontractor most likely to receive the award.

(c) *Approved purchasing system*. Contracting officers should consider whether a contractor or subcontractor has an approved purchasing system, has performed cost or price analysis of proposed subcontractor prices, or has negotiated the subcontract prices before negotiation of the prime contract, in determining the reasonableness of the prime contract price. This does not relieve contracting officers from the responsibility to analyze the contractor's submission, including subcontractor's certified cost or pricing data.

15.404-9 Profit.

(a) *General*. This subsection prescribes policies for establishing the profit or fee portion of the Government prenegotiation objective in price negotiations based on cost analysis.

(b) *Policy*. Structured approaches (see paragraph (d) of this subsection) for determining profit or fee prenegotiation objectives provide a discipline for ensuring that all relevant factors are considered.

(1) Subject to the authorities in part 1, agencies making noncompetitive contract awards over $100,000 totaling $50 million or more a year—

(i) Must use a structured approach for determining the profit or fee objective in those acquisitions that require cost analysis (Agencies may use another agency's structured approach); and

(ii) May prescribe specific exemptions for situations in which mandatory use of a structured approach would be clearly inappropriate.

(2) When the price negotiation is based on cost analysis, contracting officers in agencies that have a structured approach must use it to analyze profit. When not using a structured approach, contracting officers must comply with paragraph (d)(1) of this subsection in developing profit or fee prenegotiation objectives.

(3) When the price negotiation is not based on cost analysis, contracting officers are not required to analyze profit.

(c) *Contracting officer responsibilities*. Contracting officers –

(1) Must use the Government prenegotiation cost objective amounts as the basis for calculating the profit or fee prenegotiation objective.

(2) Must not require any prospective contractor to submit breakouts or supporting rationale for its profit or fee objective but may consider it, if it is submitted voluntarily.

(3) Before applying profit or fee factors, must exclude-

(i) From the pre-negotiation cost objective amounts, the purchase cost of contractor-acquired property that is categorized as equipment, as defined in FAR 45, and where such equipment is to be charged directly to the contract; and

(ii) Facilities capital cost of money included in the cost objective amounts. If the prospective contractor fails to identify or propose facilities capital cost of money in a proposal for a contract that will be subject to the cost principles for contracts with commercial organizations, facilities capital cost of money will not be an allowable cost in any resulting contract.

(4) Must not negotiate a price or fee that exceeds the following statutory limitations, imposed by 10 U.S.C. 3322(b) and 41 U.S.C. 3905:

(i) For experimental, developmental, or research work performed under a cost-plus-fixed-fee contract, the fee must not exceed 15 percent of the contract's estimated cost, excluding fee.

(ii) For architect-engineer services for public works or utilities, the contract price or the estimated cost and fee for production and delivery of designs, plans, drawings, and specifications must not exceed 6 percent of the estimated cost of construction of the public work or utility, excluding fees.

(iii) For other cost-plus-fixed-fee contracts, the fee must not exceed 10 percent of the contract's estimated cost, excluding fee.

(iv) The contracting officer's signature on the price negotiation memorandum or other documentation supporting determination of fair and reasonable price documents the contracting officer's determination that the statutory price or fee limitations have not been exceeded.

(5) May use the basic contract's profit or fee rate as the prenegotiation objective for a change or modification, if that change or modification calls for essentially the same type and mix of work as the basic contract and is of relatively small dollar value compared to the total contract value, contracting officers.

(d) *Profit-analysis factors —*

(1) *Common factors*. Unless it is clearly inappropriate or not applicable, each factor outlined in paragraphs (d)(1)(i) through (vi) of this subsection must be considered by agencies in developing their structured approaches and by contracting officers in analyzing profit, whether or not using a structured approach.

(i) *Contractor effort*. This factor measures the complexity of the work and the resources required of the prospective contractor for contract performance. Greater profit opportunity should be provided under contracts requiring a high degree of professional and managerial skill and to prospective contractors whose skills, facilities, and technical assets can be expected to lead to efficient and economical contract performance. The subfactors in paragraphs (d)(1)(i)(A) through (D) of this subsection must be considered in determining contractor effort, but they may be modified in specific situations to accommodate differences in the categories used by prospective contractors for listing costs—

(A) *Material acquisition*. This subfactor measures the managerial and technical effort needed to obtain the required purchased parts and material, subcontracted items, and special tooling. Considerations include the complexity of the items required, the number of purchase orders and subcontracts to be awarded and administered, whether established sources are available or new or second sources must be developed, and whether material will be obtained through routine purchase orders or through complex subcontracts requiring detailed specifications. Profit consideration should correspond to the managerial and technical effort involved.

(B) *Conversion direct labor*. This subfactor measures the contribution of direct engineering, manufacturing, and other labor to converting the raw materials, data, and subcontracted items into the contract items. Considerations include the diversity of engineering, scientific, and manufacturing labor skills required and the amount and quality of supervision and coordination needed to perform the contract task.

(C) *Conversion-related indirect costs*. This subfactor measures how much the indirect costs contribute to contract performance. The labor elements in the allocable indirect costs should be given the profit consideration they would receive if treated as direct labor. The other elements of indirect costs should be evaluated to determine whether they merit only limited profit consideration because of their routine nature, or are elements that contribute significantly to the proposed contract.

(D) *General management*. This subfactor measures the prospective contractor's other indirect costs and general and administrative (G&A) expense, their composition, and how much they contribute to contract performance. Considerations include how labor in the overhead pools would be treated if it were direct labor, whether elements within the pools are routine expenses or instead are elements that contribute significantly to the proposed contract, and whether the elements require routine as opposed to unusual managerial effort and attention.

(ii) *Contract cost risk*.

(A) This factor measures the degree of cost responsibility and associated risk that the prospective contractor will assume as a result of the contract type contemplated and considering the reliability of the cost estimate in relation to the complexity and duration of the contract task. Determination of contract type should be closely related to the risks involved in timely, cost-effective, and efficient performance. This factor should compensate contractors proportionately for assuming greater cost risks.

(B) The contractor assumes the greatest cost risk in a closely priced firm-fixed-price contract under which it agrees to perform a complex undertaking on time and at a predetermined price. Some firm-fixed-price contracts may entail substantially less cost risk than others because, for example, the contract task is less complex or many of the contractor's costs are known at the time of price agreement, in which case the risk factor should be reduced accordingly. The contractor assumes the least cost risk in a cost-plus-fixed-fee level-of-effort contract, under which it is reimbursed those costs determined to be allocable and allowable, plus the fixed fee.

(C) In evaluating assumption of cost risk, contracting officers must, except in unusual circumstances, treat time-and-materials, labor-hour, and firm-fixed-price, level-of-effort term contracts as cost-plus-fixed-fee contracts.

(iii) *Federal socioeconomic programs*. This factor measures the degree of support given by the prospective contractor to Federal socioeconomic programs, such as those involving small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, WOSB concerns, veteran-owned, HUBZone, SDVOSB concerns, sheltered workshops for workers with disabilities, and energy conservation. Greater profit opportunity should be provided contractors that have displayed unusual initiative in these programs.

(iv) *Capital investments*. This factor takes into account the contribution of contractor investments to efficient and economical contract performance.

(v) *Cost-control and other past accomplishments*. This factor allows additional profit opportunities to a prospective contractor that has previously demonstrated its ability to perform similar tasks effectively and economically. In addition, consideration should be given to measures taken by the prospective contractor that result in productivity improvements, and other cost-reduction accomplishments that will benefit the Government in follow-on contracts.

(vi) *Independent development*. Under this factor, the contractor may be provided additional profit opportunities in recognition of independent development efforts relevant to the contract end item without Government assistance. The contracting officer should consider whether the development cost was recovered directly or indirectly from Government sources.

(2) *Additional factors*. In order to foster achievement of program objectives, each agency may include additional factors in its structured approach or take them into account in the profit analysis of individual contract actions.

15.405 Special cost or pricing areas.

15.405-1 Inaccurate, incomplete, or noncurrent cost or pricing data.

(a) If, before agreement on price, the contracting officer learns that any certified cost or pricing data submitted are inaccurate, incomplete, or noncurrent, the contracting officer must immediately bring the matter to the attention of the prospective contractor, whether the defective data increase or decrease the contract price.

(b) The contracting officer must consider any new data submitted to correct the deficiency, or consider the inaccuracy, incompleteness, or noncurrency of the data when negotiating the contract price. The price negotiation memorandum must reflect the adjustments made to the data or the corrected data used to negotiate the contract price.

15.405-2 Make-or-buy programs.

(a) *Evaluation, negotiation, and agreement*. Contracting officers must evaluate and negotiate proposed make-or-buy programs as soon as practicable after their receipt and before contract award.

(1) When the program is to be incorporated in the contract and the design status of the product being acquired does not permit accurate precontract identification of major items or work efforts, contracting officers must notify the prospective contractor in writing that these items or efforts, when identifiable, must be added under the clause at 52.215-9, *Changes or Additions to Make-or-Buy Program*.

(2) Contracting officers normally must not agree to proposed "make items" when the products or services are not regularly manufactured or provided by the contractor and are available—quality, quantity, delivery, and other essential factors considered—from another firm at equal or lower prices, or when they are regularly manufactured or provided by the contractor, but are available—quality, quantity, delivery, and other essential factors considered—from another firm at lower prices. Contracting officers may agree to these as "make items" if an overall lower Governmentwide cost would result or it is otherwise in the best interest of the Government. If this situation occurs in any fixed-price incentive or cost-plus-incentive-fee contract, contracting officers must specify these items in the contract and state that they are subject to paragraph (d) of the clause at 52.215-9, *Changes or Additions to Make-or-Buy Program*. If the contractor proposes to reverse the categorization of such items during contract performance, the contract price must be subject to equitable reduction.

(b) *Incorporating make-or-buy programs in contracts*. Contracting officers may incorporate the make-or-buy program in negotiated contracts for—

(1) Major systems or their subsystems or components, regardless of contract type; or

(2) Other supplies and services if—

(i) The contract is a cost-reimbursable contract, or a cost-sharing contract in which the contractor's share of the cost is less than 25 percent; and

(ii) The contracting officer determines that technical or cost risks justify Government review and approval of changes or additions to the make-or-buy program.

15.405-3 Forward pricing rate agreements.

(a) All data submitted in connection with the Forward Rate Pricing Agreement (FPRA), updated as necessary, form a part of the total data that the offeror certifies to be accurate, complete, and current at the time of agreement on price for an initial contract or for a contract modification.

(b) Contracting officers will use FPRA rates as bases for pricing all contracts, modifications, and other contractual actions to be performed during the period covered by the agreement. Conditions that may affect the agreement's validity must be reported promptly to the administrative contracting officer (ACO). If the ACO determines that a changed condition invalidates the agreement, the ACO must notify all interested parties of the extent of its effect and status of efforts to establish a revised FPRA.

(c) Contracting officers must not require certification at the time of agreement for data supplied in support of FPRA's or other advance agreements. When a forward pricing rate agreement or other advance agreement is used to price a contract action that requires a certificate, the certificate supporting that contract action must cover the data supplied to support the FPRA or other advance agreement, and all other data supporting the action.

15.405-4 Should-cost review.

(a) *General*. (1) Should-cost reviews are a specialized form of cost analysis. Should-cost reviews differ from traditional evaluation methods because they do not assume that a contractor's historical costs reflect efficient and economical operation. Instead, these reviews evaluate the economy and efficiency of the contractor's existing work force, methods, materials, equipment, real property, operating systems, and management. These reviews are accomplished by a multi-functional team of Government contracting, contract administration, pricing, audit, and engineering representatives. The objective of should-cost reviews is to promote both short and long-range improvements in the contractor's economy and efficiency in order to reduce the cost of performance of Government contracts. In addition, by providing rationale for any recommendations and quantifying their impact on cost, the Government will be better able to develop realistic objectives for negotiation.

(2) There are two types of should-cost reviews: program should-cost review and overhead should-cost review. These should-cost reviews may be performed together or independently. The scope of a should-cost review can range from a large-scale review examining the contractor's entire operation (including plant-wide overhead and selected major subcontractors) to a small-scale tailored review examining specific portions of a contractor's operation.

(b) *Program should-cost review*.

(1) A program should-cost review is used to evaluate significant elements of direct costs, such as material and labor, and associated indirect costs, usually associated with the production of major systems. When a program should-cost review is conducted relative to a contractor proposal, a separate audit report on the proposal is required.

(2) A program should-cost review should be considered, particularly in the case of a major system acquisition, when—

(i) Some initial production has already taken place;

(ii) The contract will be awarded on a sole source basis;

(iii) There are future year production requirements for substantial quantities of like items;

(iv) The items being acquired have a history of increasing costs;

(v) The work is sufficiently defined to permit an effective analysis and major changes are unlikely;

(vi) Sufficient time is available to plan and adequately conduct the should-cost review; and

(vii) Personnel with the required skills are available or can be assigned for the duration of the should-cost review.

(3) Contracting officers should decide which elements of the contractor's operation have the greatest potential for cost savings and assign the available personnel resources accordingly. The expertise of on-site Government personnel should be used, when appropriate. While the particular elements to be analyzed are a function of the contract work task, elements such as manufacturing, pricing and accounting, management and organization, and subcontract and vendor management are normally reviewed in a should-cost review.

(4) In acquisitions for which a program should-cost review is conducted, a separate program should-cost review team report, prepared in accordance with agency procedures, is required. Contracting officers must consider the findings and recommendations contained in the program should-cost review team report when negotiating the contract price. After completing the negotiation, contracting officers must provide the ACO a report of any identified uneconomical or inefficient practices, together with a report of correction or disposition agreements reached with the contractor. Contracting officers must establish a follow-up plan to monitor the correction of the uneconomical or inefficient practices.

(c) *Overhead should-cost review*.

(1) An overhead should-cost review is used to evaluate indirect costs, such as fringe benefits, shipping and receiving, real property, and equipment, depreciation, plant maintenance and security, taxes, and general and administrative activities. It is normally used to evaluate and negotiate an FPRA with the contractor. When an overhead should-cost review is conducted, a separate audit report is required.

(2) The following factors should be considered when selecting contractor sites for overhead should-cost reviews:

(i) Dollar amount of Government business.

(ii) Level of Government participation.

(iii) Level of noncompetitive Government contracts.

(iv) Volume of proposal activity.

(v) Major system or program.

(vi) Corporate reorganizations, mergers, acquisitions, or takeovers.

(vii) Other conditions (e.g., changes in accounting systems, management, or business activity).

(3) The objective of the overhead should-cost review is to evaluate significant indirect cost elements in-depth, and identify and recommend corrective actions regarding inefficient and uneconomical practices. If it is conducted in conjunction with a program should-cost review, a separate overhead should-cost review report is not required. However, the findings and recommendations of the overhead should-cost team, or any separate overhead should-cost review report, shall be provided to the ACO. The ACO should use this information to form the basis for the Government position in negotiating an FPRA with the contractor. The ACO shall establish a follow-up plan to monitor the correction of the uneconomical or inefficient practices.

15.406 Data to support proposal analysis.

(a) *Field pricing assistance*.

(1) Contracting officers should request field pricing assistance when the information available at the buying activity is inadequate to determine a fair and reasonable price. The request must reflect the minimum essential supplementary information needed to conduct a technical or cost or pricing analysis.

(2) Contracting officers must tailor the type of information and level of detail requested in accordance with the specialized resources available at the buying activity and the magnitude and complexity of the required analysis. Field pricing assistance is generally available to provide—

(i) Technical, audit, and special reports associated with the cost elements of a proposal, including subcontracts;

(ii) Information on related pricing practices and history;

(iii) Information to help contracting officers determine commerciality and a fair and reasonable price, including—

(A) Verifying sales history to source documents;

(B) Identifying special terms and conditions;

(C) Identifying customarily granted or offered discounts for the item;

(D) Verifying the item to an existing catalog or price list;

(E) Verifying historical data for a product or service previously not determined commercial that the offeror is now trying to qualify as a commercial product or commercial service; and

(F) Identifying general market conditions affecting determinations of commerciality and a fair and reasonable price.

(iv) Information relative to the business, technical, production, or other capabilities and practices of an offeror.

(b) *Reporting field pricing information*.

(1) Field pricing review results, including supporting rationale, may be reported directly to the contracting officer orally, in writing, or by any other method acceptable to the contracting officer.

(i) Contracting officers and field pricing experts are encouraged to use telephonic and/or electronic means to request and send pricing information.

(ii) When it is necessary to have written technical and audit reports, contracting officers must request that the audit agency concurrently forward the audit report to the requesting contracting officer and the ACO. The completed field pricing assistance results may reference audit information, but need not reconcile the audit recommendations and technical recommendations. A copy of the information submitted to the contracting officer by field pricing personnel must be provided to the audit agency.

(2) Audit and field pricing information, whether written or reported telephonically or electronically, must be made a part of the official contract file.

(c) *Audit assistance for prime contracts or subcontracts*.

(1) Contracting officers should contact the cognizant audit office directly to request assistance, particularly when an audit is the only field pricing support required. The audit office must send the audit report, or otherwise transmit the audit recommendations, directly to the contracting officer.

(i) The auditor must not reveal the audit conclusions or recommendations to the offeror/contractor without obtaining the concurrence of the contracting officer. However, the auditor may discuss statements of facts with the contractor.

(ii) Contracting officers must be notified immediately of any information disclosed to the auditor after submission of a report that may significantly affect the audit findings and, if necessary, a supplemental audit report must be issued.

(2) Contracting officers must not request a separate preaward audit of indirect costs unless the information already available from an existing audit, completed within the preceding 12 months, is considered inadequate for determining the reasonableness of the proposed indirect costs (41 U.S.C. 4706 and 10 U.S.C. 3841).

(3) The auditor is responsible for the scope and depth of the audit. Copies of updated information that will significantly affect the audit must be provided to the auditor by the contracting officer.

(4) General access to the offeror's books and financial records is limited to the auditor. This limitation does not preclude the contracting officer or the ACO, or their representatives, from requesting that the offeror provide or make available any data or records necessary to analyze the offeror's proposal.

(d) *Deficient proposals*.

(1) The ACO or the auditor, as appropriate, must notify the contracting officer immediately if the data provided for review is so deficient as to preclude review or audit, or if the contractor or offeror has denied access to any records considered essential to conduct a satisfactory review or audit. Oral notifications must be confirmed promptly in writing, including a description of deficient or denied data or records.

(2) The contracting officer must immediately take appropriate action to obtain the required data. Should the offeror/contractor again refuse to provide adequate data, or provide access to necessary data, the contracting officer must withhold the award or price adjustment and refer the contract action to a higher authority, providing details of the attempts made to resolve the matter and a statement of the practicability of obtaining the supplies or services from another source.

15.407 Price negotiation.

(a) The purpose of performing cost or price analysis is to develop a negotiation position that permits the contracting officer and the offeror an opportunity to reach agreement on a fair and reasonable price. A fair and reasonable price does not require that agreement be reached on every element of cost, nor is it mandatory that the agreed price be within the contracting officer's initial negotiation position. Contracting officers are responsible for exercising the requisite judgment needed to reach a negotiated settlement with the offeror and is solely responsible for the final price agreement. However, when significant audit or other specialist recommendations are not adopted, contracting officers should provide rationale that supports the negotiation result in the price negotiation documentation.

(b) The contracting officer's primary concern is the overall price the Government will actually pay. The contracting officer's objective is to negotiate a contract of a type and with a price providing the contractor the greatest incentive for efficient and economical performance. The negotiation of a contract type and a price are related and should be considered together with the issues of risk and uncertainty to the contractor and the Government.

(c) The Government's cost objective and proposed pricing arrangement directly affect the profit or fee objective. Because profit or fee is only one of several interrelated variables, contracting officers must not agree on profit or fee without concurrent agreement on cost and type of contract.

(d) If, however, the contractor insists on a price or demands a profit or fee that the contracting officer considers unreasonable, and the contracting officer has taken all authorized actions (including determining the feasibility of developing an alternative source) without success, the contracting officer must refer the contract action to a level above the contracting officer and document the contract file.

15.408 Documentation.

15.408-1 Prenegotiation objectives.

(a) The prenegotiation objectives establish the Government's initial negotiation position and are based on the results of the contracting officer's analysis of the offeror's proposal.

(b) Contracting officers must establish prenegotiation objectives before negotiating a pricing action. The scope and depth of the analysis supporting the objectives should be directly related to the dollar value, importance, and complexity of the

pricing action. When cost analysis is required, contracting officers must document the pertinent issues to be negotiated, the cost objectives, and a profit or fee objective.

15.408-2 Documenting the negotiation.

(a) Contracting officers must document in the contract file the principal elements of the negotiated agreement. The documentation (*e.g.*, price negotiation memorandum) must include the following:

(1) The purpose of the negotiation.

(2) A description of the acquisition, including appropriate identifying numbers (*e.g.*, RFP No.).

(3) The name, position, and organization of each person representing the contractor and the Government in the negotiation.

(4) The current status of any contractor systems (*e.g.*, purchasing, estimating, accounting, and compensation) to the extent they affected and were considered in the negotiation.

(5) If certified cost or pricing data were not required in the case of any price negotiation exceeding the certified cost or pricing data threshold, the exception used and the basis for it.

(6) If certified cost or pricing data were required, the extent to which the contracting officer—

(i) Relied on the certified cost or pricing data submitted and used them in negotiating the price;

(ii) Recognized as inaccurate, incomplete, or noncurrent any certified cost or pricing data submitted; the action taken by the contracting officer and the contractor as a result; and the effect of the defective data on the price negotiated; or

(iii) Determined that an exception applied after the data were submitted and, therefore, considered not to be certified cost or pricing data.

(7) A summary of the contractor's proposal, any field pricing assistance recommendations, including the reasons for any pertinent variances from them, the Government's negotiation objective, and the negotiated position.

(i) When the determination of a fair and reasonable price is based on cost analysis, the summary must address each major cost element.

(ii) When determination of a fair and reasonable price is based on price analysis, the summary must include the source and type of data used to support the determination.

(8) The most significant facts or considerations controlling the establishment of the prenegotiation objectives and the negotiated agreement including an explanation of any significant differences between the two positions.

(9) To the extent such direction has a significant effect on the action, a discussion and quantification of the impact of direction given by Congress, other agencies, and higher-level officials (*i.e.*, officials who would not normally exercise authority during the award and review process for the instant contract action).

(10) The basis for the profit or fee prenegotiation objective and the profit or fee negotiated.

(11) Documentation of fair and reasonable pricing.

(b) Whenever field pricing assistance has been obtained, the contracting officer must forward a copy of the negotiation documentation to the office(s) providing assistance. When appropriate, information on how advisory field support can be made more effective should be provided separately.

Table 15-1—Instructions for Submitting Cost/Price Proposals When Certified Cost or Pricing Data Are Required

This document provides instructions for preparing a contract pricing proposal when certified cost or pricing data are required.

Note 1: There is a clear distinction between submitting certified cost or pricing data and merely making available books, records, and other documents without identification. The requirement for submission of certified cost or pricing data is met when all accurate certified cost or pricing data reasonably available to the offeror have been submitted, either actually or by specific identification, to the Contracting Officer or an authorized representative. As later data come into your possession, it should be submitted promptly to the Contracting Officer in a manner that clearly shows how the data relate to the offeror's price proposal. The requirement for submission of certified cost or pricing data continues up to the time of agreement on price, or an earlier date agreed upon between the parties if applicable.

Note 2: By submitting your proposal, you grant the Contracting Officer or an authorized representative the right to examine records that formed the basis for the pricing proposal. That examination can take place at any time before award. It may include those books, records, documents, and other types of factual data (regardless of form or whether the data are specifically referenced or included in the proposal as the basis for pricing) that will permit an adequate evaluation of the proposed price.

I. General Instructions

A. You must provide the following information on the first page of your pricing proposal:

(1) RFP, contract, and/or modification number;

(2) Name and address of offeror;

(3) Name, telephone number, and email address of the point of contact;

(4) Name of contract administration office (if available);

(5) Type of contract action (that is, new contract, change order, price revision/redetermination, letter contract, unpriced order, or other);

(6) Proposed cost; profit or fee; and total;

(7) Whether you will require the use of Government property in the performance of the contract, and, if so, what property;

(8) Whether your organization is subject to cost accounting standards; whether your organization has submitted a CASB Disclosure Statement, and if it has been determined adequate; whether you have been notified that you are or may be in noncompliance with your Disclosure Statement or CAS (other than a noncompliance that the cognizant Federal agency official has determined to have an immaterial cost impact), and, if yes, an explanation; whether any aspect of this proposal is inconsistent with your disclosed practices or applicable CAS, and, if so, an explanation; and whether the proposal is consistent with your established estimating and accounting principles and procedures and FAR part 31, *Cost Principles*, and, if not, an explanation;

(9) The following statement: This proposal reflects our estimates and/or actual costs as of this date and conforms with the instructions in the RFP and FAR 15.408-2, Table 15-1. By submitting this proposal, we grant the Contracting Officer and authorized representative(s) the right to examine, at any time before award, those records, which include books, documents, accounting procedures and practices, and other data, regardless of type and form or whether such supporting information is specifically referenced or included in the proposal as the basis for pricing, that will permit an adequate evaluation of the proposed price.

(10) Date of submission; and

(11) Name, title, and signature of authorized representative.

B. In submitting your proposal, you must include an index, appropriately referenced, of all the certified cost or pricing data and information accompanying or identified in the proposal. In addition, you must annotate any future additions and/or revisions, up to the date of agreement on price, or an earlier date agreed upon by the parties, on a supplemental index.

C. As part of the specific information required, you must submit, with your proposal—

(1) Certified cost or pricing data (as defined at FAR 2.101). You must clearly identify on your cover sheet that certified cost or pricing data are included as part of the proposal.

(2) Information reasonably required to explain your estimating process, including—

(i) The judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data; and

(ii) The nature and amount of any contingencies included in the proposed price.

D. You must show the relationship between line item prices and the total contract price. You must attach cost-element breakdowns for each proposed line item, using the appropriate format prescribed in the "Formats for Submission of Line Item Summaries" section of this table. You must furnish supporting breakdowns for each cost element, consistent with your cost accounting system.

E. When more than one line item is proposed, you must also provide summary total amounts covering all line items for each element of cost.

F. Whenever you have incurred costs for work performed before submission of a proposal, you must identify those costs in your cost/price proposal.

G. If you have reached an agreement with Government representatives on use of forward pricing rates/factors, identify the agreement, include a copy, and describe its nature.

H. As soon as practicable after final agreement on price or an earlier date agreed to by the parties, but before the award resulting from the proposal, you must, under the conditions stated in FAR 15.403-4, submit a Certificate of Current Cost or Pricing Data.

II. Cost Elements

Depending on your system, you must provide breakdowns for the following basic cost elements, as applicable:

A. *Materials and services*. Provide a consolidated priced summary of individual material quantities included in the various tasks, orders, or line items being proposed and the basis for pricing (vendor quotes, invoice prices, etc.). Include raw materials, parts, components, assemblies, and services to be produced or performed by others. For all items proposed, identify the item and show the source, quantity, and price. Conduct price analyses of all subcontractor proposals. Conduct cost analyses for all subcontracts when certified cost or pricing data are submitted by the subcontractor. Include these analyses as

part of your own certified cost or pricing data submissions for subcontracts expected to exceed the appropriate threshold in FAR 15.403-3(a). Submit the subcontractor certified cost or pricing data and data other than certified cost or pricing data as part of your own certified cost or pricing data as required in paragraph IIA(2) of this table. These requirements also apply to all subcontractors if required to submit certified cost or pricing data.

(1) *Adequate Price Competition*. Provide data showing the degree of competition and the basis for establishing the source and reasonableness of price for those acquisitions (such as subcontracts, purchase orders, material order, etc.) exceeding, or expected to exceed, the appropriate threshold set forth at FAR 15.403-3(a) priced on the basis of adequate price competition. For interorganizational transfers priced at other than the cost of comparable competitive commercial work of the division, subsidiary, or affiliate of the contractor, explain the pricing method (see FAR 31).

(2) *All Other*. Obtain certified cost or pricing data from prospective sources for those acquisitions (such as subcontracts, purchase orders, material order, etc.) exceeding the threshold set forth in FAR 15.403-3(a) and not otherwise exempt, in accordance with FAR 15.403-2. Also provide data showing the basis for establishing source and reasonableness of price. In addition, provide a summary of your cost analysis and a copy of certified cost or pricing data submitted by the prospective source in support of each subcontract, or purchase order that is the lower of either $20 million or more, or both more than the pertinent certified cost or pricing data threshold and more than 10 percent of the prime contractor's proposed price. Also submit any information reasonably required to explain your estimating process (including the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price). The Contracting Officer may require you to submit cost or pricing data in support of proposals in lower amounts. Subcontractor certified cost or pricing data must be accurate, complete and current as of the date of final price agreement, or an earlier date agreed upon by the parties, given on the prime contractor's Certificate of Current Cost or Pricing Data. The prime contractor is responsible for updating a prospective subcontractor's data. For standard commercial products fabricated by the offeror that are generally stocked in inventory, provide a separate cost breakdown, if priced based on cost. For interorganizational transfers priced at cost, provide a separate breakdown of cost elements. Analyze the certified cost or pricing data and submit the results of your analysis of the prospective source's proposal. When submission of a prospective source's certified cost or pricing data is required as described in this paragraph, it must be included as part of your own certified cost or pricing data. You must also submit any data other than certified cost or pricing data obtained from a subcontractor, either actually or by specific identification, along with the results of any analysis performed on that data.

B. *Direct Labor*. Provide a time-phased (e.g., monthly, quarterly, etc.) breakdown of labor hours, rates, and cost by appropriate category, and furnish bases for estimates.

C. *Indirect Costs*. Indicate how you have computed and applied your indirect costs, including cost breakdowns. Show trends and budgetary data to provide a basis for evaluating the reasonableness of proposed rates. Indicate the rates used and provide an appropriate explanation.

D. *Other Costs*. List all other costs not otherwise included in the categories described above (e.g., special tooling, travel, computer and consultant services, preservation, packaging and packing, spoilage and rework, and Federal excise tax on finished articles) and provide bases for pricing.

E. *Royalties*. If royalties exceed $1,500, you must provide the following information on a separate page for each separate royalty or license fee:

(1) Name and address of licensor.

(2) Date of license agreement.

(3) Patent numbers.

(4) Patent application serial numbers, or other basis on which the royalty is payable.

(5) Brief description (including any part or model numbers of each contract item or component on which the royalty is payable).

(6) Percentage or dollar rate of royalty per unit.

(7) Unit price of contract item.

(8) Number of units.

(9) Total dollar amount of royalties.

(10) If specifically requested by the Contracting Officer, a copy of the current license agreement and identification of applicable claims of specific patents (see part 27 and 31).

F. *Facilities Capital Cost of Money*. When you elect to claim facilities capital cost of money as an allowable cost, you must submit Form CASB CMF and show the calculation of the proposed amount (see 31.205-10 and 48 CFR 9904.414).

III. Formats for Submission of Line Item Summaries

A. New Contracts (Including Letter Contracts)

Cost elements (1)	Proposed contract estimate—total cost (2)	Proposed contract estimate—unit cost (3)	Reference (4)

Column and Instruction

(1) Enter appropriate cost elements.

(2) Enter those necessary and reasonable costs that, in your judgment, will properly be incurred in efficient contract performance. When any of the costs in this column have already been incurred (e.g., under a letter contract), describe them on an attached supporting page. When preproduction or startup costs are significant, or when specifically requested to do so by the Contracting Officer, provide a full identification and explanation of them.

(3) Optional, unless required by the Contracting Officer.

(4) Identify the attachment in which the information supporting the specific cost element may be found. (Attach separate pages as necessary.)

B. Change Orders, Modifications, and Claims

Cost elements (1)	Estimated cost of all work deleted (2)	Cost of deleted work already performed (3)	Net cost to be deleted (4)	Cost of work added (5)	Net cost of change (6)	Reference (7)

Column and Instruction

(1) Enter appropriate cost elements.

(2) Include the current estimates of what the cost would have been to complete the deleted work not yet performed (not the original proposal estimates), and the cost of deleted work already performed.

(3) Include the incurred cost of deleted work already performed, using actuals incurred if possible, or, if actuals are not available, estimates from your accounting records. Attach a detailed inventory of work, materials, parts, components, and hardware already purchased, manufactured, or performed and deleted by the change, indicating the cost and proposed disposition of each line item. Also, if you desire to retain these items or any portion of them, indicate the amount offered for them.

(4) Enter the net cost to be deleted, which is the estimated cost of all deleted work less the cost of deleted work already performed. Column (2) minus Column (3) equals Column (4).

(5) Enter your estimate for cost of work added by the change. When nonrecurring costs are significant, or when specifically requested to do so by the Contracting Officer, provide a full identification and explanation of them. When any of the costs in this column have already been incurred, describe them on an attached supporting schedule.

(6) Enter the net cost of change, which is the cost of work added, less the net cost to be deleted. Column (5) minus Column (4) equals Column (6). When this result is negative, place the amount in parentheses.

(7) Identify the attachment in which the information supporting the specific cost element may be found. (Attach separate pages as necessary.)

C. Price Revision/Redetermination

Cutoff date (1)	Number of units completed (2)	Number of units to be completed (3)	Contract amount (4)	Redetermination proposal amount (5)	Difference (6)	Cost elements (7)	Incurred cost—preproduction (8)	Incurred cost—completed units (9)	Incurred cost—work in process (10)	Total incurred cost (11)	Estimated cost to complete (12)	Estimated total cost (13)	Reference (14)

(Use as applicable)

Column and Instruction

(1) Enter the cutoff date required by the contract, if applicable.

(2) Enter the number of units completed during the period for which experienced costs of production are being submitted.

(3) Enter the number of units remaining to be completed under the contract.

(4) Enter the cumulative contract amount.

(5) Enter your redetermination proposal amount.

(6) Enter the difference between the contract amount and the redetermination proposal amount. When this result is negative, place the amount in parentheses. Column (4) minus Column (5) equals Column (6).

(7) Enter appropriate cost elements. When residual inventory exists, the final costs established under fixed-price-incentive and fixed-price-redeterminable arrangements should be net of the fair market value of such inventory. In support of subcontract costs, submit a listing of all subcontracts subject to repricing action, annotated as to their status.

(8) Enter all costs incurred under the contract before starting production and other nonrecurring costs (usually referred to as startup costs) from your books and records as of the cutoff date. These include such costs as preproduction engineering, special plant rearrangement, training program, and any identifiable nonrecurring costs such as initial rework, spoilage, pilot runs, etc. In the event the amounts are not segregated in or otherwise available from your records, enter in this column your best estimates. Explain the basis for each estimate and how the costs are charged on your accounting records (e.g., included in production costs as direct engineering labor, charged to manufacturing overhead). Also show how the costs would be allocated to the units at their various stages of contract completion.

(9) Enter in Column (9) the production costs from your books and records (exclusive of preproduction costs reported in Column (8)) of the units completed as of the cutoff date.

(10) Enter in Column (10) the costs of work in process as determined from your records or inventories at the cutoff date. When the amounts for work in process are not available in your records but reliable estimates for them can be made, enter the estimated amounts in Column (10) and enter in Column (9) the differences between the total incurred costs (exclusive of preproduction costs) as of the cutoff date and these estimates. Explain the basis for the estimates, including identification of any provision for experienced or anticipated allowances, such as shrinkage, rework, design changes, etc. Furnish experienced unit or lot costs (or labor hours) from inception of contract to the cutoff date, improvement curves, and any other available production cost history pertaining to the item(s) to which your proposal relates.

(11) Enter total incurred costs (Total of Columns (8), (9), and (10)).

(12) Enter those necessary and reasonable costs that in your judgment will properly be incurred in completing the remaining work to be performed under the contract with respect to the item(s) to which your proposal relates.

(13) Enter total estimated cost (Total of Columns (11) and (12)).

(14) Identify the attachment in which the information supporting the specific cost element may be found. (Attach separate pages as necessary.)

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Subpart 15.5 - Unsolicited Proposals

15.500 Scope of subpart.

This subpart contains policies and procedures for the submission, receipt, evaluation, and acceptance or rejection of unsolicited proposals.

15.501 Definitions.

As used in this subpart—

Advertising material means material designed to acquaint the Government with a prospective contractor's present products, services, or potential capabilities, or designed to stimulate the Government's interest in buying such products or services.

Commercial product or commercial service offer means an offer of a commercial product or commercial service that the vendor wishes to see introduced in the Government's supply system as an alternate or a replacement for an existing supply item. This term does not include innovative or unique configurations or uses of commercial products or commercial services that are being offered for further development and that may be submitted as an unsolicited proposal.

Contribution means a concept, suggestion, or idea presented to the Government for its use with no indication that the source intends to devote any further effort to it on the Government's behalf.

15.502 General.

(a) *Purpose*. Unsolicited proposals allow unique and innovative ideas or approaches developed outside the Government to be made available to Government agencies for use in accomplishing their missions.

(b) *Intent*. Unsolicited proposals are offered with the intent that the Government will award a contract to the offeror for research and development or other efforts supporting the Government mission. Only the cognizant contracting officer has the authority to bind the Government regarding unsolicited proposals.

(c) *Early exchanges*. Preliminary contact with technical and other appropriate agency personnel before preparing a detailed unsolicited proposal or submitting proprietary information to the Government may save considerable time and effort for both parties.

(d) *Information for potential offerors*. Agencies must make the following information available to potential offerors of unsolicited proposals:

(1) Definition and content of an unsolicited proposal acceptable for formal evaluation.

(2) Requirements concerning responsible prospective contractors and organizational conflicts of interest.

(3) Guidance on preferred methods for submitting ideas/concepts to the Government, such as any agency: upcoming requests for proposals (RFP); Broad Agency Announcements (BAA); Small Business Innovative Research programs (SBIR); Small Business Technology Transfer (STTR) programs; program research and development announcements; or grant programs.

(4) Agency points of contact for information regarding advertising, contributions, and other types of transactions similar to unsolicited proposals.

(5) Information sources on agency objectives and areas of potential interest.

(6) Procedures for submission and evaluation of unsolicited proposals.

(7) Instructions for identifying and marking proprietary information so that it is protected and restrictive legends conform to this subpart.

(e) *Prohibitions*.

(1) Government personnel should not use any data, concept, idea, or other part of an unsolicited proposal as the basis, or part of the basis, for a RFP or in negotiations with any other firm unless the offeror is notified of and agrees to the intended use. This prohibition does not preclude using any data, concept, or idea in the proposal that also is available from another source without restriction.

(2) Government personnel should not disclose restrictively marked information included in an unsolicited proposal. The disclosure of such information concerning trade secrets, processes, operations, style of work, apparatus, and other matters, except as authorized by law, may result in criminal penalties under 18 U.S.C. 1905.

15.503 Preparing unsolicited proposals.

15.503-1 Scope of proposals.

(a) Unsolicited proposals may be submitted for new and innovative ideas that do not already fall under topic areas publicized under BAA, SBIR topics, STTR topics, program research and development announcements, or any other Government-initiated RFP or program.

(b) A valid unsolicited proposal must—

(1) Be innovative and unique;

(2) Be independently originated and developed by the offeror;

(3) Be prepared without Government supervision, endorsement, direction, or direct Government involvement;

(4) Include sufficient detail to permit a determination that Government support could be worthwhile and the proposed work could benefit the agency's research and development or other mission responsibilities;

(5) Not be an advance proposal for a known agency requirement that can be acquired by competitive methods; and

(6) Not address a previously published agency requirement.

(c) Advertising material, commercial product or commercial service offers, contributions, or routine correspondence on technical issues, are not unsolicited proposals.

(d) Unsolicited proposals in response to a publicized general statement of agency needs are considered to be independently originated.

15.503-2 Content of proposals.

Unsolicited proposals must contain the following information to permit consideration in an objective and timely manner:

(a) Basic information including—

(1) Offeror's name and address and type of organization; *e.g.*, profit, nonprofit, educational, small business;

(2) Names and telephone numbers of technical and business personnel to be contacted for evaluation or negotiation purposes;

(3) Identification of proprietary data to be used only for evaluation purposes;

(4) Names of other Federal, State, or local agencies or parties receiving the proposal or funding the proposed effort;

(5) Date of submission; and

(6) Signature of a person authorized to represent and contractually obligate the offeror.

(b) Technical information including—

(1) Concise title and short abstract of the proposed effort;

(2) A reasonably complete discussion stating the objectives of the effort or activity, the method of approach and extent of effort to be employed, the nature and extent of the anticipated results, and the manner in which the work will help to support accomplishment of the agency's mission;

(3) Names and biographical information on the offeror's key personnel who would be involved, including alternates; and

(4) Type of support needed from the agency; e.g., Government property or personnel resources.

(c) Supporting information including—

(1) Proposed price or total estimated cost for the effort in sufficient detail for meaningful evaluation;

(2) Period of time for which the proposal is valid (a 6-month minimum is suggested);

(3) Type of contract preferred;

(4) Proposed duration of effort;

(5) Brief description of the organization, previous experience, relevant past performance, and facilities to be used;

(6) Other statements, if applicable, about organizational conflicts of interest, security clearances, and environmental impacts; and

(7) The names and telephone numbers of agency technical or other agency points of contact already contacted regarding the proposal.

15.503-3 Restricting use and disclosure of data.

(a) Unsolicited proposals may include data that the offeror does not want disclosed to the public for any purpose or used by the Government except for evaluation purposes. If the offeror wishes to restrict the use and disclosure of data, the title page must be marked the following legend:

Use and Disclosure of Data

This proposal includes data that must not be disclosed outside the Government and must not be duplicated, used, or disclosed, in whole or in part, for any purpose other than to evaluate this proposal. However, if a contract is awarded to this offeror as a result of, or in connection with, the submission of these data, the Government must 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 these data if they are obtained from another source without restriction. The data subject to this restriction are contained in Sheets [*insert numbers or other identification of sheets*].

(1) The offeror must also 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.

(2) An offeror should identify trade secrets, commercial or financial information, and privileged or confidential information to the Government

15.504 Receipt and initial review of unsolicited proposals.

(a) Agencies must establish procedures for controlling the receipt, evaluation, and timely disposition of unsolicited proposals. The procedures must include controls on the reproduction and disposition of proposal material, particularly data identified by the offeror as subject to duplication, use, or disclosure restrictions; and identify agency points of contact to coordinate the receipt and handling of unsolicited proposals.

(b) Agencies may decline evaluation or consideration of unsolicited proposals submitted concurrently to more than one agency, or distributed in bulk.

15.504-1 Initial Review.

(a) Before beginning a comprehensive evaluation, the agency contact point must determine if the proposal—

(1) Is a valid unsolicited proposal, as described at 15.503-1(b);

(2) Is suitable for submission in response to an existing agency requirement;

(3) Is related to the agency mission;

(4) Contains sufficient technical information and cost-related or price-related information for evaluation;

(5) Has overall scientific, technical, or socioeconomic merit;

(6) Has been approved by a responsible official or other representative authorized to obligate the offeror contractually; and

(7) Complies with the marking requirements of this subpart.

(b) If the proposal meets these requirements, the contact point must promptly acknowledge receipt and process the proposal.

(c) If a proposal is rejected because the proposal does not meet these requirements, the agency contact point must promptly inform the offeror in writing of the reasons for rejection and the proposed disposition of the unsolicited proposal.

15.504-2 Handling use and disclosure of data restrictions.

(a) *Alternate legend*. When an unsolicited proposal meeting the requirements at 15.504-1(a) is marked with a legend different from that at 15.503-3, the agency point of contact must—

(1) Return the proposal to the offeror and notify them that the proposal cannot be considered because it is impracticable for the Government to comply with the legend and that the agency will consider the proposal if it is resubmitted with the proper legend; and

(2) Unless the offeror clearly states in writing that no restrictions are imposed on the disclosure or use of the data contained in the proposal, mark the unsolicited proposal as follows:

Unsolicited Proposal—Use of Data Limited

All Government personnel must exercise extreme care to ensure that the information in this proposal is not disclosed to an individual who has not been authorized access to such data in accordance with FAR part 3, and is not duplicated, used, or disclosed in whole or in part for any purpose other than evaluation of the proposal, without the written permission of the offeror. If a contract is awarded on the basis of this proposal, the terms of the contract must control disclosure and use. This notice does not limit the Government's right to use information contained in the proposal if it is obtainable from another source without restriction. This is a Government notice, and must not by itself be construed to impose any liability upon the Government or Government personnel for disclosure or use of data contained in this proposal.

(3) Not use this notice to justify withholding of a record, or to improperly deny the public access to a record, where an obligation is imposed by the Freedom of Information Act (5 U.S.C. 552).

(b) *Evaluation by personnel outside of the agency or the Government*.

(1) When an agency receives an unsolicited proposal from other than an educational or nonprofit organization or institution, and an evaluation by Government personnel outside the agency or non-Government personnel is necessary, written permission must be obtained from the offeror before releasing the proposal for evaluation. The agency point of contact should—

(i) Attach a cover sheet marked with the legend in paragraph (a)(2) of this section;

(ii) Change the beginning of the legend to read "All Government and non-Government personnel * * * "; and

(iii) Require any non-Government evaluator to agree in writing that data in the proposal will not be disclosed to persons outside the Government.

(2) When an agency receives an unsolicited proposal without a restrictive legend from an educational or nonprofit organization or institution, and evaluation outside of the Government is necessary, the agency point of contact should follow paragraphs (b)(1)(i) through (iii) of this section.

(3) When an agency receives an unsolicited proposal with a restrictive legend from an educational or nonprofit organization or institution, and evaluation by non-Government personnel is necessary, the agency point of contact must—

(i) Follow paragraphs (b)(1)(i) through (iii) of this section; and

(ii) Obtain written permission from the offeror before releasing the proposal for evaluation.

15.505 Evaluation of unsolicited proposals.

(a) Agencies must evaluate unsolicited proposals for energy savings performance contracts in accordance with the procedures in 10 CFR 436.33(b).

(b) The agency point of contact must coordinate the evaluation of proposals and attach the legend at 15.504-2(a)(2) to each copy of the proposal distributed for evaluation.

(c) When evaluating unsolicited proposals, evaluators should consider, at a minimum, the following factors:

(1) Unique, innovative and meritorious methods, approaches, or concepts demonstrated by the proposal;

(2) Overall scientific, technical, or socioeconomic merits of the proposal;

(3) Potential contribution of the effort to the agency's specific mission;

(4) Offeror's capabilities, related experience, facilities, techniques, or unique combinations of these that are integral factors for achieving the proposal objectives;

(5) Qualifications, capabilities, and experience of the proposed principal investigator, team leader, or key personnel critical to achieving the proposal objectives; and

(6) Realism of the proposed cost.

(d) Evaluators must notify the agency point of contact of their recommendations when the evaluation is complete.

(e) A favorable evaluation of an unsolicited proposal does not, in itself, justify awarding a contract without providing for full and open competition. The agency point of contact should return an unsolicited proposal to the offeror, citing reasons, when its substance—

(1) Is available to the Government without restriction from another source;

(2) Closely resembles a pending competitive acquisition requirement;

(3) Does not relate to the activity's mission; or

(4) Does not demonstrate an innovative and unique method, approach, or concept, or is otherwise not deemed a meritorious proposal.

15.506 Criteria for acceptance and negotiation of an unsolicited proposal.

Contracting officers may begin negotiations on a sole source basis only when—

(a) An unsolicited proposal receives a favorable comprehensive evaluation;

(b) A justification and approval is obtained in accordance with part 6;

(c) The agency technical office sponsoring the contract furnishes the necessary funds; and

(d) The requirements for synopsizing a proposed contract action are met.

PART 16 - TYPES OF CONTRACTS

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16.000 Scope of part.

This part prescribes policies and procedures for selecting contract type(s) appropriate to the circumstances of the acquisition. Except for limited instructions regarding the placement of task and delivery orders, the entirety of this part applies to the pre-solicitation phase and is meant to guide in acquisition planning.

16.001 Definitions.

As used in this part-

Award-Fee Board means the team of individuals identified in the award-fee plan who have been designated to assist the Fee-Determining Official in making award-fee determinations.

Established price means a price that—

(1) Is an established catalog or market price for a commercial product sold in substantial quantities to the general public; and

(2) Is the net price after applying any standard trade discounts offered by the contractor.

Fee-Determining Official means the designated Agency official(s) who reviews the recommendations of the Award-Fee Board in determining the amount of award fee to be earned by the contractor for each evaluation period.

Rollover of unearned award fee means the process of transferring unearned award fee, which the contractor had an opportunity to earn, from one evaluation period to a subsequent evaluation period, thus allowing the contractor an additional opportunity to earn that previously unearned award fee.

Subpart 16.1 - Selecting Contract Types

16.101 Policies.

(a) Unless expressly prohibited by statute or this regulation, contract types that promote the best interests of the Government, but are not described in this regulation, are permitted for use in accordance with agency procedures (see 10 U.S.C. 3321(a) and 41 U.S.C. 3901). Ensure selection of contract type is consistent with the Guiding Principles for the System in 1.102.

(b) The cost-plus-a-percentage-of-cost system of contracting must not be used (see 10 U.S.C. 3322(a) and 41 U.S.C. 3905(a)). Prime contracts (including letter contracts) other than firm-fixed-price contracts must, by an appropriate clause, prohibit cost-plus-a-percentage-of-cost subcontracts (see clauses prescribed in part 44 for cost-reimbursement contracts and part 16 for fixed-price contracts).

16.102 Negotiating contract type.

(a) (1) Selecting the contract type is generally a matter for negotiation and requires the exercise of sound judgment. When selecting and negotiating the contract type, the contracting officer must consider contract terms, risks (e.g., technical, performance, delivery), and pricing.

(2) Contracting officers may instruct offerors in the solicitation to propose an alternative contract type within their proposals.

(b) Fixed-price contract types are the default and preferred contract types. If a fixed-price contract type is not appropriate for an entire contract, consider whether a portion of the contract can be established on a fixed-price basis.

(c) A firm-fixed-price contract (see section 16.202) must be used when the risk involved is minimal or can be predicted with an acceptable degree of certainty. However, when a reasonable basis for firm pricing does not exist, other contract types should be considered, and negotiations should be directed toward selecting a contract type (or combination of types) that will appropriately tie profit to contractor performance.

(d) In the course of an acquisition program, a series of contracts, or a single long-term contract, changing circumstances may necessitate different contract types than those used initially. Contracting officers should avoid extended use of a cost-reimbursement or time-and-materials contract after experience provides a basis for firmer pricing.

16.103 Documenting contract type.

(a) Except as identified in paragraph (b) of this section, document and explain in the acquisition plan, or in the contract file if a written acquisition plan is not required by agency procedures-

(1) Why the contract type selected must be used to meet the agency's needs;

(2) The Government’s risks and the burden to manage the contract type selected. As applicable, discuss –

(i) How the Government identified the risks (e.g., pre-award survey, or past performance information);

(ii) The nature of the risks (e.g., inadequate contractor's accounting system, weaknesses in contractor's internal control, non-compliance with Cost Accounting Standards, or lack of or inadequate earned value management system); and

(iii) How the Government will manage and mitigate the risks;

(3) The Government resources necessary to properly plan for, award, and administer the contract type selected (e.g., resources needed and the additional risks to the Government if adequate resources are not provided);

(4) Why a level-of-effort, price redetermination, or fee provision was included; and

(5) For other than a fixed-price contract, at a minimum include–

(i) An analysis of why the use of other than a fixed-price contract (e.g., cost reimbursement, time-and-materials, labor hour, innovative contract type) is appropriate;

(ii) Rationale that detail specific facts and circumstances (e.g., lack of incentive to control costs,complexity of the requirements, uncertain work duration, contractor's technical capability and financial responsibility, or adequacy of the contractor's accounting system), and associated reasoning essential to support the contract type selection;

(iii) An assessment of whether Government resources are adequate to properly plan for, award, and administer other than fixed-price contracts; and

(iv) A discussion of planned actions to minimize the use of other than fixed-price contracts on future acquisitions for the same requirement and to transition to fixed-price contracts to the maximum extent practicable.

(b) Documentation of contract type is not required for the following:

(1) Fixed-price acquisitions made under simplified acquisition procedures.

(2) Contracts on a firm-fixed-price basis (see section 16.202) other than those for major systems or research and development.

16.104 Executive Order 14402 justification for covered contracts and orders.

(a) *Definition*. As used in this section, covered contract or order means a contract or order that is—

(1) Other than fixed-price;

(2) Firm-fixed-price, level-of-effort term; or

(3) A hybrid contract that includes one or more elements described in paragraphs (1) and (2).

(b) *Policy*. This section implements Executive Order 14402, Promoting Efficiency, Accountability, and Performance in Federal Contracting, April 30, 2026. The head of the agency must approve a written justification described in paragraph (d) of this section prior to using a covered contract or order.

(c) *Application*. (1) *Thresholds*. Unless an exception in paragraph (e) of this section applies, a justification is required for covered contracts and orders valued at or above—

(i) $100 million, for DoD;

(ii) $35 million, for NASA;

(iii) $25 million, for Department of Homeland Security; or

(iv) $10 million, for all other Federal agencies.

(2) *Hybrid contracts or orders*. Hybrid contracts or orders. A hybrid contract or order is a covered contract or order when the value of the other than fixed-price or firm-fixed-price, level-of-effort term portion meets or exceeds the thresholds.

(3) *Single-award indefinite-delivery contracts*. A single award indefinite-delivery contract (IDC) is a covered contract if the estimated total value of the known and forecasted covered orders meets or exceeds the thresholds. Use the contract ceiling price if the contract only allows for covered orders.

(4) Blanket purchase agreements. The head of the agency decides whether the justification requirement applies when the blanket purchase agreement (BPA) is awarded, or when each order under the BPA is placed.

(5) Duration of a justification. An approved justification is valid for the duration of the contract or order.

(d) *Procedures*. (1) Submit to the head of the agency the required justification for approval that includes–

(i) The information in section 16.103; and

(ii) Any determination and findings required for the contract type (see 16.401-2, 16.601-3).

(2) The head of the agency may only delegate the justification approval to the chief acquisition officer of the agency or another non-career official in the Senior Executive Service within the agency.

(e) *Exceptions*. The justification requirement does not apply to-

(1) Multiple-award contracts. However, the justification requirement does apply to task orders, delivery orders, and BPAs under those contracts;

(2) Contracts in support of a response to an emergency, major disaster, or contingency operation;

(3) Research and development contracts or orders (see part 35); or

(4) Pre-production development for a major system acquisition (see part 34).

16.105 Solicitation provision.

The contracting officer may complete and insert the provision at 52.216-1, Type of Contract, in a solicitation. When the solicitation provides for the opportunity for an offeror to propose an alternative contract type, include the provision with its Alternate I.

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Subpart 16.2 - Fixed-Price Contracts

16.201 General.

(a) Fixed-price types of contracts provide for a firm price or, in appropriate cases, an adjustable price. Fixed-price contracts with adjustable prices may include a ceiling price, a target price (including target cost), or both. Unless otherwise specified in the contract, the ceiling price or target price may only be adjusted through contract clauses that provide for equitable adjustment or other revision of the contract price under stated circumstances.

(b) The contracting officer must use firm-fixed-price or fixed-price with economic price adjustment contracts when acquiring commercial products and commercial services, except as provided in 12.104(a).

(c) Time-and-materials contracts and labor-hour contracts are not fixed-price contracts.

16.202 Firm-fixed-price contracts.

16.202-1 Description.

A firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor's experience in performing the contract. The contracting officer may use a firm-fixed-price contract in conjunction with an award-fee incentive (see 16.402) and performance or delivery incentives (see 16.403 and 16.404) when the award fee or incentive is based solely on factors other than cost. The contract type remains firm-fixed-price when used with these incentives.

16.202-2 Application.

A firm-fixed-price contract is suitable for acquiring supplies or services on the basis of clearly defined functional or detailed specifications (see part 11) when the contracting officer can establish fair and reasonable prices at the outset.

16.203 Fixed-price contracts with economic price adjustment.

16.203-1 Description.

(a) A fixed-price contract with economic price adjustment provides for upward and downward revision of the stated contract price when specific events occur. Economic price adjustments are of three general types:

(1) Adjustments based on established prices. These price adjustments are based on increases or decreases from an agreed-upon level in published or established prices of specific items or the contract end items.

(2) Adjustments based on actual costs of labor or material. These price adjustments are based on increases or decreases in specified costs of labor or material that the contractor actually experiences during contract performance.

(3) Adjustments based on cost indexes of labor or material. These price adjustments are based on increases or decreases in labor or material cost standards or indexes that are specifically identified in the contract.

(b) The contracting officer may use a fixed-price contract with economic price adjustment in conjunction with an award-fee incentive (see 16.402) and performance or delivery incentives (see 16.403 and 16.404). This combination is appropriate when the award fee or incentive is based solely on factors other than cost. The contract type remains fixed-price with economic price adjustment when used with these incentives.

16.203-2 Application.

(a) A fixed-price contract with economic price adjustment may be used when-

(1) There is serious doubt concerning the stability of market or labor conditions that will exist during an extended period of contract performance; and

(2) Contingencies that would otherwise be included in the contract price can be identified and covered separately in the contract. Price adjustments based on established prices should normally be restricted to industry-wide contingencies. Price adjustments based on labor and material costs should be limited to contingencies beyond the contractor's control. For use of economic price adjustment in sealed bid contracts, see part 14.

(b) When establishing the base level from which adjustments will be made, the contracting officer must ensure that contingency allowances are not duplicated by inclusion in both the base price and the adjustment requested by the contractor under economic price adjustment clause.

(c) In contracts that do not require submission of certified cost or pricing data, the contracting officer must obtain adequate data to establish the base level from which adjustment will be made and may require verification of data submitted.

16.203-3 Limitations.

A fixed-price contract with economic price adjustment may be used only if the contracting officer determines that it is necessary to protect the contractor and the Government against significant fluctuations in labor or material costs or to provide for contract price adjustment in the event of changes in the contractor's established prices.

16.203-4 Contract clauses.

(a) *Adjustment based on established prices-standard supplies*.

(1) The contracting officer must, when contracting by negotiation, insert the clause at 52.216-2, Economic Price Adjustment-Standard Supplies, or an agency-prescribed clause in solicitations and contracts when all of the following conditions apply:

(i) A fixed-price contract is contemplated.

(ii) The requirement is for standard supplies that have an established catalog or market price.

(iii) The contracting officer has made the determination specified in 16.203-3.

(2) The contracting officer may modify the clause by increasing the 10 percent limit on aggregate increases specified in 52.216-2(c)(1), upon approval by the chief of the contracting office.

(b) *Adjustment based on established prices-semistandard supplies.*

(1) The contracting officer must, when contracting by negotiation, insert the clause at 52.216-3, Economic Price Adjustment-Semistandard Supplies, or an agency-prescribed clause in solicitations and contracts when all of the following conditions apply:

(i) A fixed-price contract is contemplated.

(ii) The requirement is for semistandard supplies for which the prices can be reasonably related to the prices of nearly equivalent standard supplies that have an established catalog or market price.

(iii) The contracting officer has made the determination specified in 16.203-3.

(2) Before entering into the contract, the contracting officer and contractor must agree in writing on the identity of the standard supplies and the corresponding line items to which the clause applies.

(3) If the supplies are standard, except for preservation, packaging, and packing requirements, the clause prescribed in 16.203-4(a) must be used rather than this clause.

(4) The contracting officer may modify the clause by increasing the 10 percent limit on aggregate increases specified in 52.216-3(c)(1), upon approval by the chief of the contracting office.

(c) *Adjustments based on actual cost of labor or material.*

(1) The contracting officer must, when contracting by negotiation, insert a clause that is substantially the same as the clause at 52.216-4, Economic Price Adjustment -Labor and Material, or an agency-prescribed clause in solicitations and contracts when all of the following conditions apply:

(i) A fixed-price contract is contemplated.

(ii) There is no major element of design engineering or development work involved.

(iii) One or more identifiable labor or material cost factors are subject to change.

(iv) The contracting officer has made the determination specified in 16.203-3.

(2) The contracting officer must describe in detail in the contract Schedule-

(i) The types of labor and materials subject to adjustment under the clause;

(ii) The labor rates, including fringe benefits (if any) and unit prices of materials that may be increased or decreased; and

(iii) The quantities of the specified labor and materials allocable to each unit to be delivered under the contract.

(3) In negotiating adjustments under the clause, the contracting officer must-

(i) Consider work in process and materials on hand at the time of changes in labor rates, including fringe benefits (if any) or material prices;

(ii) Not include in adjustments any indirect cost (except fringe benefits as defined in 31.205-6(l) or profit; and

(iii) Consider only those fringe benefits specified in the contract Schedule.

(4) The contracting officer may modify the clause by increasing the 10 percent limit on aggregate increases specified in 52.216-4(c)(4), upon approval by the chief of the contracting office.

(d) *Adjustments based on cost indexes of labor or material.* The contracting officer should consider using an economic price adjustment clause based on cost indexes of labor or material under the circumstances and subject to approval as described in paragraphs(d)(1) and (d)(2) of this subsection.

(1) A clause providing adjustment based on cost indexes of labor or materials may be appropriate when-

(i) The contract involves an extended period of performance with significant costs to be incurred beyond 1 year after performance begins;

(ii) The contract amount subject to adjustment is substantial; and

(iii) The economic variables for labor and materials are too unstable to permit a reasonable division of risk between the Government and the contractor, without this type of clause.

(2) Any clause using this method must be prepared and approved under agency procedures.

16.204 Fixed-price contracts with prospective price redetermination.

16.204-1 Description.

A fixed-price contract with prospective price redetermination provides for-

(a) A firm-fixed-price for an initial period of contract deliveries or performance; and

(b) Prospective redetermination, at a stated time or times during performance, of the price for subsequent periods of performance.

16.204-2 Application.

A fixed-price contract with prospective price redetermination may be used in acquisitions of quantity production or services for which it is possible to negotiate a fair and reasonable firm-fixed-price for an initial period, but not for subsequent periods of contract performance.

(a) The initial period should be the longest period for which it is possible to negotiate a fair and reasonable firm-fixed-price. Each subsequent pricing period should be at least 12 months.

(b) The contract may provide for a ceiling price based on evaluation of the uncertainties involved in performance and their possible cost impact.

16.204-3 Limitations.

This contract type must not be used unless-

(a) Negotiations have established that using a firm-fixed-price or fixed-price incentive contract is not appropriate for the acquisition;

(b) The contractor's accounting system is adequate for price redetermination;

(c) The prospective pricing periods can be made to conform with operation of the contractor's accounting system; and

(d) There is reasonable assurance that price redetermination actions will take place promptly at the specified times.

16.204-4 Contract clause.

The contracting officer must, when contracting by negotiation, insert the clause at 52.216-5, Price Redetermination-Prospective, in solicitations and contracts when a fixed-price contract is contemplated and the conditions specified in 16.204-2 and 16.204-3 apply.

16.205 Fixed-ceiling-price contracts with retroactive price redetermination.

16.205-1 Description.

A fixed-ceiling-price contract with retroactive price redetermination provides for (a) a fixed ceiling price and (b) retroactive price redetermination within the ceiling after completion of the contract.

16.205-2 Application.

A fixed-ceiling-price contract with retroactive price redetermination is appropriate when it is established at the outset that a fair and reasonable firm-fixed-price cannot be negotiated, and that the amount involved and short performance period make the use of any other fixed-price contract type impracticable.

(a) A ceiling price must be negotiated for the contract at a level that reflects a reasonable sharing of risk by the contractor. The established ceiling price may be adjusted only if required by the operation of contract clauses providing for equitable adjustment or other revision of the contract price under stated circumstances.

(b) The contract should be awarded only after negotiation of a billing price that is as fair and reasonable as the circumstances permit.

16.205-3 Limitations.

This contract type may only be used when-

(a) The contract is for research and development and the estimated cost is at or below the simplified acquisition threshold (SAT);

(b) The contractor's accounting system is adequate for price redetermination;

(c) There is reasonable assurance that the price redetermination will take place promptly at the specified time; and

(d) The head of the contracting activity (or a higher-level official, if required by agency procedures) approves its use in writing.

16.205-4 Contract clause.

The contracting officer must, when contracting by negotiation, insert the clause at 52.216-6, Price Redetermination-Retroactive, in solicitations and contracts when a fixed-price contract is contemplated and the conditions in 16.205-2 and 16.205-3 apply.

16.206 Firm-fixed-price, level-of-effort term contracts.

16.206-1 Description.

A firm-fixed-price, level-of-effort term contract requires—

(a) The contractor to provide a specified level of effort, over a stated period of time, on work towards a deliverable that can be described in general terms; and

(b) The Government to pay the contractor a fixed dollar amount for the effort.

16.206-2 Application.

A firm-fixed-price, level-of-effort term contract is suitable for investigation or study in a specific research and development area. The product of the contract is usually a report showing the results achieved through application of the required level of effort. However, payment is based on the effort expended rather than on the results achieved.

16.206-3 Limitations.

This contract type may be used only when-

(a) The work required cannot otherwise be clearly defined;

(b) The required level of effort is identified and agreed upon in advance;

(c) There is reasonable assurance that the intended result cannot be achieved by expending less than the stipulated effort; and

(d) The agency head approves a justification if required by 16.104.

Subpart 16.3 - Cost-Reimbursement Contracts

16.301 General.

16.301-1 Description.

Cost-reimbursement contracts allow for the reimbursement of allowable incurred costs. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling value that the contractor may not exceed (except at its own risk) without the approval of the contracting officer.

16.301-2 Application.

The contracting officer must use cost-reimbursement contracts only when-

(a) The requirements cannot be sufficiently defined to allow for a fixed-price type contract; or

(b) Uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract.

16.301-3 Limitations.

(a) A cost-reimbursement contract may be used only when-

(1) A written acquisition plan has been approved at least one level above the contracting officer (see 7.102(d));

(2) The agency head approves a justification if required by 16.104;

(3) The contractor's accounting system can adequately segregate, accumulate and allocate costs specifically attributed to the contract or order during contract performance; and

(4) Before award of the contract or order, sufficient Government resources are available to award and manage a contract other than firm-fixed-priced (see part 7). This includes designating a contracting officer's representative to monitor contractor performance and cost controls (see part 1).

(b) The use of cost-reimbursement contracts is not allowed for the purchase of commercial products and commercial services (see part 12).

16.302 Cost contracts.

A cost contract is a cost-reimbursement contract that does not include fee.

16.303 Cost-sharing contracts.

A cost-sharing contract is a cost-reimbursement contract that does not include fee, and the Government reimburses only a portion of the allowable costs. The contracting officer must state in the contract the agreed upon portion or percentage of allowable costs that will be reimbursed.

16.304 Cost-plus-fixed-fee contracts.

16.304-1 Description.

A cost-plus-fixed-fee contract is a cost-reimbursement contract that includes payment of an agreed upon fixed-fee. The fixed fee does not change with actual cost but may be adjusted as a result of changes in the work to be performed under the contract.

16.304-2 Limitations.

A cost-plus-fixed-fee contract must not be awarded unless the contracting officer complies with all limitations in part 15.

16.304-3 Completion and term forms.

A cost-plus-fixed-fee contract may take one of two basic forms-completion or term.

(a) The completion form describes the scope of work by stating a definite goal or target and specifying an end product. This form of contract normally requires the contractor to complete and deliver the specified end product (e.g., a final report of research accomplishing the goal or target) within the estimated cost, if possible, as a condition for payment of the entire fixed fee. However, if the work costs more than estimated, the Government may increase allowable costs to complete the work without increasing the fee.

(b) The term form describes the scope of work in general terms and requires the contractor to work at a specified level for a specific time period. The term form may not be used unless required by the contract to provide a specific level of effort within a definite time period. Under this form, if the performance is considered satisfactory by the Government, the fixed fee is payable at the end of the agreed upon period. Renewal for further periods of performance is a new acquisition that involves new cost and fee arrangements.

16.305 Contract clauses.

(a) (1) The contracting officer must insert the clause at 52.216-7, Allowable Cost and Payment, in solicitations and contracts when a cost-reimbursement contract or a time-and-materials contract (other than a contract for a commercial product or commercial service) is anticipated. If the contract is a time-and-materials contract, the clause at 52.216-7 applies in conjunction with the clause at 52.232-7 but only to the portion of the contract that provides for reimbursement of materials (as defined in the clause at 52.232-7) at actual cost. Further, the clause at 52.216-7 does not apply to labor-hour contracts.

(2) If the contract is a construction contract and contains the clause at 52.232-27, Prompt Payment for Construction Contracts, the contracting officer must use the clause at 52.216-7 with its Alternate I.

(3) If the contract is with an educational institution, the contracting officer must use the clause at 52.216-7 with its Alternate II.

(4) If the contract is with a State or local government, the contracting officer must use the clause at 52.216-7 with its Alternate III.

(5) If the contract is with a nonprofit organization other than an educational institution, a State or local government, or a nonprofit organization exempted under the OMB Uniform Guidance at 2 CFR part 200, appendix VIII, the contracting officer must use the clause at 52.216-7 with its Alternate IV.

(b) The contracting officer must insert the clause at 52.216-8, Fixed Fee, in solicitations and contracts when a cost-plus-fixed-fee contract (other than a construction contract) is anticipated.

(c) The contracting officer must insert the clause at 52.216-9, Fixed Fee-Construction, in solicitations and contracts when a cost-plus-fixed-fee construction contract is anticipated.

(d) The contracting officer must insert the clause at 52.216-10, Incentive Fee, in solicitations and contracts when a cost-plus-incentive-fee contract is anticipated.

(e) (1) The contracting officer must insert the clause at 52.216-11, Cost Contract-No Fee, in solicitations and contracts when a cost-reimbursement contract that provides no fee and is not a cost-sharing contract is anticipated. This clause may be modified by substituting $10,000 in lieu of $100,000 as the maximum reserve in paragraph (b) if the Contractor is a nonprofit organization.

(2) If a cost-reimbursement research and development contract with an educational institution or a nonprofit organization that provides no profit and is not a cost-sharing contract is anticipated, and if the contracting officer determines that withholding of a portion of allowable costs is not required, the contracting officer must use the clause with its Alternate I.

(f) (1) The contracting officer must insert the clause at 52.216-12, Cost-Sharing Contract-No Fee, in solicitations and contracts when a cost-sharing contract is anticipated. In solicitations and contracts when a cost-sharing contract is contemplated. This clause may be modified by substituting $10,000 in lieu of $100,000 as the maximum reserve in paragraph (b) if the contract is with a nonprofit organization.

(2) If a cost-sharing research and development contract with an educational institution or a nonprofit organization is anticipated, and if the contracting officer determines that withholding of a portion of allowable costs is not required, the contracting officer must use the clause with its Alternate I.

(g) The contracting officer must insert the clause at 52.216-15, Predetermined Indirect Cost Rates, in solicitations and contracts when a cost-reimbursement research and development contract with an educational institution (see part 42) is anticipated and predetermined indirect cost rates are to be used.

Subpart 16.4 - Incentive Contracts

16.401 General.

16.401-1 Description.

(a) Incentive contracts are designed to obtain specific acquisition objectives by-

(1) Establishing realistic and achievable targets that are clearly communicated to the contractor; and

(2) Including appropriate incentive arrangements designed to-

(i) Motivate contractor efforts that might not otherwise be emphasized and

(ii) Discourage contractor inefficiency and waste.

(b) When predetermined, formula-type incentives on technical performance or delivery are included, profit or fee increases are only earned when performance exceeds the targets. Decreases apply when contractors fail to meet these targets. These incentive increases or decreases relate only to performance targets, not minimum performance requirements.

(c) The two basic categories of incentive contracts are fixed-price incentive contracts (see 16.402-3 and 16.404) and cost-reimbursement incentive contracts (see 16.402-4 and 16.405).

16.401-2 Limitations.

(a) A determination and findings, signed by the head of the contracting activity, must be completed for all incentive- and award-fee contracts justifying that the use of this type of contract is in the best interest of the Government. The determination for award-fee contracts must address all of the suitability items in 16.402-1.

(b) (1) For cost-reimbursement incentive contracts, the agency head must approve a justification if required by 16.104.

(2) Fixed-price incentive contracts based solely on factors other than cost, do not require a justification.

16.401-3 Incentive- and award-fee data collection and analysis.

Each agency must collect relevant data on award fee and incentive fees paid to contractors and include performance measures to evaluate such data on a regular basis to determine effectiveness of award and incentive fees as a tool for improving contractor performance and achieving desired program outcomes. This information should be considered as part of the acquisition planning process (see part 7) in determining the appropriate type of contract to be used for future acquisitions.

16.401-4 Incentive- and award-fee best practices.

Each agency head must provide processes for sharing proven incentive strategies for the acquisition of different types of products and services among contracting and program management officials.

16.402 Award-fee.

16.402-1 Application.

An award-fee contract is suitable for use when-

(a) The work to be performed is too complex or uncertain to set predetermined objective incentive targets applicable to cost, schedule, and technical performance;

(b) The likelihood of meeting acquisition objectives will be increased by using a contract that effectively motivates the contractor toward exceptional performance and provides the Government with the flexibility to evaluate both actual performance and the circumstances under which work was achieved; and

(c) Any additional administrative effort and cost required to monitor and evaluate performance are justified by the expected benefits as documented by a risk and cost benefit analysis to be included in the determination and findings referenced in 16.401-2.

16.402-2 Limitations.

(a) *Justification for other than fixed-price*. For award-fee contracts, except for fixed-price award-fee contracts based solely on factors other than cost, the agency head must approve a justification, if required by 16.104.

(b) *Award-fee plan*. An award-fee contract must not be awarded unless an award-fee plan is completed in accordance with the requirements in paragraph (d) of this section.

(c) *Award-fee amount*. The amount of award fee earned must be in line with the contractor’s overall cost, schedule, and technical performance as measured against contract requirements in accordance with the criteria stated in the award-fee plan.

Award fee must not be earned if the contractor's overall cost, schedule, and technical performance in the aggregate is below satisfactory. The basis for all award-fee determinations must be documented in the contract file to include, at a minimum, a determination that overall cost, schedule and technical performance in the aggregate is or is not at a satisfactory level. This determination and the approach for determining the award fee are unilateral decisions made solely at the discretion of the Government.

(d) *Award-fee plan*. All contracts providing for award fees must be supported by an award-fee plan that sets up the process for evaluating award fee and an Award-Fee Board for completing the award-fee evaluation. Award-fee plans must-

(1) Be approved by the Fee-Determining Official unless otherwise authorized by agency procedures;

(2) Identify the award-fee evaluation criteria and how they are connected to acquisition objectives which must be defined in terms of contract cost, schedule, and technical performance. Criteria should motivate the contractor to enhance performance in the areas rated, but not at the expense of at least minimum acceptable performance in all other areas;

(3) Describe how the contractor's performance will be evaluated against the award-fee evaluation criteria;

(4) Use the adjectival rating and associated description as well as the award-fee pool earned percentages shown below in Table 16-1. Contracting officers may supplement the adjectival rating description. The approach used to determine the adjectival rating must be documented in the award-fee plan;

TABLE 16-1

Award-Fee Adjectival Rating	Award-Fee Pool Available To Be Earned	Description
Excellent	91%-100%	Contractor has exceeded almost all of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and evaluated against the criteria in the award-fee plan for the award-fee evaluation period.
Very Good	76%-90%	Contractor has exceeded many of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and evaluated against the criteria in the award-fee plan for the award-fee evaluation period.
Good	51%-75%	Contractor has exceeded some of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and evaluated against the criteria in the award-fee plan for the award-fee evaluation period.
Satisfactory	No Greater Than 50%	Contractor has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and evaluated against the criteria in the award-fee plan for the award-fee evaluation period.

Unsatisfactory	0%	Contractor has failed to meet overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and evaluated against the criteria in the award-fee plan for the award-fee evaluation period.

(5) Earning any award fee when a contractor's overall cost, schedule, and technical performance in the aggregate is below satisfactory is not allowed;

(6) Provide for evaluation period(s) to be conducted at stated intervals during the contract period of performance so that the contractor will periodically be informed of the quality of its performance and the areas in which improvement is expected (e.g., six months, nine months, twelve months, or at specific milestones); and

(7) Define the total award-fee pool amount and how this amount is allocated to each evaluation period.

(e) *Rollover of unearned award fee.* The use of rollover of unearned award fee is prohibited.

16.402-3 Fixed-price contracts with award fees.

Award-fee provisions may be used in fixed-price contracts when the Government wishes to motivate a contractor and other incentives cannot be used because contractor performance cannot be measured objectively. Such contracts must establish a fixed-price (including normal profit) for the work, which will be paid for satisfactory contract performance. Any award fee earned will be paid in addition to that fixed-price. See 16.402-1 and 16.402-2 for the requirements on using this contract type.

16.402-4 Cost-plus-award-fee contracts.

A cost-plus-award-fee contract is a cost-reimbursement contract that provides a fee consisting of (1) a base amount fixed at inception of the contract, if applicable and at the discretion of the contracting officer, and (2) an award fee that the contractor may earn in whole or in part to provide motivation for excellence in the areas of cost, schedule, and technical performance. See 16.301, 16.402-1, and 16.402-2 for the requirements relative to utilizing this contract type.

16.403 Application of predetermined, formula-type incentives.

16.403-1 Cost incentives.

(a) Cost incentives take the form of a profit or fee adjustment formula and are intended to motivate the contractor to effectively manage costs. No incentive contract may provide for other incentives without also providing a cost incentive (or constraint).

(b) Except for award-fee contracts (see 16.402), cost incentive contracts include a target cost, a target profit or fee, and a profit or fee adjustment formula that (within the constraints of a price ceiling or minimum and maximum fee) provides that-

(1) If actual costs equal the target cost, the contractor will earn the target profit or fee;

(2) If actual costs exceed the target cost, the contractor's earned profit or fee will be lower than the target profit or fee; and

(3) If actual costs are below the target cost, the contractor's earned profit or fee will be higher than the target profit or fee.

16.403-2 Performance incentives.

(a) Performance incentives may be considered in connection with specific product characteristics (e.g., a missile range, an aircraft speed, an engine thrust, or a vehicle maneuverability) or other specific areas of the contractor's performance. Incentives should be linked to the contractor's profit or fee based on how their actual performance compares to the set targets.

(b) To the maximum extent practicable, positive and negative performance incentives for objectively measured tasks should be considered when the quality of performance is critical, and incentives are likely to motivate the contractor.

16.403-3 Delivery incentives.

(a) Delivery incentives should be considered when improvement from a required delivery schedule is important to the Government.

(b) Delivery incentives should include a reward-penalty structure in the event of Government-caused delays or other delays beyond the control, and without the fault or negligence, of the contractor or subcontractor.

16.403-4 Structuring multiple-incentive contracts.

A properly structured multiple-incentive arrangement should-

(a) Motivate the contractor to work towards outstanding results in all incentive areas; and

(b) Encourage trade-offs between incentive areas to align with the Government's goals. Due to the connection of cost, technical performance, and delivery goals, a contract that focuses on only one of the goals may jeopardize control over the others. All multiple-incentive contracts must include a cost incentive (or constraint) that prevents rewarding a contractor for greater technical performance or delivery results when the cost of those results outweighs their value to the Government.

16.404 Fixed-price incentive contracts.

(a) *Description*. A fixed-price incentive contract is a fixed-price contract that uses an established formula to adjust profit upward or downward and establishes the final contract price. Two forms of fixed-price incentive contracts, firm target and successive targets, are further described in 16.404-1 and 16.404-2.

(b) *Application*. A fixed-price incentive contract is appropriate when-

(1) A firm-fixed-price contract is not suitable;

(2) The contractor's acceptance of a degree of cost responsibility will provide a positive profit incentive to control costs and increase performance; and

(3) If the contract also includes technical, performance or delivery incentives, the technical/performance/delivery incentives should provide opportunities for the incentives to improve the contractor's management of the work.

(c) *Billing prices*. In fixed-price incentive contracts, interim billing prices are established for payment. Billing prices may be adjusted, within the ceiling limit, when requested by either party to the contract, when it becomes apparent that final price will be substantially different from the target price.

16.404-1 Fixed-price incentive (firm target) contracts.

(a) *Description*. A fixed-price incentive (firm target) contract specifies a target cost, a target profit, a price ceiling (but not a profit ceiling or floor), and a formula for profit adjustments. When the final cost is less than the target cost, application of the formula results in a final profit greater than the target profit; conversely, when final cost is more than target cost, application of the formula results in a final profit less than the target profit, or even a net loss. If the final negotiated cost exceeds the price ceiling, the contractor absorbs the difference as a loss.

(b) *Limitations*. This contract type may be used only when-

(1) The contractor's accounting system is adequate for providing data to support negotiation of final cost and incentive price revision; and

(2) Adequate cost or pricing information for establishing reasonable firm targets is available at the time of initial contract negotiation.

(c) *Contract schedule*. The contracting officer must specify in the contract schedule the target cost, target profit, and target price for each item subject to incentive price revision.

16.404-2 Fixed-price incentive (successive targets) contracts.

(a) *Description*. A fixed-price incentive (successive targets) contract specifies the following elements, all of which are negotiated at the outset:

(1) An initial target cost.

(2) An initial target profit.

(3) An initial profit adjustment formula to calculate the firm target profit, including a ceiling and floor for the firm target profit.

(4) The production point at which the firm target cost and firm target profit will be negotiated.

(5) A ceiling price.

(b) *Limitations*. This contract type may be used only when-

(1) The contractor's accounting system is adequate for providing data for negotiating firm targets and a realistic profit adjustment formula, as well as later negotiation of final costs; and

(2) Cost or pricing information adequate for establishing a reasonable firm target cost is expected to be available early on in contract performance.

(c) *Contract schedule*. The contracting officer must specify in the contract schedule the initial target cost, initial target profit, and initial target price for each item subject to incentive price revision.

16.405 Cost-plus-incentive-fee contracts.

The cost-plus-incentive-fee contract is a cost-reimbursement contract that adjusts the initially negotiated fee based on a formula comparing total allowable costs to total target costs. This contract type includes a target cost, target fee, minimum and maximum fees, and a fee adjustment formula. After contract performance, the contractor's fee is determined using the specified fee formula. The formula allows for fee increases above the target fee when total allowable costs are less than target costs, and fee decreases below the target fee when total allowable costs exceed target costs, creating an incentive for effective contract management. When total allowable costs fall outside the range of the fee formula, the contractor receives total allowable costs plus either the minimum or maximum fee.

16.406 Contract clauses.

(a) Insert the clause at 52.216-16, Incentive Price Revision-Firm Target, in solicitations and contracts when a fixed-price incentive (firm target) contract is contemplated. If the contract calls for supplies or services to be ordered under a provisioning document or Government option and the prices are to be subject to the incentive price revision under the clause, the contracting officer must use the clause with its *Alternate I*.

(b) Insert the clause at 52.216-17, Incentive Price Revision-Successive Targets, in solicitations and contracts when a fixed-price incentive (successive targets) contract is contemplated. If the contract calls for supplies or services to be ordered under a provisioning document or Government option and the prices are to be subject to incentive price revision under the clause, the contracting officer must use the clause with its *Alternate I*.

(c) The clause at 52.216-10, Incentive Fee, is prescribed in 16.305(d) for insertion in solicitations and contracts when a cost-plus-incentive-fee contract is contemplated.

(d) Insert an appropriate award-fee clause in solicitations and contracts when an award-fee contract is contemplated, provided that the clause-

(1) Is prescribed by or approved under agency acquisition regulations;

(2) Is compatible with the clause at 52.216-7, Allowable Cost and Payment; and

(3) Expressly provides that the award amount and the award-fee determination methodology are unilateral decisions made solely at the discretion of the Government.

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Subpart 16.5 - Indefinite-Delivery Contracts

16.500 Scope.

(a) This subpart prescribes policies and procedures for making awards of indefinite-delivery contracts and subsequent orders and establishes a preference for making multiple awards of indefinite-quantity contracts.

(b) This subpart does not limit the use of other than competitive procedures authorized by part 6.

(c) See part 19 for procedures to set aside part or parts of multiple-award contracts for small businesses and to reserve one or more awards for small business on multiple-award contracts.

(d) The statutory multiple award preference (see 10 U.S.C. 3403 and 41 U.S.C. 4103) implemented by this subpart does not apply to architect-engineer contracts subject to the procedures in part 36. However, agencies are not precluded from making multiple awards for architect-engineer services using the procedures in this subpart, provided the selection of contractors and placement of orders are consistent with part 36.

(e) This subpart does not limit the authority of the General Services Administration (GSA) to enter into schedule, multiple-award, or task or delivery order contracts under any other provision of law. Therefore, GSA regulations and the coverage for the Federal Supply Schedule program take precedence over this subpart.

16.501 General.

16.501-1 Definitions.

As used in this subpart-

Delivery-order contract means a contract for property [supplies] that does not procure or specify a firm quantity of property (other than a minimum or maximum quantity) and that provides for the issuance of orders for the delivery of supplies during the period of the contract.

Task-order contract means a contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.

16.501-2 Policies.

(a) There are three types of indefinite-delivery contracts: definite-quantity contracts, requirements contracts, and indefinite-quantity contracts. The appropriate type of indefinite-delivery contract may be used to acquire supplies and/or services when the exact times and/or exact quantities of future deliveries are not known at the time of contract award. Pursuant to 10 U.S.C. 3401 and 41 U.S.C. 4101, requirements contracts and indefinite-quantity contracts are also known as delivery-order contracts or task-order contracts.

(b) (1) Indefinite-delivery contracts may provide for any appropriate cost or pricing arrangement under part 16. Cost or pricing arrangements that provide for an estimated quantity of supplies or services (e.g., estimated number of labor hours) must comply with the appropriate procedures of this subpart.

(2) In accordance with 10 U.S.C. 3206(c), for DoD, NASA, and the Coast Guard—

(i) The contracting officer may choose not to include price or cost as an evaluation factor for award when a solicitation—

(A) Has an estimated value above the simplified acquisition threshold;

(B) Will result in multiple-award contracts that are for the same or similar services; and

(C) States that the Government intends to make an award to each and all qualifying offerors.

(ii) If the contracting officer chooses not to include price or cost as an evaluation factor for the contract award, in accordance with paragraph (b)(2)(i), the contracting officer shall consider price or cost as one of the factors in the selection decision for each order placed under the contract.

(iii) The exception in paragraph (b)(2)(i) of this subsection shall not apply to solicitations for multiple-award contracts that provide for sole source orders pursuant to section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

(c) Task order and delivery order contracts (requirements contracts and indefinite-quantity contracts) have an ordering period in which orders may be placed. Individual task and delivery orders have a period of performance effective for that specific task or delivery order's scope of work. The effective period of a task or delivery order contract includes the ordering period of the base contract and any period of performance of task orders beyond the end of the ordering period.

(1) *Limitation on ordering period*. In accordance with 10 U.S.C. 3403, for the DoD, NASA, and the Coast Guard, the head of an agency entering into a task or delivery order contract may provide for the contract to cover any period up to five

years and may extend the contract period for one or more successive periods pursuant to an option provided in the contract or a modification of the contract. The total contract period as extended may not exceed 10 years unless such head of an agency determines in writing that exceptional circumstances necessitate a longer contract period.

(2) *Limitation on ordering period for task-order contracts for advisory and assistance services.*

(i) In accordance with 10 U.S.C. 3405, except as provided for in paragraphs (c)(2)(ii) and (iii) of this subsection, the ordering period of a task-order contract for advisory and assistance services, including all periods of extensions of the contract under options, modifications or otherwise, may not exceed 5 years.

(ii) The 5-year limitation does not apply when—

(A) A longer ordering period is specifically authorized by statute; or

(B) The contract is for an acquisition of supplies or services that includes the acquisition of advisory and assistance services and the contracting officer, or other official designated by the head of the agency, determines that the advisory and assistance services are incidental and not a significant component of the contract.

(iii) The contracting officer may extend the contract on a sole-source basis for a period not exceeding 6 months if the contracting officer, or other official designated by the head of the agency, determines that—

(A) The award of a follow-on contract is delayed by circumstances that were not reasonably foreseeable at the time the initial contract was entered into; and

(B) The extension is necessary to ensure continuity of services, pending the award of, and commencement of performance under, the follow-on contract.

16.502 Definite-quantity contracts.

16.502-1 Description.

A definite-quantity contract provides for delivery of a definite (fixed) quantity of specific supplies or services for a fixed period, with deliveries or performance to be scheduled at designated locations upon order. The delivery schedule and/or location may be flexible or set, but the total number of items or services to be delivered under the contract will not change.

16.502-2 Application.

A definite-quantity contract may be used when it can be determined in advance that-

(a) The exact quantity of supplies or services required during the contract period is known at the time of award; and

(b) The supplies or services are regularly available or will be available after a short lead time.

16.503 Requirements contracts.

16.503-1 Description.

A requirements contract provides for filling all actual purchase requirements of designated Government activities for supplies or services during a specified ordering period exclusively from one contractor, with deliveries or performance to be scheduled by placing orders with the contractor.

16.503-2 Application.

A requirements contract may be appropriate for acquiring any supplies or services when the Government anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that designated Government activities will need during a definite period.

16.503-3 Limitations.

(a) No requirements contract in an amount estimated to exceed $150 million (including all options) may be awarded to a single source unless a determination is executed in accordance with 16.504-3(a)(4).

(b) *Limitations on use of requirements contracts for advisory and assistance services*.

(1) Except as provided in paragraph (b)(2), no solicitation for a requirements contract for advisory and assistance services in excess of three years and $20 million (including all options) may be issued unless the contracting officer or other official designated by the head of the agency determines in writing that the services required are so unique or highly specialized that it is not practicable to make multiple awards using the procedures in 16.504-3.

(2) The limitation in paragraph (b)(1) of this subsection does not apply to a contract for the acquisition of supplies or services that includes acquisition of advisory and assistance services if the head of the executive agency entering into the

contract determines that, under the contract, advisory and assistance services are necessarily incident to, and not a significant component of, the contract.

16.503-4 Required content.

(a) Requirements contracts obligate the seller to supply all the buyer's actual needs, and the buyer to purchase all their requirements from that specific seller, within stated limits of the contract. The contract must state, if feasible, the maximum limit of the contractor's obligation to deliver and the Government's obligation to order. The contract may also set minimum and/or maximum limits on the quantities the Government may order under each individual order or over a specified period of time.

(b) The solicitation and resulting contract must state a realistic estimated total quantity. This estimated total quantity is not a representation to an offeror or contractor that the estimate is guaranteed quantity, or that conditions affecting requirements will stay the same. The contracting officer should base the estimate on the most current information available, and may calculate the estimate based on records of previous requirements and consumption, or by other means.

(c) When a requirements contract is used to acquire work (e.g., repair, modification, or overhaul) on existing items of Government property, the contracting officer must specify in the Schedule that failure of the Government to furnish such items in the amounts or quantities described in the Schedule as "estimated" or "maximum" will not entitle the contractor to any equitable adjustment in price under the Government Property clause of the contract.

16.504 Indefinite-quantity contracts.

16.504-1 Description.

(a) An indefinite-quantity contract provides for an indefinite quantity, within stated limits, of supplies or services during an ordering period. The Government places orders for individual requirements. Quantity limits may be stated as number of units or as dollar values.

(b) The contract must require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services. To ensure that the contract is binding, the minimum quantity must be more than a nominal quantity, but it should not exceed the amount that the Government is fairly certain to order.

(c) In addition, if ordered, the contractor must furnish any additional quantities, not to exceed the stated maximum. The contracting officer should establish a reasonable maximum quantity based on market research, trends on recent contracts for similar supplies or services, survey of potential users, or any other rational basis.

(d) The contract may also specify maximum or minimum quantities that the Government may order under each task or delivery order and the maximum that it may order during a specific period of time.

16.504-2 Application.

The contracting officer may use an indefinite-quantity contract when the Government knows what kind of supplies or services it needs and a certain minimum amount that will be needed, but does not know exactly how much will be needed or when during the effective period. The contracting officer should use an indefinite-quantity contract only when the government expects to have ongoing, repeated needs for the supplies or services.

16.504-3 Multiple award preference.

(a) (1) Except for indefinite-quantity contracts for advisory and assistance services as provided in paragraph (b) of this subsection, the contracting officer must, to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to more than one source.

(2) The contracting officer must document the decision whether to make multiple awards in the acquisition plan or contract file. Reasons for deciding that multiple awards are not in the best interests of the Government include, but are not limited to-

(i) Only one contractor is capable of providing performance at the level of quality required because the supplies or services are unique or highly specialized;

(ii) Based on the contracting officer's knowledge of the market, more favorable terms and conditions, including pricing, will be provided if a single award is made;

(iii) The expected cost of administration of multiple contracts outweighs the expected benefits of making multiple awards;

(iv) The projected orders are so integrally related that only a single contractor can reasonably perform the work;

(v) The total estimated value of the contract is at or below the SAT.

(3) The contracting officer may determine that a class of acquisitions is not appropriate for multiple awards.

(4) (i) No task or delivery order contract in an amount estimated to exceed $150 million (including all options) may be awarded to a single source unless the head of the agency determines in writing that-

(A) The task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work;

(B) The contract provides only for firm-fixed-price (see 16.202) task or delivery orders for-

(1) Products for which unit prices are established in the contract; or

(2) Services for which prices are established in the contract for the specific tasks to be performed;

(C) Only one source is qualified and capable of performing the work at a reasonable price to the Government; or

(D) It is necessary in the public interest to award the contract to a single source due to exceptional circumstances.

(ii) The head of the agency must notify Congress within 30 days after any determination under paragraph (c)(4)(i)(D) of this section.

(iii) The requirement for a determination for a single-award contract greater than $150 million-

(A) Is in addition to any applicable requirements of part 6; and

(B) Is not applicable for architect-engineer services awarded pursuant to part 36.

(b) *Preference for multiple awards for advisory and assistance services*.

(1) In accordance with 10 U.S.C. 3405 and 41 U.S.C. 4105, except as provided in paragraph (b)(2) of this subsection, if an indefinite-quantity contract for advisory and assistance services is estimated to exceed 3 years and $20 million (including all options), the solicitation must provide for multiple awards unless-

(i) The contracting officer or other official designated by the head of the agency determines in writing-

(A) It is not practicable to award more than one contract because the services required are unique or highly specialized or the tasks are so integrally related; or

(B) After the evaluation of offers, that only one offeror is capable of providing the services required at the level of quality required; or

(ii) Only one offer is received.

(2) The requirements of paragraph (b)(1) of this subsection do not apply to a contract for the acquisition of supplies or services that includes acquisition of advisory and assistance services if the head of an agency entering into such contract determines in writing during acquisition planning that, under the contract, advisory and assistance services are necessarily incident to, and not a significant component of, the contract.

16.504-4 On-ramps and off-ramps.

To maintain a current, competitive, and innovative pool of vendors on a multiple-award contract, the solicitation and contract may provide for-

(a) Adding new contractor (on-ramp) and increasing the maximum quantity during open seasons; and

(b) Removing a contractor (off-ramp) for underperforming, failure to actively participate in order competitions, or if requested by the awardee.

16.504-5 Required content.

An indefinite-quantity solicitation and contract must-

(a) Specify the ordering period of the contract, including the number of options and the period for which the Government may extend the contract ordering period under each option;

(b) Specify the total minimum and maximum quantity of supplies or services the Government will acquire under the contract;

(c) Specify the last date that a contractor will be required to make deliveries under orders issued during the ordering period (see 52.216-22(d));

(d) Include a statement of work, specifications, or other description that reasonably describes the general scope, nature, complexity, and purpose of the supplies or services the Government will acquire under the contract in a manner that will enable a prospective offeror to decide whether to submit an offer;

(e) State any uniform ordering procedures that the Government will use in issuing all orders, including the ordering media; otherwise, the ordering procedures are at the discretion of the ordering contracting officer;

(f) Specify the activities authorized to issue orders;

(g) Include authorization for placing oral orders, if appropriate, provided that the Government has established procedures for obligating funds and that oral orders are confirmed in writing; and

(h) When multiple awards are anticipated-

(1) Specify any fair opportunity procedures and selection criteria that must apply to all competed orders; otherwise, the procedures and selection criteria are at the discretion of the ordering contracting officer (see 16.507);

(2) Specify whether one or more blanket purchase agreements (BPAs) may be established under the contract according to 16.507-2(c)(3). Existing contracts may be modified to allow BPAs;

(3) If the ordering period exceeds five years, provide for on-ramps according to paragraph (e), unless the contracting officer documents that on-ramps are not in the best interests of the Government.

16.505 Solicitation provisions and contract clauses.

(a) Insert the clause at 52.216-18, Ordering, in solicitations and contracts when a definite-quantity contract, a requirements contract, or an indefinite-quantity contract is contemplated.

(b) Insert a clause substantially the same as the clause at 52.216-19, Order Limitations, in solicitations and contracts when a definite-quantity contract, a requirements contract, or an indefinite-quantity contract is contemplated.

(c) Insert the clause at 52.216-20, Definite Quantity, in solicitations and contracts when a definite-quantity contract is contemplated.

(d) (1) Insert the clause at 52.216-21, Requirements, in solicitations and contracts when a requirements contract is contemplated.

(2) If the contract is for nonpersonal services and related supplies and covers estimated requirements that exceed a specific Government activity's internal capability to produce or perform, use the clause with its *Alternate I*.

(3) If the contract includes subsistence for both Government use and resale in the same Schedule, and similar products may be acquired on a brand-name basis, use the clause with its Alternate II (but see paragraph (d)(5) of this section).

(4) If the contract involves a partial small business set-aside, use the clause with its Alternate III (but see paragraph (d)(5) of this section).

(5) If the contract-

(i) Includes subsistence for Government use and resale in the same schedule and similar products may be acquired on a brand-name basis; and

(ii) Involves a partial small business set-aside, use the clause with its *Alternate IV*.

(e) Insert the clause at 52.216-22, Indefinite Quantity, in solicitations and contracts when an indefinite-quantity contract is contemplated.

(1) If off-ramping is contemplated and the agency desires a unilateral cancellation executable by either party, the contracting officer may include the clause with a paragraph substantially the same as its Alternate I. The contracting officer may vary the 30-day period in which the cancellation becomes effective from as few as 15 days to as many as 90 days.

(2) If off-ramping is contemplated and the agency wishes to retain discretion to disapprove contractor-requested off-ramps, the contracting officer may include the clause with a paragraph substantially the same as its Alternate II. The contracting officer may vary the 30-day period in which the cancellation becomes effective from as few as 15 days to as many as 90 days.

(f) Insert the provision at 52.216-27, Single or Multiple Awards, in solicitations for indefinite-quantity contracts that may result in multiple contract awards. Modify the provision to specify the estimated number of awards. Do not use this provision for advisory and assistance services contracts that exceed 3 years and $20 million (including all options).

(g) Insert the provision at 52.216-28, Multiple Awards for Advisory and Assistance Services, in solicitations for task-order contracts for advisory and assistance services that exceed 3 years and $20 million (including all options), unless a determination has been made under 16.504-3(b)(1)(i). Modify the provision to specify the estimated number of awards.

(h) See 10.001(d) for insertion of the clause at 52.210-1, Market Research, when the contract is over $7.5 million for the procurement of items other than commercial products or commercial services.

(i) See 7.107-4 for use of 52.207-6, Solicitation of Offers from Small Business Concerns and Small Business Teaming Arrangement or Joint Ventures (Multiple-Award Contracts) in solicitations for multiple-award contracts above the substantial bundling threshold of the agency.

(j) Insert the clause at 52.216-32, Task-Order and Delivery-Order Ombudsman, in solicitations and contracts when a multiple-award task or delivery order contract is contemplated. Use the clause with its Alternate I when the contract will be available for use by multiple agencies (e.g., Governmentwide acquisition contracts or multi-agency contracts). When placing

orders under the multiple-award contract available for use by multiple agencies, the ordering activity's contracting officer must complete paragraph (d)(2) and include Alternate I in the notice of intent to place an order, and in the resulting order.

16.506 Postaward procedures for placement of task and delivery orders.

(a) Orders must be within the scope, issued within the specified ordering period, and be within the maximum value of the contract.

(b) All orders placed under a task or delivery order contract must contain the following information:

(1) Date of order.

(2) Contract number and order number.

(3) For supplies and services, line-item number, subline item number (if applicable), description, quantity, and unit price or estimated cost and fee (as applicable). The corresponding line-item number and subline item number from the base contract must also be included.

(4) Delivery or performance schedule.

(5) Statement of work that clearly specifies all tasks to be performed or property supplies to be delivered under the order. Performance-based acquisition methods must be used to the maximum extent practicable, if the order is for services.

(6) Place of delivery or performance (including consignee).

(7) Any packaging, packing, and shipping instructions.

(8) Accounting and appropriation data.

(9) Method of payment and payment office, if not specified in the contract (see part 32).

(10) North American Industry Classification System code (see part 19).

(c) Orders placed under a task-order contract or delivery-order contract awarded by another agency (i.e., a Governmentwide acquisition contract, or multi-agency contract)—

(1) Are not exempt from the development of acquisition plans (see part 7), and an information technology acquisition strategy (see part 39);

(2) May not be used to circumvent conditions and limitations imposed on the use of funds (e.g., 31 U.S.C. 1501(a)(1)); and

(3) Must comply with all FAR requirements for a consolidated or bundled contract when the order meets the definition at 2.101 of "consolidation" or "bundling".

(d) In accordance with section 1427(b) of Public Law 108-136 (40 U.S.C. 1103 note), orders placed under multi-agency contracts for services that substantially or to a dominant extent specify performance of architect-engineer services, as defined in 2.101, must-

(1) Be awarded using the procedures at part 36.

(2) Require the direct supervision of a professional architect or engineer licensed, registered, or certified in the State, possession, Federal District, or outlying area in which the services are to be performed.

(e) When using the Governmentwide commercial purchase card as a method of payment, orders at or below the micro-purchase threshold are exempt from verification in the System for Award Management as to whether the contractor has a delinquent debt subject to collection under the Treasury Offset Program.

(f) If the contract did not establish the price for the supply or service, the contracting officer must establish prices for each order using the policies and methods in subpart 15.4.

(g) For additional requirements for cost-reimbursement orders, see subpart 16.3.

(h) For additional requirements for time-and-materials or labor-hour orders, see subpart 16.6.

(i) The contracting officer should rely on the small business representations at the contract level (but see part 19 for order rerepresentations).

16.507 Additional ordering procedures for multiple-award contracts.

16.507-1 Placement of orders valued at or below the micro-purchase threshold.

Each order valued at or below the micro-purchase threshold may be placed with any multiple-award contractor that can meet the agency’s needs. Although not required to solicit from a specific number of contractors, ordering activities should attempt to distribute orders among multiple-award contractors.

16.507-2 Fair opportunity procedures.

(a) *Fair opportunity*. (1) The contracting officer must provide each awardee a fair opportunity to be considered for each order or BPA valued above the micro-purchase threshold according to paragraph (c) and 16.507-3 through 16.507-5, unless a sole source order or BPA is justified and approved according to 16.507-6.

(2) The contracting officer has broad discretion to develop appropriate order placement procedures. To maximize efficiency, ordering activities are encouraged to use innovative approaches when placing orders and establishing BPAs commensurate with the risk and complexity of the requirement. To solicit orders against indefinite-quantity contracts, issue a task order solicitation (e.g., request for quotation, request for proposal, or request for task plan). Learn more about innovative approaches in the Periodic Table of Acquisition Innovations at https://acquisitiongateway.gov/periodic-table.

(3) The contracting officer should keep submission requirements to a minimum. The ordering process is not subject to the competition requirements in part 6 or the policies in subpart 15.3 or part 14. The contracting officer may use streamlined procedures, including oral presentations. The contracting officer is not required to have evaluation plans, score offeror responses, or establish a competitive range before communicating with interested parties or soliciting revised responses to the solicitation.

(b) *Task-order and delivery-order ombudsman*. The head of the agency must designate a task-order and delivery-order ombudsman. The ombudsman must review complaints from contractors and ensure they are afforded a fair opportunity to be considered, consistent with the procedures in the contract. The ombudsman must be a senior agency official who is independent of the contracting officer and may be the agency's advocate for competition.

(c) *Procedures*. (1) *Requirements*. The contracting officer must-

(i) Not use any method (such as allocation or designation of any preferred awardee) that would not result in fair consideration being given to all awardees prior to placing each order;

(ii) Tailor the procedures to the risk and complexity of each acquisition;

(iii) Include the procedures in the solicitation and the contract;

(iv) Consider price or cost under each order as one of the factors in the selection decision;

(v) Except for DoD, document in the contract file a justification for use of the lowest price technically acceptable source selection process, including an explanation that the criteria at 15.101-2(c)(1)-(5) are met, when using the lowest price technically acceptable source selection process; and

(vi) Except for DoD, avoid using the lowest price technically acceptable source selection process to acquire certain supplies and services in accordance with 15.101-2(d).

(2) *Considerations*. The contracting officer should consider the following when developing the placement procedures:

(i) Past performance on earlier orders under the contract, including quality, timeliness and cost control. When past performance under the multiple-award contract is available and sufficient, it is unnecessary to consider past performance under other efforts.

(ii) Potential impact on other orders placed with the contractor.

(iii) Minimum order requirements.

(iv) The amount of time contractors need to make informed business decisions on whether to respond to potential orders.

(v) Whether contractors could be encouraged to respond to potential orders by outreach efforts to promote exchanges of information, such as—

(A) Seeking comments from two or more contractors on draft statements of work;

(B) Using a multiphase approach when effort required to respond to a potential order may be resource intensive (e.g., requirements are complex or need continued development), where all contractors are initially considered on price considerations (e.g., rough estimates), and other considerations as appropriate (e.g., proposed conceptual approach, past performance). The contractors most likely to submit the highest value solutions are then selected for one-on-one sessions with the Government to increase their understanding of the requirements, provide suggestions for refining requirements, and discuss risk reduction measures.

(3) *Blanket purchase agreements.* If authorized in the multiple-award contract according to 16.504(f)(8), the contracting officer may establish one or more blanket purchase agreements (BPAs) to fill repetitive needs for supplies or services (see 12.201-1(e)(3) and part 13). Establish BPAs using the fair opportunity procedures at 16.507-3 through 16.507-5, based on the total estimated value of the BPA. BPAs must include—

(i) Sufficient detail about the need, such as scope of work or objectives;

(ii) An ordering period, inclusive of any options or award terms;

(iii) Ordering activity requirements (e.g., invoicing, delivery, and discounts/other concessions) that are not otherwise included in the master multiple-award contract;

(iv) Ordering procedures that—

(A) Identify the customers/individuals authorized to place orders and any limitations surrounding the placement of orders;

(B) Ensure that for each order BPA recipients are provided the fair opportunity procedures in 16.507-3 through 16.507-5, based on the total estimated value of the order.

(v) If the ordering period of the BPA exceeds five years, on-ramps according to 16.504-4, unless the contracting officer documents that on-ramps are not in the best interest of the Government.

16.507-3 Orders valued above the micro purchase threshold but not above the SAT.

(a) The contracting officer must fairly consider all contractors offering the supplies or services. If information available to the contracting officer allows each contractor to be fairly considered, the contracting officer may place an order without further soliciting contractors, or by soliciting fewer than all contractors.

(b) Document the file to the extent necessary to support the award decision, such as demonstrating that each contractor was fairly considered.

16.507-4 Orders valued above the SAT but not above $7.5 million.

(a) Provide a fair notice of the intent to place an order to all contractors offering the products or services by issuing-

(1) A solicitation including a description of the work to be performed and the basis on which selection will be made; or

(2) A notice of intent to place an order that requires contractors to respond in order to receive the solicitation or be considered for the order.

(b) Document the file to the extent necessary to support the award decision, such as demonstrating that each quotation, offer, proposal, or other response to a notice was fairly considered.

16.507-5 Orders valued above $7.5 million.

(a) *Procedures* . Provide a fair notice of the intent to place an order to all contractors offering the products or services according to 16.507-4. A fair notice must—

(1) Include a clear statement of the agency's requirements;

(2) Allow for a reasonable response period; and

(3) Disclose the significant factors and subfactors, as applicable, including cost or price, that the agency expects to consider in evaluating quotations, offers, or other responses to notices, and their relative importance;

(b) *Documentation*. Document the file to the extent necessary to support the award decision, such as demonstrating—

(1) That each quotation, offer, or other response to a notice was fairly considered; and

(2) When award is made on a best value basis, the relative importance of quality and price or cost factors.

(c) *Postaward notices and debriefings.* Provide postaward notifications and debriefings according to part 15. A summary of the debriefing must be included in the task or delivery order file.

16.507-6 Exceptions to fair opportunity.

(a) *Procedures.* Orders placed and BPAs established against multiple-award contracts are exempt from the competition requirements in part 6. However, the contracting officer must justify placing an order valued above the micro-purchase threshold (MPT) on a sole source basis in accordance with this subsection.

(b) *Exceptions*. The exceptions permitting an order or a BPA valued above the MPT to be placed on a sole source basis are:

(1) The agency need for the supplies or services is so urgent that providing a fair opportunity would result in unacceptable delays.

(2) Only one awardee is capable of providing the supplies or services required at the level of quality required because the supplies or services ordered are unique or highly specialized.

(3) The order must be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to an order already issued under the contract, provided that all awardees were given a fair opportunity to be considered for the original order.

(4) It is necessary to place an order to satisfy a minimum guarantee.

(5) For orders exceeding the SAT, a statute expressly authorizes or requires that the purchase be made from a specified source.

(6) For DoD, NASA, and the Coast Guard, the order satisfies one of the exceptions permitting the use of other than full and open competition listed in part 6.103 (10 U.S.C. 3406(c)(5)). The public interest exception must not be used unless Congress is notified in accordance with 10 U.S.C. 3204(a)(7).

(c) *Small business considerations.* Part 19 and Public Law 111-240 (15 U.S.C. 644(r)) provide authority for setting aside orders and placing orders under reserves, which are not subject to the justification, approval, and posting requirements in paragraphs (d)-(f).

(d) *Justification*. The justification for an exception to fair opportunity must be in writing as specified in paragraphs (d)(1)-(3).

(1) *Orders valued above the micro-purchase threshold but not above the SAT*. The contracting officer must document the basis for using an exception to the fair opportunity process. If the contracting officer uses the logical follow-on exception, the rationale must describe why the relationship between the initial order and the follow-on is logical (e.g., in terms of scope, period of performance, or value).

(2) *Orders valued above the SAT*. As a minimum, each justification must include the following information:

(i) Identification of the agency and the contracting activity, and specific identification of the document as a "Justification for an Exception to Fair Opportunity."

(ii) Nature and/or description of the action being approved.

(iii) A description of the supplies or services required to meet the agency's needs (including the estimated value).

(iv) Identification of the exception to fair opportunity (see paragraph (b)) and the supporting rationale, including a demonstration that the proposed contractor's unique qualifications or the nature of the acquisition requires use of the exception cited. If the contracting officer uses the logical follow-on exception, the rationale must describe why the relationship between the initial order and the follow-on is logical (e.g., in terms of scope, period of performance, or value).

(v) A determination by the contracting officer that the anticipated cost to the Government will be fair and reasonable.

(vi) Any other facts supporting the justification.

(vii) A statement of the actions, if any, the agency may take to remove or overcome any barriers that led to the exception to fair opportunity before any subsequent acquisition for the supplies or services is made.

(viii) The contracting officer's certification that the justification is accurate and complete to the best of the contracting officer's knowledge and belief.

(ix) Evidence that any supporting data that is the responsibility of technical or requirements personnel (e.g., verifying the Government's minimum needs or requirements or other rationale for an exception to fair opportunity) and which form a basis for the justification have been certified as complete and accurate by the technical or requirements personnel.

(x) A written determination by the approving official that one of the circumstances in paragraphs (b)(1) through (6) applies to the order.

(e) *Approval*. (1) For proposed orders valued above the SAT, but not valued above $900,000, the ordering activity contracting officer's certification that the justification is accurate and complete to the best of the ordering activity contracting officer's knowledge and belief will serve as approval, unless a higher approval level is established in accordance with agency procedures.

(2) For a proposed order valued above $900,000, but not above $20 million, the justification must be approved by the advocate for competition of the activity placing the order, or by an official named in paragraph (e)(3) or (4). This authority is not delegable.

(3) For a proposed order valued above $20 million, but not above $90 million (or, for DoD, NASA, and the Coast Guard, not above $150 million, the justification must be approved by—

(i) The head of the procuring activity placing the order;

(ii) A designee who—

(A) If a member of the armed forces, is a general or flag officer;

(B) If a civilian, is serving in a position in a grade above GS-15 under the General Schedule (or in a comparable or higher position under another schedule); or

(iii) An official named in paragraph (e)(4) of this subsection.

(4) For a proposed order valued above $90 million (or, for DoD, NASA, and the Coast Guard, above $150 million), the justification must be approved by the senior procurement executive of the agency placing the order. This authority is

not delegable, except in the case of the Under Secretary of Defense for Acquisition and Sustainment, acting as the senior procurement executive for the Department of Defense.

(f) *Posting*. (1) Except as provided in paragraph (f)(4), within 14 days after placing an order or establishing a BPA valued above the SAT on a sole source basis according to paragraph (b), the contracting officer must—

(i) Publish a notice to the GPE; and

(ii) Post the justification required by paragraph (d)(2) for a minimum of 30 days)-

(A) At the GPE https://www.sam.gov ; and

(B) On the Web site of the agency, which may provide access to the justifications by linking to the GPE.

(2) In the case of an order permitted under paragraph (b)(1), the justification must be posted within 30 days after award of the order.

(3) Contracting officers must carefully screen all justifications for contractor proprietary data and remove all such data, and such references and citations as are necessary to protect the proprietary data, before posting the justification. Contracting officers must also be guided by the exemptions to disclosure of information contained in the Freedom of Information Act (5 U.S.C. 552) and the prohibitions against disclosure in part 24 in determining whether other data should be removed. Although the submitter notice process set out in Executive Order 12600 "Predisclosure Notification Procedures for Confidential Commercial Information" does not apply, if the justification appears to contain proprietary data, the contracting officer should provide the contractor that submitted the information an opportunity to review the justification for proprietary data before posting the justification, redacted as necessary. This process must not prevent or delay posting the justification in accordance with the timeframes required in paragraphs (f)(1)-(2).

(4) The posting requirement does not apply when disclosure would compromise the national security (e.g., would result in disclosure of classified information) or create other security risks.

16.507-7 Items peculiar to one manufacturer.

(a) The contracting officer must justify restricting consideration to an item peculiar to one manufacturer (e.g., a particular brand-name, product, or a feature of a product that is peculiar to one manufacturer). A brand-name item, even if available on more than one contract, is an item peculiar to one manufacturer. Brand-name specifications must not be used unless the particular brand-name, product, or feature is essential to the Government's requirements and market research indicates other companies' similar products, or products lacking the particular feature, do not meet, or cannot be modified to meet, the agency's needs.

(b) Brand-name requirements must be justified and approved when the requirement is determined, using the format(s) and requirements from 16.507-6(d)-(e)), modified to show the brand-name justification, unless—

(1) A justification covering the requirements in the order was previously approved for the contract in accordance with 6.103-1(d); or

(2) The base contract is a single-award contract.

(c) (1) For an order in excess of $40,000, the contracting officer must—

(i) Post the justification and supporting documentation on the agency website used (if any) to solicit offers for orders under the contract; or

(ii) Provide the justification and supporting documentation along with the solicitation to all contract awardees.

(2) The justification for brand-name requirements may apply to the portion of the acquisition requiring the brand-name item. If the justification is to cover only the portion of the acquisition which is brand-name, then it should so state; the approval level requirements will then only apply to that portion.

(3) The requirements in paragraph (c)(1) this subsection do not apply when disclosure would compromise the national security (e.g., would result in disclosure of classified information) or create other security risks.

(d) The justification is subject to the screening requirement in 16.507-6(f)(3).

16.508 Protests of orders.

(a) No protest under part 33 is authorized in connection with the issuance or proposed issuance of an order under a task-order contract or delivery-order contract, except—

(1) A protest on the grounds that the order increases the scope, period, or maximum value of the contract; or

(2) (i) For agencies other than DoD, NASA, and the Coast Guard, a protest of an order valued in excess of $10 million (41 U.S.C. 4106(f)); or

(ii) For DoD, NASA, or the Coast Guard, a protest of an order valued in excess of $35 million (10 U.S.C. 3406(f)).

(b) Protests of orders in excess of the thresholds stated in paragraph (a)(2) of this section may only be filed with the Government Accountability Office, in accordance with the procedures at 33.105.

(c) For protests of small business size status for set-aside orders, see part 19.

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Subpart 16.6 - Time-and-Materials, Labor-Hour, and Letter Contracts

16.600 Scope.

Time-and-materials contracts and labor-hour contracts are not fixed-price contracts.

16.601 Time-and-materials contracts.

Definitions for the purposes of Time-and-Materials Contracts.

Direct materials means those materials that enter directly into the end product, or that are used or consumed directly in connection with the furnishing of the end product or service.

Hourly rate means the rate(s) prescribed in the contract for payment for labor that meets the labor category qualifications of a labor category specified in the contract that are-

(1) Performed by the contractor;

(2) Performed by the subcontractors; or

(3) Transferred between divisions, subsidiaries, or affiliates of the contractor under a common control.

Materials means-

(1) Direct materials, including supplies transferred between divisions, subsidiaries, or affiliates of the contractor under a common control;

(2) Subcontracts for supplies and incidental services for which there is not a labor category specified in the contract;

(3) Other direct costs (e.g., incidental services for which there is not a labor category specified in the contract, travel, computer usage charges, etc.); and

(4) Applicable indirect costs.

16.601-1 Description.

A time-and-materials contract provides for acquiring supplies or services on the basis of-

(a) Direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit; and

(b) Actual cost for materials (except as provided for in part 31).

16.601-2 Application.

A time-and-materials contract may be used only when it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence.

(a) *Government surveillance*. A time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, appropriate Government surveillance of contractor performance is required to give reasonable assurance that efficient methods and effective cost controls are being used.

(b) *Fixed hourly rates*. (1) The contract must specify separate fixed hourly rates that include wages, overhead, general and administrative expenses, and profit for each category of labor.

(2) For acquisitions of other than commercial products or commercial services awarded without adequate price competition (see part 15), the contract must specify separate fixed hourly rates that include wages, overhead, general and administrative expenses, and profit for each category of labor to be performed by-

(i) The contractor;

(ii) Each subcontractor; and

(iii) Each division, subsidiary, or affiliate of the contractor under a common control.

(3) For contract actions that are not awarded using competitive procedures, unless exempt under paragraph (c)(2)(iv), the fixed hourly rates for services transferred between divisions, subsidiaries, or affiliates of the contractor under a common control-

(i) Must not include profit for the transferring organization; but

(ii) May include profit for the prime contractor.

(4) For contract actions that are not awarded using competitive procedures, the fixed hourly rates for services that meet the definition of "commercial service" that are transferred between divisions, subsidiaries, or affiliates of the contractor under a common control may be the established catalog or market rate when-

(i) It is the established practice of the transferring organization to price interorganizational transfers at other than cost for commercial work of the contractor or any division, subsidiary or affiliate of the contractor under a common control; and

(ii) The contracting officer has not determined the price to be unreasonable.

(c) *Material handling costs*. When included as part of material costs, material handling costs must include only costs clearly excluded from the labor-hour rate. Material handling costs may include all appropriate indirect costs allocated to direct materials in accordance with the contractor's usual accounting procedures consistent with part 31.

16.601-3 Limitations.

A time-and-materials contract or order may be used only if-

(a) *Determination and findings*. The contracting officer prepares a determination and findings that no other contract type is suitable. The determination and findings must be-

(1) Signed by the contracting officer prior to the execution of the base period or any option periods of the contracts; and

(2) Approved by the head of the contracting activity prior to the execution of the base period when the base period plus any option periods exceeds three years;

(b) The agency head approves a justification if required by 16.104; and

(c) The contract or order must include a ceiling price that the contractor exceeds at its own risk. See part 12 for further limitations on use of time-and-materials or labor-hour contracts for acquisition of commercial products and commercial services.

16.601-4 Solicitation provisions.

(a) The contracting officer must insert the provision at 52.216-29, Time-and-Materials/Labor-Hour Proposal Requirements—Other Than Commercial Acquisition With Adequate Price Competition, in solicitations contemplating use of a time-and-materials or labor-hour type of contract for the acquisition of other than commercial products or commercial services, if the price is expected to be based on adequate price competition. If authorized by agency procedures, the contracting officer may amend the provision to make mandatory one of the three approaches in paragraph (c) of the provision, and/or to require the identification of all subcontractors, divisions, subsidiaries, or affiliates included in a blended labor rate.

(b) The contracting officer must insert the provision at 52.216-30, Time-and-Materials/Labor-Hour Proposal Requirements—Other Than Commercial Acquisition Without Adequate Price Competition, in solicitations for the acquisition of other than commercial products or commercial services contemplating use of a time-and-materials or labor-hour type of contract if the price is not expected to be based on adequate price competition.

(c) The contracting officer must insert the provision at 52.216-31, Time-and-Materials/Labor-Hour Proposal Requirements—Commercial Acquisition, in solicitations contemplating use of a commercial time-and-materials or labor-hour contract.

16.601-5 Postaward requirements.

Prior to an increase in the ceiling price of a time-and-materials or labor-hour contract or order, the contracting officer must-

(a) Conduct an analysis of pricing and other relevant factors to determine if the action is in the best interest of the Government;

(b) Document the decision in the contract or order file; and

(c) When making a change that modifies the general scope of-

(1) A contract, follow the procedures at part 6;

(2) An order issued under the Federal Supply Schedules, follow the procedures at part 8; or

(3) An order issued under multiple award task and delivery order contracts, follow the procedures at 16.507-6.

16.602 Labor-hour contracts.

Description. A labor-hour contract is a variation of the time-and-materials contract, differing only in that materials are not supplied by the contractor. See part 12, 16.601-2, and 16.601-3 for application and limitations for time-and-materials contracts that also apply to labor-hour contracts.

16.603 Letter contracts.

16.603-1 Description.

A letter contract is a written preliminary contractual instrument that authorizes the contractor to begin immediately manufacturing supplies or performing services.

16.603-2 Application.

(a) A letter contract may be used when (1) the Government's interests demand that the contractor be given a binding commitment so that work can start immediately and (2) negotiating a definitive contract is not possible in sufficient time to meet the requirement. However, a letter contract should be as complete and definite as feasible under the circumstances.

(b) When a letter contract award is based on price competition, the contracting officer must include an overall price ceiling in the letter contract.

(c) Each letter contract must, as required by the clause at 52.216-25, Contract Definitization, contain a negotiated definitization schedule including (1) dates for submission of the contractor's price proposal, required certified cost or pricing data and data other than certified cost or pricing data; and, if required, make-or-buy and subcontracting plans, (2) a date for the start of negotiations, and (3) a target date for definitization, which must be the earliest practicable date for definitization. The schedule will provide for definitization of the contract within 180 days after the date of the letter contract or before completion of 40 percent of the work to be performed, whichever occurs first. However, the contracting officer may, in extreme cases and according to agency procedures, authorize an additional period. If, after exhausting all reasonable efforts, the contracting officer and the contractor cannot negotiate a definitive contract because of failure to reach agreement as to price or fee, the clause at 52.216-25 requires the contractor to proceed with the work and provides that the contracting officer may, with the approval of the head of the contracting activity, determine a reasonable price or fee in accordance with subpart 15.4 and part 31, subject to appeal as provided in the Disputes clause.

(d) The maximum liability of the Government inserted in the clause at 52.216-24, Limitation of Government Liability, must be the estimated amount necessary to cover the contractor's requirements for funds before definitization. However, it must not exceed 50 percent of the estimated cost of the definitive contract unless approved in advance by the official that authorized the letter contract.

(e) The contracting officer must assign a priority rating to the letter contract if it is appropriate under part 11.

16.603-3 Limitations.

A letter contract may be used only after the head of the contracting activity determines in writing that no other contract is suitable. The agency head must approve a justification if required by 16.104. Letter contracts must not-

(a) Commit the Government to a definitive contract in excess of the funds available at the time the letter contract is executed;

(b) Be entered into without competition when competition is required by part 6; or

(c) Be amended to satisfy a new requirement unless that requirement is inseparable from the existing letter contract. Any such amendment is subject to the same requirements and limitations as a new letter contract.

16.603-4 Contract clauses.

(a) The contracting officer must include in each letter contract the clauses required by this regulation for the type of definitive contract contemplated and any additional clauses known to be appropriate for it.

(b) In addition, the contracting officer must insert the following clauses in solicitations and contracts when a letter contract is contemplated:

(1) The clause at 52.216-23, Execution and Commencement of Work, except that this clause may be omitted from letter contracts awarded on SF 26;

(2) The clause at 52.216-24, Limitation of Government Liability, with dollar amounts completed in a manner consistent with 16.603-2(d); and

(3) The clause at 52.216-25, Contract Definitization, with its paragraph (b) completed in a manner consistent with 16.603-2(c). If at the time of entering into the letter contract, the contracting officer knows that the definitive contract will be based on adequate price competition or will otherwise meet the criteria of part 15 for not requiring submission of certified cost or pricing data, the words "and certified cost or pricing data in accordance with FAR 15.408, Table 15-1 supporting its proposal" may be deleted from paragraph (a) of the clause. If the letter contract is being awarded on the basis of price competition, the contracting officer must use the clause with its *Alternate I*.

(c) The contracting officer must also insert the clause at 52.216-26, Payments of Allowable Costs Before Definitization, in solicitations and contracts if a cost-reimbursement definitive contract is contemplated, unless the acquisition involves conversion, alteration, or repair of ships.

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Subpart 16.7 - Agreements

16.701 Scope.

This subpart prescribes policies and procedures for establishing and using basic agreements and basic ordering agreements. (See part 12 for additional coverage of BPAs and see part 35 for additional coverage of basic agreements with educational institutions and nonprofit organizations.)

16.702 Basic agreements.

16.702-1 Description.

(a) A basic agreement is a written instrument of understanding, negotiated between an agency or contracting activity and a contractor, that-

(1) Contains contract clauses applying to future contracts between the parties during its term; and

(2) Contemplates separate future contracts that will incorporate by reference or attachment the required and applicable clauses agreed upon in the basic agreement.

(b) A basic agreement is not a contract.

16.702-2 Application.

A basic agreement should be used when a substantial number of separate contracts may be awarded to a contractor during a particular period and significant recurring negotiating problems have been experienced with the contractor. Basic agreements may be used with negotiated fixed-price or cost-reimbursement contracts.

(a) Basic agreements must contain-

(1) Clauses required for negotiated contracts by statute, executive order, and this regulation; and

(2) Other clauses prescribed in this regulation or agency acquisition regulations that the parties agree to include in each contract as applicable.

(b) Each basic agreement must provide for discontinuing its future applicability upon 30 days' written notice by either party.

(c) Each basic agreement must be reviewed annually before the anniversary of its effective date and revised as necessary to conform to the requirements of this regulation. Basic agreements may need to be revised due to mandatory statutory requirements. A basic agreement may be changed only by modifying the agreement itself and not by a contract incorporating the agreement.

(d) Discontinuing or modifying a basic agreement must not affect any prior contract incorporating the basic agreement.

(e) Contracting officers of one agency should obtain and use existing basic agreements of another agency to the maximum practical extent.

16.702-3 Limitations.

(a) A basic agreement must not-

(1) Cite appropriations or obligate funds;

(2) State or imply any agreement by the Government to place future contracts or orders with the contractor; or

(3) Be used in any manner to restrict competition.

(b) *Contracts incorporating basic agreements*. (1) Each contract incorporating a basic agreement must include a scope of work and price, delivery, and other appropriate terms that apply to the particular contract. The basic agreement must be incorporated into the contract by specific reference (including reference to each amendment) or by attachment.

(2) The contracting officer must include clauses pertaining to subjects not covered by the basic agreement, but applicable to the contract being negotiated, in the same manner as if there were no basic agreement.

(3) When new work is added to an existing contract, the modification must incorporate the most recent basic agreement. These terms will apply only to work added by the modification. This is not required if the contract or modification already includes all clauses required by statute, executive order, and this regulation as of the date of the modification. If it is in the Government's interest and the contractor agrees, the modification may incorporate the most recent basic agreement for application to the entire contract as of the date of the modification.

16.703 Basic ordering agreements.

16.703-1 Description.

(a) A basic ordering agreement is a written instrument of understanding, negotiated between an agency, contracting activity, or contracting office and a contractor, that contains-

(1) Terms and clauses applying to future contracts (orders) between the parties during its term;

(2) A description, as specific as practicable, of supplies or services to be provided, and

(3) Methods for pricing, issuing, and delivering future orders under the basic ordering agreement.

(b) A basic ordering agreement is not a contract.

16.703-2 Application.

A basic ordering agreement is used to expedite contracting for supplies or services when specific items, quantities, and prices are uncertain at the time the agreement is executed, but a substantial number of requirements for the type of supplies or services covered by the agreement are anticipated to be purchased from the contractor. These procedures, when applied appropriately, can result in benefits and cost savings by reducing administrative lead-time, inventory investment, and inventory obsolescence due to design changes.

16.703-3 Limitations.

(a) A basic ordering agreement must not state or imply any agreement by the Government to place future contracts or orders with the contractor or be used in any manner to restrict competition.

(b) Each basic ordering agreement must-

(1) Describe the method for determining prices to be paid to the contractor for the supplies or services;

(2) Include delivery terms and conditions or specify how they will be determined;

(3) List one or more Government activities authorized to issue orders under the agreement;

(4) Specify the point at which each order becomes a binding contract (e.g., issuance of the order, acceptance of the order in a specified manner, or failure to reject the order within a specified number of days);

(5) Provide that failure to reach agreement on price for any order issued before its price is established (see paragraph (d)(3) of this subsection) is a dispute under the Disputes clause included in the basic ordering agreement; and

(6) If fast payment procedures will apply to orders, include the special data required at part 32.

(c) Basic ordering agreements may need to be revised due to mandatory statutory requirements. A basic ordering agreement must be changed only by modifying the agreement itself and not by individual orders issued under it. Modifying a basic ordering agreement must not retroactively affect orders previously issued under it.

(d) A contracting officer representing any Government activity listed in a basic ordering agreement may issue orders for required supplies or services covered by that agreement.

(1) Before issuing an order under a basic ordering agreement, the contracting officer must-

(i) Obtain competition in accordance with part 6;

(ii) If the order is being placed after competition, ensure that use of the basic ordering agreement is not prejudicial to other offerors; and

(iii) Sign or obtain any applicable justifications and approvals, and any determination and findings, and comply with other requirements in accordance with part 1, as if the order were a contract awarded independently of a basic ordering agreement.

(2) Contracting officers must-

(i) Issue orders under basic ordering agreements on Optional Form (OF) 347, Order for Supplies or Services, or on any other appropriate contractual instrument;

(ii) Incorporate by reference the provisions of the basic ordering agreement;

(iii) If applicable, cite the authority under part 6 in each order; and

(iv) Comply with part 5's publicizing and response time requirements when part 5 also requires a synopsis.

(3) The contracting officer must neither make any final commitment nor authorize the contractor to begin work on an order under a basic ordering agreement until prices have been established, unless the order establishes a ceiling price limiting the Government's obligation and either-

(i) The basic ordering agreement provides adequate procedures for timely pricing of the order early in its performance period; or

(ii) The need for the supplies or services is compelling and unusually urgent (i.e., when the Government would be seriously injured, financially or otherwise, if the requirement is not met sooner than would be possible if prices were

established before the work began). The contracting officer must proceed with pricing as soon as practical. An entire order must never be priced retroactively.

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PART 17 - SPECIAL CONTRACTING METHODS

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17.000 Scope of part.

This part prescribes policies and procedures for the acquisition of supplies and services through special contracting methods, including—

(a) Multiyear contracting;
(b) Options;
(c) Leader company contracting;
(d) Interagency acquisitions;
(e) Management and operating contracts; and
(f) Reverse auctions

Subpart 17.1 - Multiyear Contracting

17.101 Authority.

This subpart prescribes policies and procedures for acquiring supplies or services through multiyear contracting, as authorized by 10 U.S.C. 3501 and 41 U.S.C. 3903. It addresses requirements for presolicitation planning, solicitation content, evaluation and award, funding, and cancellation provisions unique to multiyear contracts.

17.102 Definitions.

As used in this subpart—

Cancellation means the cancellation (within a contractually specified time) of the total requirements of all remaining program years. Cancellation results when the contracting officer-

(1) Notifies the contractor of nonavailability of funds for contract performance for any subsequent program year; or

(2) Fails to notify the contractor that funds are available for performance of the succeeding program year requirement.

Cancellation ceiling means the maximum cancellation charge that the contractor can receive if the contract is cancelled.

Cancellation charge means the amount of unrecovered costs which would have been recouped through amortization over the full term of the contract, including the canceled term.

Multiyear contract means a contract for the purchase of supplies or services for more than 1, but not more than 5 program years. A multiyear contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds, and (if it does so provide) may provide for a cancellation payment to be made to the contractor if appropriations are not made. The key distinguishing difference between multiyear contracts and multiple year contracts is that multiyear contracts buy more than 1 year's requirement (of a product or service) without establishing and having to exercise an option for each program year after the first.

Nonrecurring costs means costs that are generally incurred on a one-time basis and include such costs as plant or equipment relocation, plant rearrangement, special tooling and special test equipment, preproduction engineering, preliminary design effort, initial spoilage and rework, and specialized work force training.

Recurring costs means costs that vary with the quantity being produced, such as labor and materials, and are the ongoing expenses associated with its production and maintenance.

17.103 Presolicitation.

17.103-1 Policy.

(a) Except for DoD, NASA, and the Coast Guard, the contracting officer may enter into a multiyear contract if the head of the contracting activity determines that—

(1) The need for the supplies or services is reasonably firm and continuing throughout the contract period; and

(2) A multiyear contract will serve the best interest of the Government by either encouraging competition or promoting economy in program administration, performance, and operation.

(b) For DoD, NASA, and the Coast Guard, the head of the agency may enter into a multiyear contract for supplies if—

(1) The contract will save significant costs compared to using annual contracts, or will provide necessary stability to the defense industrial base not otherwise achievable through annual contracts;

(2) The required purchase amounts are expected to remain substantially unchanged throughout the contract period, in terms of production and procurement rates and total quantities;

(3) The agency head is reasonably expected to request sufficient funding throughout the contract period at a level required to avoid contract cancellation;

(4) The design of the supplies is stable, and technical risks are not excessive;

(5) Both the contract cost estimates and projected cost avoidance through the use of a multiyear contract are realistic;

(6) For Department of Defense purchases, the contract will promote national security of the United States; and

(7) For Department of Defense contracts valued at $500,000,000 or more, the Secretary certifies that the conditions in 10 U.S.C. 3501 (i)(3) subparagraphs (C) through (F) will be met.

17.103-2 Procedures.

(a) *Method of contracting*. The specific requirement should guide the selection of the contracting method.

(b) *Funding*.

(1) Agency funding of multiyear contracts must follow the policies in OMB Circular A-11 (Preparation, Submission, and Execution of the Budget) and other applicable guidance on funding multiyear contracts.

(2) Multiyear contracts for fixed assets should be either-

(i) Fully funded; or

(ii) Funded in economically or programmatically viable stages.

17.103-3 Solicitations.

(a) In solicitations for multiyear contracts, the contracting officer must include-

(1) The supply or service requirements for the first program year, and the entire multiyear contract period, broken down by program year;

(2) A statement that if the Government only needs the first-year requirements, evaluation will be based on first year pricing;

(3) A provision requiring a cancellation ceiling (as a percentage or dollar amount) and applicable dates for each program year that could be cancelled; and

(4) A statement that the Government will not award less than the first program year requirements.

(b) The solicitation must explain how the Government will compare offers for the first year against offers for the entire multiyear period. This applies to both sealed bidding and negotiated acquisitions.

17.104 Evaluation and Award.

17.104-1 General.

Contracting officers must follow the appropriate acquisition policies and procedures (such as those in parts 14 and 15). In addition, contracting officers must comply with the requirements unique to multiyear contracting in this section, including cancellation procedures, congressional notification, and funding obligations at award.

17.104-2 Cancellation provisions.

(a) *Cancellation procedures*.

(1) All program years except the first are subject to cancellation.

(2) For each program year subject to cancellation, the contracting officer must—

(i) Set a cancellation ceiling;

(ii) Not include amounts for requirements from prior program years; and

(iii) Lower the cancellation ceiling proportionally as requirements are completed.

(3) When calculating cancellation ceilings, the contracting officer must—

(i) Estimate reasonable startup costs, learning curve costs, and other nonrecurring costs; and

(ii) Not include labor, materials, or other costs related to future program years.

(4) Set specific cancellation dates for each program year based on production needs and funding availability. These dates must be in the contract schedule.

(b) *Revising ceilings or dates*. The contracting officer may revise cancellation ceilings or dates after solicitation release when necessary. For sealed bidding, changes must be made by amendment before bid opening. In negotiated acquisitions, discussions may reveal a need for changes before final award.

17.104-3 Congressional notification.

(a) Except for DoD, NASA, and the Coast Guard, a multiyear contract with a cancellation ceiling over $20 million may not be awarded until the agency head notifies Congress in writing.

(b) For DoD, NASA, and the Coast Guard, when the ceiling is over $200 million, the agency head must notify the House and Senate armed services and appropriations committees in writing.

(c) The contract may not be awarded until 31 days after notification.

17.104-4 Funding at award.

(a) At award, obligated funds must cover either—

(1) The full contract period; or

(2) The first fiscal year plus any potential cancellation and termination costs.

(b) The contract must state the funded amount for the first program year and any amounts for cancellation or termination.

17.104-5 Special procedures for DoD, NASA, and the Coast Guard.

(a) *Participation by subcontractors and suppliers*. To the extent practicable, structure multiyear contracts to attract and retain a diverse defense industrial base.

(b) *Protection of existing authority*. To the extent practicable, multiyear contracting must not limit an agency's ability to maintain competition or terminate contracts based on performance deficiencies related to cost, quality, or schedule.

(c) *Property*. Multiyear contracts must be—

(1) Firm-fixed-price;

(2) Fixed-price with economic price adjustment; or

(3) Fixed-price incentive.

(d) *Level unit prices*. Where appropriate, the contracting officer should negotiate level unit prices for the items to be delivered in each program year.

17.105 Postaward.

(a) Termination vs. cancellation. The termination for convenience procedure applies to any Government contract, including multiyear contracts. Termination differs from cancellation in these ways:

(1) Timing. Termination can occur anytime during the contract life, while cancellation happens between fiscal years.

(2) Quantity. Termination can apply to total or partial quantities, while cancellation must apply to all quantities for future fiscal years.

(b) Funding limitations upon termination. If funds are not available to continue a multiyear contract into the next fiscal year, the contract must be canceled or terminated. If the Government terminates the entire contract for convenience, including all cancellable requirements, the Government obligation is no more than:

(1) The amount specified as available for contract performance; plus

(2) The applicable cancellation ceiling.

17.106 Contract clauses.

(a) The contracting officer must insert the clause at 52.217-2, Cancellation Under Multiyear Contracts, in solicitations and contracts when a multiyear contract is contemplated.

(b) When the production period may cause an offeror to include a labor or material cost contingency in the contract price, consider using an economic price adjustment clause (see part 16).

(c) For service contracts, the contracting officer-

(1) Must include the clause at 52.222-43, Fair Labor Standards Act and Service Contract Labor Standards—Price Adjustment (Multiple Year and Option Contracts), when the contract includes the clause at 52.222-41, Service Contract Labor Standards;

(2) May modify the clause at 52.222-43 in overseas contracts when laws, regulations, or international agreements require contractors to pay higher wage rates; or

(3) May use an economic price adjustment clause authorized by part 16, when price changes require coverage and are not included in not already addressed by the clause at 52.222-43.

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Subpart 17.2 - Options

17.200 Scope of subpart.

This subpart prescribes policies and procedures for the use of options in contracts.

(a) Except as provided in agency regulations, this subpart does not apply to contracts for-

(1) Construction, alteration, or repair (including dredging, excavating, and painting) of buildings, bridges, roads, or other real property;

(2) Architect-engineer services; or

(3) Research and development services.

(b) Agencies may still use options in these contracts according to their own regulations.

17.201 Presolicitation.

17.201-1 Use of options.

(a) In contracting by sealed bidding or negotiation, the contracting officer may add options to contracts when beneficial to the Government, within the limitations in paragraphs (b) and (c). For sealed bidding, before including the provision at 52.217-5, Evaluation of Options, the contracting officer must document in writing that there is a probability that the Government will exercise the options.

(b) Inclusion of an option is normally not beneficial to the Government when the contracting officer determines that:

(1) The Government's needs involve-

(i) Minimum economic quantities (enough volume to permit the recovery of startup costs and the production of supplies at reasonable prices); and

(ii) Delivery needs far enough in the future to allow for a new competitive contract.

(2) An indefinite quantity or requirements contract better meets the government’s needs. However, these contract types may still include options if appropriate.

(c) The contracting officer must not use options when-

(1) Price or availability of necessary material or labor is not reasonably foreseeable, introducing significant risk into option pricing; or

(2) Market prices for the supplies or services are likely to change significantly.

17.201-2 Contracts.

(a) The contract must clearly state limits on-

(1) The additional supplies or services the Government may purchase including the number, type, frequency or duration; or

(2) The contract duration, including any extensions.

(b) The contracting officer must—

(1) Specify in the contract the period within which the option may be exercised, allowing adequate lead time for the contractor to ensure continuous production; and

(2) Follow any statutory limits on contract duration (for example, under the Service Contract Labor Standards statute—see part 22).

17.202 Evaluation and award.

(a) Prior to awarding the basic contract, the contracting officer must evaluate offers for option quantities or periods included in the solicitation.

(b) (1) The contracting officer may skip the evaluation of option quantities when such evaluation would not benefit the Government. This exception should be reserved for rare instances.

(2) This decision must be—

(i) In writing;

(ii) Approved at least one level above the contracting officer; and

(iii) Included in the contract file.

17.203 Solicitation provisions and contract clauses.

(a) Insert a provision substantially the same as the provision at 52.217-3, Evaluation Exclusive of Options, in solicitations when the solicitation includes an option clause but does not include the provision described in either paragraph (b) or (c) of this section.

(b) Insert a provision substantially the same as the provision at 52.217-4, Evaluation of Options Exercised at Time of Contract Award, in solicitations when-

(1) The solicitation includes an option clause; and

(2) The contracting officer determines there is a reasonable likelihood of option exercised when the contract is awarded.

(c) Insert a provision substantially the same as the provision at 52.217-5, Evaluation of Options, in solicitations when-

(1) The solicitation includes an option clause; and

(2) The contracting officer determines there is a reasonable likelihood of exercise, and the option will not be exercised at the time of contract award.

(d) Insert a provision substantially the same as the clause at 52.217-6, Option for Increased Quantity, in solicitations and contracts, except those for services, when adding an option is appropriate (see 17.201), and the option quantity appears as a percentage of the basic contract quantity or as additional quantities of a specific line item.

(e) Insert a provision substantially the same as the clause at 52.217-7, Option for Increased Quantity—Separately Priced Line Item, in solicitations and contracts, except those for services , when adding an option is appropriate (see 17.201), and the option quantity appears as a separate line item with the same name as a corresponding basic line item.

(f) Insert a provision substantially the same as the clause at 52.217-8, Options to Extend Services, in solicitations and contracts for services when adding an option is appropriate. (See 17.201 and part 37).

(g) Insert a provision substantially the same as the clause at 52.217-9, Option to Extend the Term of the Contract, in solicitations and contracts when adding an option is appropriate (see 17.201) and the contract needs to include any of these elements:

(1) A requirement for the Government to give the contractor advance written notice of intent to extend;

(2) A statement that an extension of the contract also extends the option; or

(3) A specific limit on the total contract duration.

17.204 Postaward.

17.204-1 Exercise of options.

(a) If the contract includes an economic price adjustment clause and the contractor requests a price revision, the contracting officer must determine how the adjustment affects option prices before exercising the option.

(b) The contracting officer may exercise options only after—

(1) Providing written notice to the contractor of the Government’s intention to exercise the option, within the time specified in the contract;

(2) Confirming that funds are available; and

(3) Determining that–

(i) The option fulfills an existing Government requirement;

(ii) The option was synopsized as required, unless exempt (see part 5);

(iii) The Contractor does not have an active exclusion record in the System for Award Management (see part 9);

(iv) The contractor’s performance on the current contract has been acceptable (for example, satisfactory or better performance ratings);

(v) After reviewing price and other factors, the option price is fair and reasonable based on current market conditions and exercise of the option is in the Government's best interest; and

(vi) The option exercise complies with the requirements of part 6 for full and open competition, i.e., the option was evaluated as part of the initial competition and is exercisable at an amount specified in or reasonably determinable from the terms of the contract.

Subpart 17.3 - [Reserved]

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Subpart 17.4 - Leader Company Contracting

17.401 Policy.

Leader company contracting is an extraordinary acquisition technique, limited to special circumstances, and may only be used in accordance with agency procedures. Under this technique, a developer or sole producer of a product or system is designated as the leader company. The leader company is responsible for furnishing assistance and proprietary know-how under an approved contract to one or more designated follower companies. The purpose is to enable those follower companies to qualify as sources of supply for the product or system, thereby expanding the industrial base and promoting competition.

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Subpart 17.5 - Interagency Acquisitions

17.500 Scope of subpart.

(a) This subpart prescribes policies and procedures for all interagency acquisitions under any authority, except as provided in paragraph (c) of this section. When nondefense agencies acquire supplies or services on behalf of the Department of Defense, the requirements in subpart 17.7 also apply.

(b) This subpart applies to interagency acquisitions as defined in 2.101, when an agency:

(1) Requires supplies or services and uses another agency's contract; or

(2) Requests another agency to provide acquisition assistance, including but not limited to awarding or administering a contract, task order, or delivery order.

(c) This subpart does not apply to-

(1) Reimbursable work performed by one agency's employees for another agency (except acquisition assistance), or interagency activities where contracting is not the primary purpose; or

(2) Orders at or below $750,000 issued against Federal Supply Schedules.

17.501 General.

(a) Interagency acquisitions are usually conducted through indefinite-delivery contracts.

(b) An interagency acquisition must not be used to circumvent statutory or regulatory restrictions on the obligation or use of funds.

(c) An interagency acquisition must not conflict with another agency's statutory authority or responsibility. For example, the Administrator of General Services has authority under 40 U.S.C. "Public Buildings, Property, and Works" and 41 U.S.C. division C of subtitle I ("Procurement").

17.502 Procedures.

17.502-1 General.

(a) *Written agreement on responsibility for management and administration.*

(1) *Assisted acquisitions*.

(i) Before issuing a solicitation, both the servicing agency and requesting agency must sign a written interagency agreement that establishes the basic terms and conditions governing the relationship, which must include—

(A) The roles and responsibilities for acquisition planning;

(B) Contract execution; and

(C) Administration and management of the contract(s) or order(s).

(ii) The requesting agency must—

(A) Provide the servicing agency for incorporation into the order or contract, any unique requesting agency terms, conditions and applicable agency-specific statutes, regulations, directives, and other applicable requirements, or

(B) Inform the servicing agency contracting officer in writing that there are no special requirements beyond the FAR.

(iii) For assisted acquisitions for the Department of Defense, also see subpart 17.6.

(iv) Agencies should follow applicable Office of Federal Procurement Policy guidance on Interagency Acquisitions when creating these agreements.

(v) Both agencies must keep the signed agreement in their files along with sufficient documentation to permit a proper audit.

(2) *Direct acquisitions*. When the requesting agency administers the order itself, no written agreement with the servicing agency is required.

(b) *Business-case analysis requirements for establishing a multi-agency contract or governmentwide acquisition contract.* In accordance with section 865 of Public Law 110-417, the agency business case must address how the contract will be administered, analyze all direct and indirect costs of awarding and administering the contract, and describe the impact the contract will have on the Government's ability to leverage its purchasing power. For example, the analysis should address whether the new contract could dilute the effectiveness of existing contracts. For additional requirements see OMB Memorandum M-19-13.

17.502-2 The Economy Act.

(a) The Economy Act (31 U.S.C. 1535)—

(1) Authorizes agencies to enter into agreements to obtain supplies or services from other agencies. The FAR applies when one agency uses another agency's contract. If the transaction between agencies does not result in a contract or order, the FAR does not apply;

(2) Allows orders between major organizational units within the same agency. Agencies should address the procedures for these intra-agency transactions in agency regulations; and

(3) Applies when more specific statutory authority does not exist, such as 40 U.S.C. 501 for Federal Supply Schedules (see part 8) or 40 U.S.C. 11302(e) for Governmentwide acquisition contracts (GWACs).

(b) Each Economy Act order must be supported by a determination and findings (D&F) that must:

(1) State that the inter-agency acquisition is in the best interest of the Government;

(2) State that the supplies or services cannot be obtained as conveniently or cheaply by contracting directly with a private source; and

(3) State which one (or more) of these conditions is true:

(i) The servicing agency has an existing contract that was created before this order and meets the same needs.

(ii) The servicing agency has expertise or abilities to enter a contract that is not available within the requesting agency.

(4) The D&F must be approved by a contracting officer from the requesting agency with authority to contract for these supplies or services. Alternatively, an official designated by the agency head may approve it. If the servicing agency is not subject to the FAR, approval may not be delegated below the senior procurement executive of the requesting agency.

(5) The requesting agency must send a copy of the D&F to the servicing agency with their order request.

(c) *Payment*. (1) The servicing agency may request advance payment for estimated costs in writing. Adjustments based on actual costs must be made as agreed to by the agencies.

(2) If the servicing agency approves, the requesting agency may pay actual costs after receiving the supplies or services.

(3) Bills rendered or advance payment requests must not be subject to audit or certification in advance of payment.

(4) The servicing agency must not charge, and the requesting agency must not pay, any fee exceeding the actual cost (or estimated cost if actual cost is unknown) of entering into and administering the contract or agreement under which the order is filled.

17.503 Ordering procedures.

(a) Before placing an order for supplies or services with another Government agency, the requesting agency must follow the procedures in 17.502-1 and, if under the Economy Act, 17.502-2.

(b) The order may be placed on any form or document that both agencies accept. The order should include—

(1) A description of the supplies or services required;

(2) Delivery requirements;

(3) A funds citation;

(4) A payment provision (see 17.502-2(c) for Economy Act orders); and

(5) Acquisition authority as appropriate (see 17.503(d)).

(c) The requesting and servicing agencies should agree to procedures for resolving disagreements that may arise under interagency acquisitions. When appropriate, this may include using a third-party forum. If a third party is proposed, that party should provide their written consent.

(d) When an interagency acquisition requires the servicing agency to award a contract, these additional procedures apply:

(1) If law or regulation requires a justification and approval or a D&F (other than the requesting agency's D&F required in 17.502-2(c)), the servicing agency must prepare and issue it. The requesting agency must provide any information needed for the justification and approval or D&F.

(2) The requesting agency must provide other necessary assistance, such as information or special contract terms needed to comply with any conditions or limitations on the requesting agency's funds.

(3) The servicing agency is responsible for compliance with all other legal or regulatory requirements for the contract, including—

(i) Having proper legal authority for the contract action; and

(ii) Following all competition requirements in part 6. If the servicing agency is not subject to the FAR, the requesting agency must verify that contracts used to meet its requirements contain provisions protecting the Government from

inappropriate charges (for example, provisions required by part 31). The requesting agency must also verify that adequate contract administration will be provided.

(e) Nonsponsoring Federal agencies may use a Federally Funded Research and Development Center (FFRDC) only if the terms of the FFRDC's sponsoring agreement allow work from agencies other than the sponsor. Work given to the FFRDC requires the sponsor's acceptance and must fall within the FFRDC's purpose, mission, general scope of effort, or special expertise. (See part 35 and part 6 for procedures when using other than full and open competition.) The nonsponsoring agency must provide documentation to the sponsoring agency showing that the requested work would not place the FFRDC in direct competition with domestic private industry.

17.504 Reporting requirements.

(a) The senior procurement executive for each executive agency must submit an annual report on interagency acquisitions to the Director of OMB, as directed by OMB.

(b) The contracting officer for the servicing agency must ensure all service contractor reporting requirements are met in accordance with part 4.

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Subpart 17.6 - Interagency Acquisitions: Acquisitions by Nondefense Agencies on Behalf of the Department of Defense

17.600 Scope of subpart.

(a) Compliance with this subpart is required in addition to the policies and procedures for interagency acquisitions in subpart 17.5. This subpart establishes policies and procedures specifically for acquisitions of supplies and services by nondefense agencies on behalf of the Department of Defense (DoD).

(b) This subpart implements Public Law 110-181, section 801, as amended (10 U.S.C. 3201 note prec.).

17.601 Definitions.

As used in this subpart—

Department of Defense (DoD) acquisition official means—

(1) A DoD contracting officer; or

(2) Any other DoD official authorized to approve a direct acquisition or an assisted acquisition on behalf of DoD.

Nondefense agency means any department or agency of the Federal Government other than the Department of Defense.

Nondefense agency that is an element of the intelligence community means the agencies identified in 50 U.S.C. 3003(4).

17.602 Applicability.

(a) This subpart applies to all acquisitions made by nondefense agencies on behalf of DoD.

(b) This subpart does not apply to contracts entered into by a nondefense agency that is an element of the intelligence community for a joint program that meets the needs of both DoD and the nondefense agency.

17.603 Policy.

(a) A DoD acquisition official may request a nondefense agency to conduct an acquisition on behalf of DoD above the simplified acquisition threshold only if the head of the nondefense agency has certified that the agency will comply with applicable procurement requirements for that fiscal year, except when waived as provided by paragraph (e) of this section.

(b) A nondefense agency is compliant with applicable procurement requirements if its procurement policies, procedures, and internal controls for acquisitions on behalf of DoD, and their administration, adequately ensure the nondefense agency complies with—

(1) The Federal Acquisition Regulation and other laws and regulations that apply to procurements of supplies and services by Federal agencies; and

(2) Laws and regulations that apply to procurements of supplies and services made by DoD through other Federal agencies, including DoD financial management regulations, the Defense Federal Acquisition Regulation Supplement (DFARS), DoD class deviations, and the DFARS Procedures, Guidance, and Information (PGI). (The DFARS, DoD class deviations, and PGI are available at: http://www.acq.osd.mil/dpap/dars).

(c) Within 30 days of the beginning of each fiscal year, submit nondefense agency certifications of compliance to the Principal Director, Defense Pricing and Contracting at: Department of Defense, Office of the Under Secretary of Defense (Acquisition and Sustainment), Defense Pricing and Contracting, Contract Policy, Room 3B938, 3060 Defense Pentagon, Washington DC 20301-3060.

(d) (1) The DoD acquisition official must provide the servicing nondefense agency contracting officer with any DoD-unique terms, conditions, other related statutes, regulations, directives, or other applicable requirements for incorporation into the order or contract.

(2) If there are no DoD-unique requirements beyond the FAR, the DoD acquisition official must inform the servicing nondefense agency contracting officer in writing.

(3) Nondefense agency contracting officers are responsible for ensuring support provided in response to DoD's request complies with paragraph (b) of this section.

(e) Waiver. The limitation in paragraph (a) of this section does not apply to acquisitions of supplies and services on behalf of DoD by a nondefense agency during any fiscal year for which the Under Secretary of Defense for Acquisition and Sustainment has determined in writing that it is necessary in DoD's interest to acquire supplies and services through the nondefense agency during that fiscal year. The written determination must identify the acquisition categories to which the waiver applies.

(f) Nondefense agency certifications, waivers, and additional information are available at https://www.acq.osd.mil/asda/dpc/cp/policy/interagency-acquisition.html

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Subpart 17.7 - Management and Operating Contracts

17.700 Scope of subpart.

This subpart establishes policies and procedures for management and operating contracts for the Department of Energy and any other agencies with the necessary statutory authority.

17.701 Definition.

Management and operating contract means an agreement where the Government contracts for the operation, maintenance, or support, on its behalf, of a Government-owned or -controlled research, development, special production, or testing facility that primarily serves one or more major programs of the Federal agency.

17.702 Presolicitation.

17.702-1 Policy.

The head of an agency, without power of delegation, and with statutory authority, may authorize contracting officers, in writing, to enter into or renew management and operating contracts. This authorization must comply with the agency's statutory authority or 41 U.S.C. chapter 33, and the agency's regulations for such contracts. Every authorized contract must state this authorization on its face.

17.702-2 Limitations.

(a) Management and operating contracts must not be authorized for—

(1) Functions involving direction, supervision, or control of Government personnel, except supervision related to training;

(2) Functions involving the exercise of police or regulatory powers in the Government's name, other than guard or plant protection services;

(3) Functions determining basic Government policies;

(4) Day-to-day staff or management functions of the agency or any of its elements; or

(5) Functions that can be better accomplished by the use or rental of Government property under subpart 45.3, Authorizing the Use and Rental of Government Property.

(b) Since an authorization under 17.702-1 is considered sufficient proof of compliance with paragraph (a) above, nothing in paragraph (a) affects the validity or legality of such an authorization.

(c) For use of project labor agreements, see part 22.

17.703 Award, renewal, and extension.

(a) Effective performance under management and operating contracts typically requires high expertise levels and continuity in operations and personnel. Due to program requirements and the unusual or unique nature of work performed under these contracts, the Government often has limited ability to create competition or replace a contractor. Therefore, contracting officers must take extraordinary steps before award to ensure that—

(1) The prospective contractor has sufficient technical and managerial capacity,

(2) Organizational conflicts of interest are adequately addressed; and

(3) The contract gives the Government broad and continuing rights to involve itself in technical and managerial decision making about performance, when necessary.

(b) The contracting officer must review each management and operating contract, following agency procedures, at appropriate intervals and at least once every 5 years.

(1) The review should determine if meaningful improvement in performance or cost might reasonably be achieved.

(2) Any extension or renewal of a management and operating contract must be authorized at a level within the agency no lower than the level at which the original contract was authorized under 17.702-1.

(c) Replacing an incumbent contractor is usually based largely on expectations of meaningful improvement in performance or cost. When reviewing contractor performance, contracting officers should consider—

(1) The incumbent contractor's overall performance, specifically including technical, administrative, and cost performance;

(2) The potential impact of changing contractors on program needs, including safety, national defense, and mobilization considerations; and

(3) Whether qualified offerors are likely to compete for the contract.

Subpart 17.8 - Reverse Auctions

17.800 Scope of subpart.

This subpart prescribes policies and procedures for conducting reverse auctions and using reverse auction service providers.

17.801 Definitions.

As used in this subpart—

Government data means any information, document, media, or machine-readable material regardless of physical form or characteristics, that is created or obtained by the Government in the course of official Government business.

Government-related data means any information, document, media, or machine-readable material regardless of physical form or characteristics that is created or obtained by a contractor through the storage, processing, or communication of Government data. This does not include a contractor's business records (*e.g.,* financial records, legal records, etc.) or data such as operating procedures, software coding, or algorithms that are not uniquely applied to the Government data.

Reverse auction service provider means a commercial or Government entity that provides a means for conducting reverse auctions when acquiring supplies or services to be used by the Government.

17.802 Presolicitation.

17.802-1 Policy.

(a) Reverse auctions may be appropriate when market research shows that—

(1) A competitive marketplace exists for the supplies and/or services being acquired;

(2) Multiple offerors can meet the agency's requirement; and

(3) The nature of the supplies and/or services (such as clearly defined specifications or less complex requirements) supports an iterative bidding process.

(b) The reverse auction process is used to obtain pricing for an acquisition. When using reverse auctions, contracting officers must still follow the appropriate acquisition policies and procedures (such as those in parts 8, 13, 15 or 16).

(c) When acquiring reverse auction services from a commercial provider, agencies must—

(1) Use competitive procedures, unless an exception applies;

(2) Detail the provider's fee structure in the resulting contract or agreement; and

(3) Make the contract or agreement details, including the fee structure, available to contracting officers to consider when deciding whether to use that provider, as required by subpart 17.802-3.

(d) When acquiring reverse auction services, the contracting officer must ensure the solicitation and contract include—

(1) Descriptions of Government data and Government-related data.

(2) Data ownership, licensing, delivery, and disposition instructions for relevant types of Government data and Government-related data (such as DD Form 1423, Contract Data Requirements List, work statement task, line item).

(3) Disposition instructions that must allow for data transition in commercially available or open and non-proprietary format and for permanent records according to National Archives and Records Administration guidance.

(e) Contracting officers must only use reverse auction service providers that—

(1) Do not claim or imply they can or will obtain a Government contract for auction participants;

(2) Allow entities to register for free as potential offerors for Government reverse auctions on their platform;

(3) Allow each entity, during registration, to sign a proprietary data protection agreement with the provider that does not affect Government solicitation or contract terms;

(4) Protect from unauthorized use or disclosure and do not release outside the Government—

(i) All contractor bid or proposal information and source selection information related to providing reverse auction services to the Government;

(ii) All information generated to support issuing a task order, delivery order, or order under a blanket purchase agreement; and

(iii) Information an offeror identifies as restricted from duplication, use, or disclosure for any purpose except evaluating the reverse auction participant's price or proposal;

(5) Allow offerors to see the successive lowest price(s) offered in the auction without revealing offerors' identities;

(6) At the close of each auction—

(i) Provide the Government with the apparent successful offer, including information that separately identifies the offeror's price and the price for each provider fee or charge in the total price; and

(ii) Provide the Government with all information and documentation received from offerors responding to the reverse auction;

(7) Do not participate as an offeror in any reverse auction they host for the Government. This prohibition includes participation by any entity with which the provider has a relationship creating an actual or potential conflict of interest; and

(8) Assert no rights or license in the data gathered or generated during a reverse auction.

(f) Only a contracting officer may—

(1) Exclude an offeror from participating in an auction;

(2) Determine the awardee(s) of any reverse auction; or

(3) Determine that the offeror is a responsible prospective contractor (see part 9).

17.802-2 Applicability.

Reverse auction processes must not be used for—

(a) Design-build construction contracts (see part 36);

(b) Procurements for architect-engineer services subject to 40 U.S.C. chapter 11 (see part 36);

(c) Procurements using sealed bidding procedures (see part 14); or

(d) Acquisition of personal protective equipment, in accordance with Sections 813 and 814 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328); Section 882 of the NDAA for FY 2018 (Pub. L. 115-91); and Section 880 of the John S. McCain NDAA for FY 2019 (Pub. L. 115-232, 41 U.S.C. 3701 note).

17.802-3 Reverse auction service provider.

When considering using a reverse auction service provider, the contracting officer must—

(a) Conduct market research of available sources of reverse auction services (such as existing agency contracts or agreements, commercial service providers, or Government service providers);

(b) Evaluate the fee structure for each reverse auction service provider; and

(c) Document in the contract file that using a reverse auction service provider is cost effective.

17.803 Evaluation and award.

(a) When conducting a reverse auction, the contracting officer must—

(1) Not reveal the identity of offeror(s) except for the awardee's identity after making an award from the auction;

(2) Allow offerors to continually revise their prices downward during the reverse auction until it closes; and

(3) Allow an offeror to withdraw an offer before the auction closes.

(b) When using reverse auction service providers, contracting officers must—

(1) Include contact information, including the contracting officer name and email address, in the synopsis and solicitation so offerors can contact the contracting officer directly with questions;

(2) Upon receiving a successful offer, verify that any provider fees or charges in the price match the provider's fee structure; and

(3) Include in the contract file any information and/or documentation received by the reverse auction service provider from offerors responding to the reverse auction.

(c) If only one offeror participates in an auction, the contracting officer may—

(1) Cancel the auction and document the contract file with evidence of single offeror participation; or

(2) Accept the offer, but only if the price is determined to be fair and reasonable.

17.804 Solicitation provision and contract clauses.

(a) Insert the provision at 52.217-10, Reverse Auction, in solicitations when using a reverse auction to award a contract or blanket purchase agreement.

(b) Insert the clause at 52.217-11, Reverse Auction—Orders, in solicitations and contracts for a multiple-award contract or blanket purchase agreement when a reverse auction may be used to place orders under the basic contract or blanket purchase agreement.

(c) Insert the clause at 52.217-12, Reverse Auction Services, in all solicitations and contracts for the purchase of reverse auction services.

PART 18 - EMERGENCY ACQUISITIONS

Sec.

18.000 Scope of part.

18.001 Emergency acquisitions.

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18.000 Scope of part.

This part identifies acquisition flexibilities available for emergency acquisitions.

18.001 Emergency acquisitions.

(a) *General flexibilities*. Contracting officers should use the flexibilities included in the FAR to respond quickly for an emergency or urgent need. See the list of FAR flexibilities available at https://acquisition.gov/emergency-procurement.

(b) *Micro-purchase threshold and simplified acquisition threshold*. The definitions of micro-purchase threshold and simplified acquisition threshold at part 2 describe the circumstances and new thresholds to which they may be raised when, as determined by the head of an executive agency, they are used to—

(1) Support a contingency operation;

(2) Help defend against or recover from cyber, nuclear, biological, chemical, or radiological attack against the United States;

(3) Support a request from the Secretary of State or the Administrator of the United States Agency for International Development to help provide international disaster assistance as described in 22 U.S.C. 2292 *et seq*.;

(4) Support response to an emergency or major disaster, or

(5) Support a humanitarian or peacekeeping operation using a contract to be awarded and performed, or purchase to be made, outside the United States. The simplified acquisition threshold may be changed, but not the micro-purchase threshold.

(c) *Simplified acquisition procedures for certain commercial products and services*. See part 12 for increased thresholds that may be used in acquiring commercial products or commercial services to support a contingency operation, or to help defend against or recover from cyber, nuclear, biological, chemical, or radiological attack; to support a request from the Secretary of State or the Administrator of the United States Agency for International Development to help provide international disaster assistance; or to support response to an emergency or major disaster. The threshold for using simplified acquisition procedures may also be raised when the acquisition is treated as a commercial product or commercial service in accordance with paragraph (d) of this section.

(d) *Commercial product or commercial service treatment*. Contracting officers may treat any acquisition of supplies or services as an acquisition of commercial products or commercial services if the head of the agency determines the acquisition is to be used to help defend against or recover from cyber, nuclear, biological, chemical, or radiological attack. (See part 12.)

(e) *Disaster or emergency assistance activities*. Award preference will be given to local organizations, firms, and individuals when contracting for major disaster or emergency assistance activities when the President has made a declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122; 41 U.S.C. 1903). Preference may take the form of local area set-asides or an evaluation preference. (See subpart 26.2).

(f) *Ocean transportation by U.S. flag vessels*. In emergency situations, the provisions of the Cargo Preference Act of 1954 may be waived. (See part 47.)

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PART 19 - SMALL BUSINESS

Sec.

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19.303-3 Indefinite-delivery contracts.

19.000 Scope of part.

(a) This part implements the acquisition-related sections of the Small Business Act (15 U.S.C. 631, *et seq.*)and 41 U.S.C. 3104. It covers—

(1) The determination that a concern is eligible for participation in the programs identified in this part;

(2) The respective roles of executive agencies and the Small Business Administration (SBA) in implementing the programs;

(3) Setting acquisitions aside for exclusive competitive participation by small business, 8(a) participants, HUBZone small business concerns, service-disabled veteran-owned small business (SDVOSB) concerns eligible under the SDVOSB Program, and economically disadvantaged women-owned small business (EDWOSB) concerns and women-owned small business (WOSB) concerns eligible under the WOSB Program;

(4) The certificate of competency program;

(5) The subcontracting assistance program;

(6) The "8(a)" business development program (hereafter referred to as 8(a) Program), under which agencies contract with the SBA for goods or services to be furnished under a subcontract by a small disadvantaged business concern;

(7) The use of a price evaluation preference for HUBZone small business concerns;

(8) Sole source awards to HUBZone small business concerns, service-disabled veteran-owned small business concerns, and EDWOSB concerns and WOSB concerns eligible under the WOSB Program; and

(9) The use of reserves.

(b) (1) Unless otherwise specified in this part (see 19.109 and 19.204)—

(i) Contracting officers must apply this part in the United States and its outlying areas; and

(ii) Contracting officers may apply this part outside the United States and its outlying areas.

(2) Offerors that participate in any procurement under this part must meet the definition of "small business concern" at 2.101.

19.001 Definitions.

As used in this part—

Alaska Native Corporation (ANC) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the state of Alaska in accordance with the Alaska Native Claims Settlement Act (43 U.S.C. 1601, *et seq.*) and which is considered a minority and economically disadvantaged concern under the criteria at 43 U.S.C. 1626(e)(1). This definition also includes ANC direct and indirect subsidiary corporations, joint ventures, and partnerships that meet the requirements of 43 U.S.C. 1626(e)(2).

Commercial plan means a subcontracting plan (including goals) that covers the offeror's fiscal year and that applies to the entire production of commercial products and performance of commercial services sold by either the entire company or a portion thereof (e.g., division, plant, or product line).

Concern means any business entity organized for profit (even if its ownership is in the hands of a nonprofit entity) with a place of business located in the United States or its outlying areas and that makes a significant contribution to the U.S. economy through payment of taxes and/or use of American products, material and/or labor, etc. "Concern" includes but is not limited to an individual, partnership, corporation, joint venture, association, or cooperative. For more information, see 13 CFR 121.105.

Failure to make a good faith effort to comply with the subcontracting plan means willful or intentional failure to perform in accordance with the requirements of the subcontracting plan, or willful or intentional action to frustrate the plan.

Fair market price means a price based on reasonable costs under normal competitive conditions and not on lowest possible cost (see 19.205(c)).

Indian tribe means any Indian tribe, band, group, pueblo, or community, including native villages and native groups (including corporations organized by Kenai, Juneau, Sitka, and Kodiak) as defined in the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*), that is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs in accordance with 25 U.S.C. 1452(c). This definition also includes Indian-owned economic enterprises that meet the requirements of 25 U.S.C. 1452(e).

Individual subcontracting plan means a subcontracting plan that covers the entire contract period (including option periods), applies to a specific contract, and has goals that are based on the offeror's planned subcontracting in support of the specific contract, except that indirect costs incurred for common or joint purposes may be allocated on a prorated basis to the contract.

Industry means all concerns primarily engaged in similar lines of activity, as listed and described in the North American Industry Classification system (NAICS) manual.

Long-term contract means a contract of more than five years in duration, including options. However, the term does not include contracts that exceed five years in duration because the period of performance has been extended for a cumulative period not to exceed six months under the clause at 52.217-8, Option to Extend Services, or other appropriate authority.

Master subcontracting plan means a subcontracting plan that contains all the required elements of an individual subcontracting plan, except goals, and may be incorporated into individual subcontracting plans, provided the master subcontracting plan has been approved.

Subcontract means any agreement (other than one involving an employer-employee relationship) entered into by a Government prime contractor or subcontractor calling for supplies and/or services required to perform the contract, contract modification, or subcontract.

Subcontracting Plan Reporting (SPR) means the electronic subcontracting reporting system at SAM.gov for small business subcontracting program reporting.

Total contract dollars means the final anticipated dollar value, including the dollar value of all options.

Subpart 19.1 - Presolicitation

19.101 Small business goals.

(a) It is the Government's policy to provide maximum practicable opportunities in its acquisitions to small business and other small business socioeconomic categories (i.e. veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns). Heads of contracting activities are responsible for achieving goals for small business and those other socioeconomic categories (15 U.S.C. 644(g)).

(1) Agencies must measure the extent of participation by small business and other small business socioeconomic categories in Government acquisitions in terms of the total value of contracts placed during each fiscal year. Agencies must report this data to the Small Business Administration (SBA) at the end of each fiscal year (see 4.301).

(2) (i) SBA certifies offerors as veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, and women-owned small business concerns under the WOSB Program. SBA certifications can be found in the Small Business Search (SBS) website. To be eligible as a small business concern or small disadvantaged business concern, an offeror is required to represent in good faith that it meets the definition of those respective terms.

(ii) (A) Insert the provision at 52.219-1, Small Business Program Representations, in solicitations exceeding the micro-purchase threshold when the contract is for supplies to be delivered or services to be performed in the United States or its outlying areas, or when the contracting officer has applied this part in accordance with 19.000(b)(1)(ii).

(B) Use the provision with its Alternate II in solicitations that will result in a multiple-award contract with more than one NAICS code assigned. This is authorized for solicitations issued after October 1, 2028 (see 19.103(b)(2)).

(iii) (A) Insert the clause at 52.219-28, Postaward Small Business Program Rerepresentation, in solicitations and contracts exceeding the micro-purchase threshold when the contract is for supplies to be delivered or services to be performed in the United States or its outlying areas, or when the contracting officer has applied this part in accordance with 19.000(b)(1)(ii).

(B) Use the clause with its Alternate I in solicitations and the resulting multiple-award contracts with more than one NAICS code. This is authorized for solicitations issued after October 1, 2028 (see 19.103(b)(2)).

(b) Contracting officers can use various acquisition strategies to further the policy and achieve the goals referenced in paragraph (a). As summarized below, some are discretionary, but others are mandatory for certain acquisitions.

(1) Contracting officers must plan acquisitions (i.e. contracts) so that, if practicable, more than one small business concern may perform the work, if the work exceeds the amount for which a surety may be guaranteed by SBA against loss under 15 U.S.C. 694b (see definition of "applicable statutory limit" at 13 CFR 115.10).

(2) Contracting officers must, to the extent practicable, encourage maximum participation by small business concerns in acquisitions. They can do this by publicizing solicitations and contract awards through the Governmentwide point of entry (see subparts 5.2 and 5.3).

(3) Contracting officers must set aside contracts valued at more than the micro-purchase threshold for small businesses in certain circumstances. See 19.104.

(4) Contracting officers may set aside or sole source contracts under the HUBZone Program. See 19.105.

(5) Contracting officers may set aside or sole source contracts under the SDVOSB Program. See 19.106.

(6) Contracting officers may set aside or sole source contracts under the WOSB Program. See 19.107.

(7) Contracting officers may set aside or sole source contracts under the 8(a) Program. See 19.108.

(8) Contracting officers may set aside task orders or delivery orders. See 19.111-2.

(9) Contracting officers must require a small business subcontracting plan in certain acquisitions. See 19.109 and 19.302-1.

(10) Contracting officers must use a HUBZone price evaluation preference in full and open competitions. See 19.110.

(11) Contracting officers may use reserves on multiple-award contracts for any of the small business concerns identified in 19.000(a)(3). See 19.112.

(c) In certain instances, contracting officers must award to the small business when there are equal low bids from a small and other than small business. See 19.203.

(d) When an apparent successful small business offeror has been determined to be nonresponsible, contracting officers must refer the business to SBA for a certificate of competency. A certificate of competency would allow award to be made to that small business offeror. See 19.204.

19.102 Coordination.

(a) SBA helps contracting personnel ensure their agency meets their small business goals. The Director of the Office of Small and Disadvantaged Business Utilization (OSDBU), or for the Department of Defense, the Director of the Office of Small Business Programs (OSBP) serves as the agency focal point for interfacing with SBA. In certain instances, coordinating with SBA, the Director of the OSDBU, or the Director of OSBP is required.

(b) (1) The SBA may assign one or more procurement center representatives (PCRs) to any contracting activity or contract administration office to carry out SBA policies and programs. Assigned SBA PCRs are required to comply with the contracting agency's directives governing the conduct of contracting personnel and the release of contract information. The SBA must obtain for its PCRs security clearances required by the contracting agency.

(2) If an SBA PCR is not assigned to the procuring activity or contract administration office, contact the SBA Office of Government Contracting Area Office serving the area in which the procuring activity is located for assistance in carrying out SBA policies and programs. See *https://www.sba.gov/federal-contracting/counseling-help/procurement-center-representative-directory* for the location of the SBA office servicing the activity.

(c) Upon their request and subject to applicable acquisition and security regulations, contracting officers must give SBA PCRs (or, if a PCR is not assigned, see paragraph (b) of this section) access to all reasonably obtainable contract information that is directly pertinent to their official duties.

(d) The duties assigned by SBA to its PCR are set forth at 13 CFR 125.2(b) and include but are not limited to reviewing proposed acquisitions to recommend the set-aside or sole-source award to a small business of selected acquisitions.

(e) (1) Contracting officers must provide a copy of the proposed acquisition package and other reasonably obtainable information related to the acquisition to the SBA procurement center representative at least 30 days before the solicitation is issued if—

(i) The proposed acquisition is for supplies or services that a small business currently provides, and the proposed acquisition is of a quantity or estimated dollar value that makes it unlikely that small businesses can compete for the prime contract;

(ii) The proposed acquisition is for construction and seeks to package or consolidate discrete construction projects, and the magnitude of this packaging or consolidation makes it unlikely that small businesses can compete for the prime contract; or

(iii) The proposed acquisition is for a consolidated or bundled requirement. The contracting officer must provide all information to justify the consolidation or bundling. The contracting officer must also provide the same information to the agency OSDBU or for the Department of Defense, the OSBP.

(2) For acquisitions described in paragraph (e)(1) of this section, provide a statement explaining why the—

(i) Proposed acquisition cannot be divided into reasonably small lots (not less than economic production runs) to permit offers on quantities less than the total requirement;

(ii) Delivery schedules cannot be established on a realistic basis that will encourage small business participation to the extent consistent with the actual requirements of the Government;

(iii) Proposed acquisition cannot be structured to make it likely that small businesses can compete for the prime contract;

(iv) Consolidated construction project cannot be acquired as separate discrete projects; or

(v) Bundling is necessary and justified.

(3) Process the 30-day notification at the same time as other processing steps required before issuing the solicitation.

(4) If the SBA PCR believes that the acquisition as proposed makes it unlikely that small businesses can compete for the prime contract, the representative will recommend any alternate contracting method that the representative reasonably believes will increase small business prime contracting opportunities. The representative has 15 days after receiving the package to make the recommendation to the contracting officer.

(f) If the contracting officer rejects a recommendation of the SBA PCR (or, if a procurement center representative is not assigned, see paragraph (b) of this section), written notice must be furnished to the appropriate SBA representative within 5 working days of the contracting officer's receipt of the recommendation.

(1) The SBA PCR (or, if a PCR is not assigned, see paragraph (b) of this section) may appeal the contracting officer's rejection to the head of the contracting activity within 2 working days after receiving the notice. The head of the contracting activity shall render a decision in writing, and provide it to the SBA representative within 7 working days. Pending issuance of a decision to the SBA representative, the contracting officer must suspend action on the acquisition.

(2) If the head of the contracting activity agrees that the contracting officer's rejection was appropriate—

(i) Within 2 working days, the SBA PCR (or, if a PCR is not assigned, see paragraph (b) of this section) may request the contracting officer to suspend action on the acquisition until the SBA Administrator appeals to the agency head (see paragraph (f)(5) of this section); and

(ii) The SBA must be allowed 15 working days after making such a written request, within which the Administrator of SBA—

(A) May appeal to the Secretary of the Department concerned; and

(B) Must notify the contracting officer whether the further appeal has, in fact, been taken. If notification is not received by the contracting officer within the 15-day period, it is deemed that the SBA request to suspend the contract action has been withdrawn and that an appeal to the Secretary was not taken.

(3) When the contracting officer has been notified within the 15-day period that the SBA has appealed to the agency head, the head of the contracting activity (or designee) must forward justification for its decision to the agency head. The contracting officer must suspend contract action until notification is received that the SBA appeal has been settled.

(4) The agency head must reply to the SBA within 30 working days after receiving the appeal. The decision of the agency head shall be final.

(5) A request to suspend action on an acquisition need not be honored if the contracting officer determines that proceeding to contract award and performance is in the public interest. The contracting officer must include in the contract file a statement of the facts justifying the determination, and must promptly notify the SBA representative of the determination and provide a copy of the justification.

(g) Contracting officers must consider the recommendations of the agency Director of the OSDBU or for the Department of Defense, the Director of the OSBP as to whether a particular contract should be set aside (see 19.104). Agencies must establish procedures including dollar thresholds for the Director to review acquisitions to make these recommendations. The contracting officer must document in the contract file whenever the Director's recommendations are not accepted.

19.103 Small business size standards.

(a) *Locating size standards and North American Industry Classification System codes.* (1) SBA establishes small business size standards on an industry-by-industry basis. Small business size standards and corresponding North American Industry Classification System (NAICS) codes are provided at 13 CFR 121.201. They are also available at *https://www.sba.gov/document/support--table-size-standards*.

(2) NAICS codes are updated by the Office of Management and Budget through its Economic Classification Policy Committee every five years. New NAICS codes are not available for use in Federal contracting until SBA publishes corresponding size standards. NAICS codes are available from the U.S. Census Bureau at *https://www.census.gov/naics/*.

(3) SBA determines the size status of a concern, including its affiliates, as of the date the concern represents that it is small to the contracting officer as part of its initial offer, which includes price.

(4) When an agency uses a solicitation for a multiple-award contract that does not require offers for the contract to include price, SBA determines size as of the date of initial offer for the multiple-award contract, whether or not the offer includes price or the price is evaluated. (See 13 CFR 121.404(a)(1)(iv)).

(b) *Determining the appropriate NAICS codes for the solicitation.* (1) Unless required to do otherwise by paragraph (b)(2)(ii)(B) of this section, contracting officers must assign one NAICS code and corresponding size standard to all solicitations, contracts, and task or delivery orders. The contracting officer must determine the appropriate NAICS code by classifying the

product or service being acquired in the one industry that best describes the principal purpose of the supply or service being acquired.

(2) (i) For solicitations issued on or before October 1, 2028, that will result in multiple-award contracts, the contracting officer must assign a NAICS code in accordance with paragraph (b)(1) of this section.

(ii) For solicitations issued after October 1, 2028, that will result in multiple-award contracts, the contracting officer must—

(A) Assign a single NAICS code (and corresponding size standard) that best describes the principal purpose of both the acquisition and each subsequent order; or

(B) Divide the acquisition into distinct portions or categories (e.g., line item numbers, Special Item Numbers, sectors, functional areas, or equivalent) and assign each portion or category a single NAICS code and size standard that best describes the principal purpose of the supplies or services to be acquired under that distinct portion or category.

(3) The contracting officer's designation is final unless appealed in accordance with the procedures in paragraph (d) of this section.

(c) *Application of small business size standards to solicitations.* (1) The contracting officer must apply the size standard in effect on the date the solicitation is issued.

(2) The contracting officer may amend the solicitation and use the new size standard if SBA amends the size standard and it becomes effective before the due date for receipt of initial offers.

(d) *Appealing the contracting officer's North American Industry Classification System code and size standard determination*. The contracting officer's determination is final unless appealed as follows:

(1) An appeal of a contracting officer's NAICS code designation and the applicable size standard must be served and filed within 10 calendar days after the issuance of the initial solicitation or any amendment affecting the NAICS code or size standard. However, SBA may file a NAICS code appeal at any time before offers are due.

(2) Appeals of a contracting officer's NAICS code designation or applicable size standard may be filed with SBA's Office of Hearings and Appeals (OHA) by—

(i) Any person adversely affected by a NAICS code designation or applicable size standard. However, with respect to a particular sole source 8(a) contract, only the SBA Associate Administrator for Business Development may appeal a NAICS code designation; or

(ii) The Associate or Assistant Director for the SBA program involved, through SBA's Office of General Counsel.

(3) Contracting officers must advise the public, by amendment to the solicitation, of the existence of a NAICS code appeal (see part 5). Such notices must include the procedures and the deadline for interested parties to file and serve arguments concerning the appeal.

(4) SBA's OHA will dismiss summarily an untimely NAICS code appeal.

(5) NAICS code appeals are filed in accordance with 13 CFR 121.1103.

(6) Upon receipt of a NAICS code appeal, OHA will notify the contracting officer by a notice and order of the date OHA received the appeal, the docket number, and the Administrative Judge assigned to the case. The contracting officer's response to the appeal, if any, must include argument and evidence (see 13 CFR part 134), and must be received by OHA within 15 calendar days from the date of the docketing notice and order, unless otherwise specified by the Administrative Judge. Upon receipt of OHA's docketing notice and order, the contracting officer must withhold award, unless withholding award is not in the best interests of the Government, and immediately send to OHA an electronic link to or a paper copy of both the original solicitation and all amendments relating to the NAICS code appeal. The contracting officer must inform OHA of any amendments, actions, or developments concerning the procurement in question.

(7) After close of record, OHA will issue a decision and inform the contracting officer. If OHA's decision is received by the contracting officer before the date the offers are due, the decision shall be final and the solicitation must be amended to reflect the decision, if appropriate. OHA's decision received after the due date of the initial offers shall not apply to the pending solicitation but shall apply to future solicitations of the same products or services.

(e) For procedures related to determining size prior to award, see FAR 19.201.

19.104 Small business set-asides

19.104-1 Total small business set-asides.

(a) A “set-aside for small business” is the limiting of an acquisition exclusively for participation by small business concerns. For contracts above the micro-purchase threshold, the contracting officer must set the contract aside for small business if there is a reasonable expectation of obtaining offers—

(1) From two or more responsible small business concerns; and

(2) That are competitive in terms of fair market prices, quality, and delivery.

(b) (1) The contracting officer makes the determination to do a small business set-aside under paragraph (a). The contracting officer must document the reason when a contract is not set aside for small business as required.

(2) If the contracting officer rejects a recommendation by SBA to do a small business set-aside, see 19.102(f).

(c) The requirement in paragraph (a) of this section does not apply to purchases at or below the micro-purchase threshold or purchases from required sources under part 8 (*e.g.,* Committee for Purchase From People Who are Blind or Severely Disabled).

(d) When using competitive procedures in accordance with 8.304(b)(1), agencies must include Federal Prison Industries, Inc. (FPI), in the solicitation process for a small business set-aside and consider a timely offer from FPI.

(e) The requirements of paragraph (a) do not preclude the contracting officer from awarding a contract to a small business under the HUBZone Program, SDVOSB Program, WOSB Program, or 8(a) Program. See FAR 19.105 through 19.108.

(f) (1) Any concern, including a supplier, that is awarded a contract or order subject to the nonmanufacturer rule, other than a construction or service acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce (*i.e.*, a "nonmanufacturer"), is required to provide an end item that a small business has manufactured, processed, or produced in the United States or its outlying areas.

(2) When the end item being acquired is a kit of supplies the offeror may not exceed 500 employees, or 150 employees for information technology value-added resellers under NAICS code 541519.

(3) (i) The SBA may grant an individual or a class waiver to the nonmanufacturer rule to allow a nonmanufacturer to provide an end item of an other than small business without regard to the place of manufacture, processing, or production.

(A) *Class waiver.* An agency may request that SBA waive the requirement at paragraph (f)(1) or (f)(2) of this section for a specific product or class of products. See 13 CFR 121.1202 for an explanation of when SBA will issue a class waiver.

(B) *Individual waiver.* The contracting officer may also request a waiver of the requirements at paragraph (f)(1) or (f)(2) of this section for an individual acquisition once the contracting officer determines through market research that no known small business manufacturers, processors, or producers in the United States or its outlying areas can reasonably be expected to offer an end item meeting the requirements of the solicitation. This type of waiver is known as an individual waiver and would apply only to a specific acquisition.

(ii) Requests for waivers must include the content specified at 13 CFR 121.1204 and must be sent via email to nmrwaivers@sba.gov or by mail to the—Director, Office of Government Contracting, Small Business Administration, 409 Third Street SW, Washington, DC 20416.

(iii) For the most current listing of class waivers, contact the SBA Office of Government Contracting or go to https://www.sba.gov/document/support-non-manufacturer-rule-class-waiver-list.

(iv) The contracting officer must provide potential offerors with written notification of any class or individual waiver in the solicitation. If providing the notification after solicitation issuance, the contracting officer must provide potential offerors a reasonable amount of additional time to respond to the solicitation.

(4) (i) If at least 50 percent of the estimated contract value is composed of items that are manufactured, processed, or produced by small business concerns, then a waiver of the nonmanufacturer rule is not required. There is no requirement that each item acquired in a multiple-item acquisition be manufactured, processed, or produced by a small business in the United States or its outlying areas.

(ii) If more than 50 percent of the estimated acquisition cost is composed of items manufactured, processed, or produced by other than small business concerns, then a waiver is required. SBA may grant an individual waiver for one or more items in an acquisition in order to ensure that at least 50 percent of the cost of the items to be supplied by the nonmanufacturer comes from small business manufacturers, processors, and producers in the United States or its outlying areas or are subject to a waiver.

(iii) If a small business offeror is both a manufacturer of item(s) and a nonmanufacturer of other item(s) for an acquisition, the contracting officer must apply the manufacturer size standard.

(g) For evaluation requirements related to set-asides, see FAR 19.205.

19.104-2 Partial small business set-asides.

(a) Contracting officers may, at their discretion, set aside a portion or portions of an acquisition, except for construction, for any of the small business concerns identified at 19.000(a)(3) when—

(1) Market research indicates that a total set-aside is not appropriate (see 19.104-1);

(2) The requirement can be divided into distinct portions;

(3) The acquisition is not subject to simplified acquisition procedures;

(4) Two or more responsible small business concerns are reasonably expected to submit an offer on the set-aside portion or portions of the acquisition that are competitive in terms of fair market prices, quality, and delivery; and

(5) The specific program eligibility requirements identified in this part apply.

(b) When the contracting officer determines that a requirement is to be partially set aside, the solicitation must identify which portion or portions are set aside and not set aside.

(c) The contracting officer must specify in the solicitation how offers must be submitted with regard to the set-aside and non-set-aside portions.

(d) Offers received from concerns that do not qualify as small business concerns shall be considered nonresponsive and must be rejected on the set-aside portion of partial set-asides. However, before rejecting an offer otherwise eligible for award because of questions concerning the size representation, an SBA determination must be obtained (see 19.201).

(e) For evaluation requirements related to partial set-asides, see FAR 19.205.

19.104-3 Small business set-aside clauses.

(a) The contracting officer must insert the clause at 52.219-6, Notice of Total Small Business Set-Aside, in solicitations involving total small business set-asides. This includes multiple-award contracts when orders may be set aside for any of the small business concerns identified in 19.000(a)(3), as described in parts 8 and 16. Use the provision with its Alternate I when including FPI in the competition in accordance with 19.104-1(d).

(b) The contracting officer must insert the clause at 52.219-7, Notice of Partial Small Business Set-Aside, in solicitations and contracts involving partial small business set-asides. This includes part or parts of multiple-award contracts. Use the clause at 52.219-7 with its Alternate I when including FPI in the competition in accordance with 19.104-1(d).

(c) The contracting officer must insert the clause at 52.219-14, Limitations on Subcontracting, in solicitations and contracts—

(1) For supplies, services, and construction, if any portion of the requirement is to be set aside for small business and the contract amount is expected to exceed the simplified acquisition threshold, and in any solicitations and contracts that are set aside or awarded on a sole-source basis in accordance with sections 19.105, 19.106, 19.107, and 19.108, regardless of dollar value. This includes multiple-award contracts when orders may be set aside for small business concerns, as described in subpart 8.4 and subpart 16.5. For contracts that are set aside, the contracting officer must indicate in paragraph (f) of the clause whether compliance with the limitations on subcontracting is required at the contract or order level;

(2) Using the HUBZone price evaluation preference (see 19.110). However, if the prospective contractor waived the use of the preference, or is an other than small business, do not insert the clause in the resultant contract.

(d) The contracting officer must insert the clause at 52.219-13, Notice of Set-Aside of Orders, in all solicitations for multiple-award contracts under which orders may be set aside for any of the small business concerns identified in 19.000(a)(3), and all contracts awarded from such solicitations.

(e) (1) The contracting officer must insert the clause at 52.219-33, Nonmanufacturer Rule, in solicitations and contracts, including multiple-award contracts, when orders may be set aside for small business concerns as described in subpart 8.4 and subpart 16.5, when—

(i) the item being acquired has been assigned a manufacturing or supply NAICS code, and—

(ii) (A) Any portion of the requirement is to be—

(1) Set aside for small business and is expected to exceed the simplified acquisition threshold; or

(2) Set aside or awarded on a sole-source basis in accordance with sections 19.105, 19.106, 19.107, and 19.108, regardless of dollar value; or

(B) Using the HUBZone price evaluation preference (see 19.110). However, if the prospective contractor waived the use of the price evaluation preference, or is an other than small business, do not insert the clause in the resultant contract.

(2) The contracting officer must not insert the clause at 52.219-33 when the Small Business Administration has waived the nonmanufacturer rule (see 19.104-1(f)(3)).

19.105 Historically Underutilized Business Zone (HUBZone) Program.

19.105-1 Status as a HUBZone small business concern.

(a) Status as a HUBZone small business concern is determined by the Small Business Administration (SBA) in accordance with 13 CFR part 126. If SBA determines that a concern is a HUBZone small business, it will designate the concern as a

HUBZone small business in the Small Business Search (SBS) at https://search.certifications.sba.gov/. SBA's designation also appears in the System for Award Management (SAM).

(b) For a HUBZone small business concern that seeks a HUBZone set-aside or sole-source contract, the contracting officer must verify that the offeror is designated in SBS or SAM as a HUBZone small business concern certified by SBA.

(c) A joint venture may be considered a HUBZone small business concern if—

(1) The joint venture qualifies as small under 19.201-1(b)(1);

(2) At least one party to the joint venture is a HUBZone small business concern; and

(3) The joint venture complies with 13 CFR 126.616(a) through (c).

(d) To be eligible for a HUBZone contract under this section, a HUBZone small business concern must be a HUBZone small business concern at the time of its initial offer.

19.105-2 Set-aside procedures.

(a) The contracting officer—

(1) May set aside contracts exceeding the micro-purchase threshold for competition restricted to HUBZone small business concerns when the requirements of paragraph (b) of this section can be satisfied; and

(2) Must consider HUBZone set-asides before considering HUBZone sole-source awards (see 19.105-3).

(b) To set aside an acquisition for competition restricted to HUBZone small business concerns, the contracting officer must have a reasonable expectation that—

(1) Offers will be received from two or more HUBZone small business concerns; and

(2) Award will be made at a fair market price.

(c) If the contracting officer receives only one acceptable offer from a HUBZone small business concern in response to a set aside, the contracting officer should make an award to that concern. If the contracting officer receives no acceptable offers from HUBZone small business concerns, the HUBZone set-aside must be withdrawn and the requirement, if still valid, set aside for small business concerns, as appropriate (*see* 19.104).

(d) The procedures at 19.102(f) apply to this section if the contracting officer decides to reject a recommendation of the SBA procurement center representative (or, if a procurement center representative is not assigned, *see* 19.102(b)) to set aside a contract for competition restricted to HUBZone small business concerns.

19.105-3 Sole source awards.

(a) A contracting officer may consider a contract award to a HUBZone small business concern on a sole-source basis (see 6.103-5(c)(1)) provided—

(1) The contracting officer does not have a reasonable expectation that offers would be received from two or more HUBZone small business concerns;

(2) The anticipated price of the contract, including options, will not exceed—

(i) $8.5 million for a requirement within the North American Industry Classification System (NAICS) codes for manufacturing; or

(ii) $5.5 million for a requirement within all other NAICS codes;

(3) The HUBZone small business concern has been determined to be a responsible contractor with respect to performance; and

(4) Award can be made at a fair and reasonable price.

(b) The SBA has the right to appeal the contracting officer's decision not to make a HUBZone sole-source award (see 13 CFR 126.610).

19.105-4 Contract clauses.

(a) The contracting officer must insert the clause at 52.219-3, Notice of HUBZone Set-Aside or Sole-Source Award, in solicitations and contracts for acquisitions that are set aside or awarded on a sole-source basis to, HUBZone small business concerns under 19.105-2 or 19.105-3. This includes multiple-award contracts when orders may be set aside for HUBZone small business concerns as described in subpart 8.4 and subpart 16.5.

(b) For use of clause 52.219-14, Limitations on Subcontracting, see the prescription at 19.104-3(c).

(c) For use of clause 52.219-33, Nonmanufacturer Rule, see the prescription at 19.104-3(e).

19.106 Service-Disabled Veteran-Owned Small Business (SDVOSB) Program.

19.106-1 Status as a SDVOSB concern.

(a) Status as an SDVOSB concern is determined by SBA in accordance with 13 CFR part 128.

(b) For an SDVOSB concern that seeks an SDVOSB set-aside or sole-source contract, the contracting officer must verify that the offeror is designated in the System for Award Management (SAM) as an SDVOSB concern certified by SBA.

(c) A joint venture may be considered an SDVOSB concern eligible under the SDVOSB Program if—

(1) The joint venture qualifies as small under 19.201-1(b)(1);

(2) The managing SDVOSB joint venture partner is designated in SAM as an SDVOSB concern certified by SBA; and

(3) The joint venture complies with the requirements of 13 CFR 128.402.

19.106-2 Set-aside procedures.

(a) The contracting officer—

(1) May set-aside contracts exceeding the micro-purchase threshold for competition restricted to SDVOSB concerns when the requirements of paragraph (b) of this section can be satisfied; and

(2) Must consider SDVOSB set-asides before considering SDVOSB sole source awards (see 19.106-3).

(b) A contracting officer may restrict competition to SDVOSB concerns eligible under the SDVOSB Program if there is a reasonable expectation based on market research that—

(1) Two or more SDVOSB concerns eligible under the SDVOSB Program will submit offers; and

(2) Award will be made at a fair market price.

(c) If the contracting officer receives only one acceptable offer from an SDVOSB concern eligible under the SDVOSB Program in response to a set-aside, the contracting officer should make an award to that concern. If the contracting officer receives no acceptable offers from SDVOSB concerns eligible under the SDVOSB Program, the SDVOSB set-aside must be withdrawn and the requirement, if still valid, set aside for small business concerns, as appropriate (see 19.104).

(d) The procedures at 19.102(f) apply to this section if the contracting officer decides to reject a recommendation of the SBA procurement center representative (or, if a procurement center representative is not assigned, *see* 19.102(b)) to set aside a contract for competition restricted to SDVOSB concerns.

19.106-3 Sole source awards.

(a) A contracting officer may consider a contract award to a SDVOSB concern on a sole source basis (see 6.103-5(c)(1)), provided—

(1) The contracting officer does not have a reasonable expectation that offers would be received from two or more SDVOSB concerns;

(2) The anticipated award price of the contract, including options, will not exceed—

(i) $8.5 million for a requirement within the NAICS codes for manufacturing; or

(ii) $5 million for a requirement within any other NAICS code;

(3) The SDVOSB concern has been determined to be a responsible contractor with respect to performance; and

(4) Award can be made at a fair and reasonable price.

(b) The SBA has the right to appeal the contracting officer's decision not to make an SDVOSB sole-source award (see 13 CFR 128.407).

19.106-4 Contract clauses.

(a) The contracting officer must insert the clause at 52.219-27, Notice of Set-Aside for, or Sole-Source Award to, Service-Disabled Veteran-Owned Small Business (SDVOSB) Concerns Eligible Under the SDVOSB Program, in solicitations and contracts for acquisitions that are set aside or awarded on a sole-source basis to, service-disabled veteran-owned small business concerns under 19.106-2 and 19.106-3. This includes multiple-award contracts when orders may be set aside for service-disabled veteran-owned small business concerns as described in subpart 8.4 and subpart 16.5.

(b) For use of clause 52.219-14, Limitations on Subcontracting, see the prescription at 19.104-3(c).

(c) For use of clause 52.219-33, Nonmanufacturer Rule, see the prescription at 19.104-3(e).

19.107 Women-Owned Small Business (WOSB) Program.

19.107-1 Status under the WOSB Program.

(a) Status as an economically disadvantaged women-owned small business (EDWOSB) concern or WOSB concern eligible under the WOSB Program is determined by the Small Business Administration in accordance with 13 CFR part 127.

(b) For a WOSB that seeks a WOSB or EDWOSB set-aside or sole-source contract, the contracting officer must verify prior to award that the offeror is designated as a certified EDWOSB or WOSB concern in the System for Award Management (SAM).

(c) A joint venture may be considered an EDWOSB concern or WOSB concern eligible under the WOSB Program if the EDWOSB or WOSB participant is certified in SAM and the joint venture meets the requirements of 13 CFR 127.506.

19.107-2 Set-aside procedures.

(a) The contracting officer—

(1) May set aside contracts exceeding the micro-purchase threshold for competition restricted to EDWOSB concerns when the acquisition is assigned a NAICS code in which SBA has determined that WOSB concerns are underrepresented in Federal procurement; or

(2) May set aside contracts exceeding the micro-purchase threshold for competition restricted to WOSB concerns eligible under the WOSB Program when the acquisition is assigned a NAICS code in which SBA has determined that WOSB concerns are substantially underrepresented in Federal procurement, as specified on SBA's website at *http://www.sba.gov/WOSB* .

(b) For requirements in NAICS codes designated by SBA as underrepresented, a contracting officer may restrict competition to EDWOSB concerns if the contracting officer has a reasonable expectation based on market research that—

(1) Two or more EDWOSB concerns will submit offers for the contract; and

(2) Contract award will be made at a fair and reasonable price.

(c) For requirements in NAICS codes designated by SBA as substantially underrepresented, a contracting officer may restrict competition to WOSB concerns eligible under the WOSB Program (including EDWOSB concerns) if there is a reasonable expectation based on market research that—

(1) Two or more WOSB concerns eligible under the WOSB Program (including EDWOSB concerns), will submit offers; and

(2) Contract award may be made at a fair and reasonable price.

(d) The contracting officer may make an award, if only one acceptable offer is received from a qualified EDWOSB concern or WOSB concern eligible under the WOSB Program. If no acceptable offers are received from an EDWOSB concern or WOSB concern eligible under the WOSB Program, the set-aside must be withdrawn and the requirement, if still valid, set aside for small business, as appropriate (see subpart 19.104).

(e) The procedures at 19.102(f) apply to this section if the contracting officer decides to reject a recommendation of the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.102(b)) to set aside a contract for competition restricted to EDWOSB concerns or WOSB concerns eligible under the WOSB Program.

19.107-3 Sole source awards.

(a) A contracting officer may consider a contract award to an EDWOSB concern on a sole-source basis (see 6.103-5(c)(1)) provided—

(1) The acquisition is assigned a NAICS code in which SBA has determined that WOSB concerns are underrepresented in Federal procurement;

(2) The contracting officer does not have a reasonable expectation that offers would be received from two or more EDWOSB concerns; and

(3) The conditions in paragraph (c) of this section exist.

(b) A contracting officer may consider a contract award to a WOSB concern (including EDWOSB concerns) eligible under the WOSB Program on a sole-source basis (see 6.103-5(c)(1)) provided—

(1) The acquisition is assigned a NAICS code in which SBA has determined that WOSB concerns are substantially underrepresented in Federal procurement;

(2) The contracting officer does not have a reasonable expectation that offers would be received from two or more WOSB concerns (including EDWOSB concerns); and

(3) The conditions in paragraph (c) of this section exist.

(c) (1) The anticipated award price of the contract, including options, will not exceed—

(i) $8.5 million for a requirement within the NAICS codes for manufacturing; or

(ii) $5.5 million for a requirement within any other NAICS codes.

(2) The EDWOSB concern or WOSB concern has been determined to be a responsible contractor with respect to performance.

(3) The award can be made at a fair and reasonable price.

(d) The SBA has the right to appeal the contracting officer's decision not to make a sole-source award to either an EDWOSB concern or WOSB concern eligible under the WOSB program.

19.107-4 Contract clauses.

(a) The contracting officer must insert the clause at 52.219-29, Notice of Set-Aside for, or Sole-Source Award to, Economically Disadvantaged Women-owned Small Business Concerns, in solicitations and contracts for acquisitions that are set aside or awarded on a sole-source basis to, EDWOSB concerns under 19.107-2(b) or 19.107-3(a). This includes multiple-award contracts when orders may be set aside for EDWOSB concerns as described in subpart 8.4 and subpart 16.5.

(b) The contracting officer must insert the clause at 52.219-30, Notice of Set-Aside for, or Sole-Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program, in solicitations and contracts for acquisitions that are set aside or awarded on a sole-source basis to WOSB concerns under 19.107-2(c) or 19.107-3(b). This includes multiple-award contracts when orders may be set aside for WOSB concerns eligible under the WOSB Program as described in subpart 8.4 and subpart 16.5.

(c) For use of clause 52.219-14, Limitations on Subcontracting, see the prescription at 19.104-3(c).

(d) For use of clause 52.219-33, Nonmanufacturer Rule, see the prescription at 19.104-3(e).

19.108 Contracting With the Small Business Administration (the 8(a) Program)

19.108-1 General.

(a) Section 8(a) of the Small Business Act (15 U.S.C. 637(a)) established a program that authorizes the Small Business Administration (SBA) to enter into all types of contracts with other agencies and award subcontracts for performing those contracts to firms eligible for program participation. This program is the "8(a) Business Development Program," commonly referred to as the "8(a) program." A small business that is accepted into the 8(a) program is known as a "participant." SBA's subcontractors are referred to as "8(a) contractors." As used in this subpart, an 8(a) contractor is an 8(a) participant that is currently performing on a Federal contract or order that was set aside for 8(a) participants.

(b) Contracts may be awarded to the SBA for performance by eligible 8(a) participants on either a sole source or competitive basis.

(c) Acting under the authority of the program, the SBA certifies to an agency that SBA is competent and responsible to perform a specific contract. The contracting officer has the discretion to award the contract to the SBA based upon mutually agreeable terms and conditions.

(d) When SBA has delegated its 8(a) program contract execution authority to an agency, the contracting officer must refer to its agency supplement or other policy directives for appropriate guidance.

19.108-2 Determining eligibility for the 8(a) program.

Determining the eligibility of a small business to be a participant in the 8(a) program is the responsibility of the SBA. SBA's regulations on eligibility requirements for participation in the 8(a) program are found at 13 CFR 124.101 through 124.112. SBA designates the concern as an 8(a) participant in the Small Business Search (SBS) at *https://search.certifications.sba.gov/*. SBA's designation also appears in the System for Award Management (SAM).

19.108-3 Selecting acquisitions for the 8(a) program.

Through their cooperative efforts, the SBA and an agency match the agency's requirements with the capabilities of 8(a) participants to establish a basis for the agency to contract with the SBA under the program. Selection is initiated in one of three ways:

(a) The SBA advises the contracting activity of an 8(a) participant's capabilities through a search letter and requests the contracting activity to identify acquisitions to support the participant's business plans. In these instances, the SBA will provide at a minimum the following information in order to enable the contracting activity to match an acquisition to the participant's capabilities:

(1) Identification of the participant and its owners.

(2) Background information on the participant, including any and all information pertaining to the participant's technical ability and capacity to perform.

(3) The participant's present production capacity and related facilities.

(4) The extent to which contracting assistance is needed in the present and the future, described in terms that will enable the agency to relate the participant's plans to present and future agency requirements.

(5) If construction is involved, the request must also include the following:

(i) A participant's capabilities in and qualifications for accomplishing various categories of construction work typically found in North American Industrial Category System subsector 236 (construction of buildings), subsector 237 (heavy and civil engineering construction), or subsector 238 (specialty trade contractors).

(ii) The participant's capacity in each construction category in terms of estimated dollar value (*e.g.,* electrical, up to $100,000).

(b) The SBA identifies a specific requirement for one or more 8(a) participant(s) and sends a requirements letter to the agency's OSDBU, or for the Department of Defense, OSBP, requesting the contracting office offer the acquisition to the 8(a) program. In these instances, in addition to the information in paragraph (a) of this section, the SBA will provide—

(1) A clear identification of the acquisition sought; *e.g.,* project name or number;

(2) A statement as to how the required equipment and real property will be provided in order to ensure that the participant will be fully capable of satisfying the agency's requirements;

(3) If construction, information as to the bonding capability of the participant(s); and

(4) Either—

(i) If a sole source request—

(A) The reasons why the participant is considered suitable for this particular acquisition; *e.g.,* previous contracts for the same or similar supply or service; and

(B) A statement that the participant is eligible in terms of its small business size status relative to the assigned NAICS code, business support levels, and business activity targets; or

(ii) If competitive, a statement that at least two 8(a) participants are considered capable of satisfying the agency's requirements and a statement that the participants are also eligible in terms of their small business size status relative to the assigned NAICS code, business support levels, and business activity targets. If requested by the contracting office, SBA will identify at least two such participants and provide information concerning the participants' capabilities.

(c) Agencies may also review other proposed acquisitions for the purpose of identifying requirements which may be offered to the SBA. Where agencies independently, or through the self marketing efforts of an 8(a) participant, identify a requirement for the 8(a) program, they may offer on behalf of a specific 8(a) participant, for the 8(a) program in general, or for 8(a) competition.

19.108-4 Evaluation, offering, and acceptance.

(a) *Agency evaluation*. In determining the extent to which a requirement should be offered in support of the 8(a) program, the agency should evaluate—

(1) Current and future plans to acquire the specific items or work that 8(a) participants are seeking to provide, identified in terms of—

(i) Estimated quantities of the supplies or services required or the estimated number of construction projects planned;

(ii) Length of contract, including option periods (see 19.303-1(d)); and

(iii) Performance or delivery requirements, including—

(A) Required monthly production rates, when applicable; and

(B) For construction, the geographical location where work is to be performed;

(2) The impact of any delay in delivery;

(3) Whether the items or work have previously been acquired using small business set-asides, and the date the items or work were acquired;

(4) Problems encountered in previous acquisitions of the items or work from the 8(a) participants or other contractors; and

(5) Any other pertinent information about known 8(a) participants, the items, or the work. This includes any information concerning the participants' products or capabilities. When necessary, the contracting agency must make an

independent review of the factors in 19.108-3(a) and other aspects of the participants' capabilities which would ensure the satisfactory performance of the requirement being considered for commitment to the 8(a) program.

(b) *Agency offering*.

(1) After completing its evaluation, the contracting office must notify the SBA of the extent of its plans to place 8(a) contracts with the SBA for specific quantities of items or work. The notification, referred to as an offering letter, must identify the time frames within which resulting 8(a) awards must be completed in order for the agency to meet its responsibilities. The offering letter must also contain the following information applicable to each prospective contract:

(i) A description of the work to be performed or items to be delivered, and a copy of the statement of work, if available.

(ii) The estimated period of performance.

(iii) The NAICS code that applies to the principal nature of the acquisition.

(iv) The anticipated dollar value of the requirement, including options, if any.

(v) Any special restrictions or geographical limitations on the requirement (for construction, include the location of the work to be performed).

(vi) Any special capabilities or disciplines needed for contract performance.

(vii) The type of contract anticipated. In accordance with 8.104, use of existing government-wide contracts is required in certain instances.

(viii) The acquisition history, if any, of the requirement, including the names and addresses of any small business contractors that have performed this requirement during the previous 24 months.

(ix) A statement that prior to the offering no solicitation for the specific acquisition has been issued as a small business, HUBZone, service-disabled veteran-owned small business set-aside, or a set-aside under the Women-Owned Small Business (WOSB) Program, and that no other public communication (such as a notice through the Governmentwide point of entry (GPE)) has been made showing the contracting agency's clear intention to set-aside the acquisition for small business, HUBZone small business, service-disabled veteran-owned small business concerns, or a set-aside under the WOSB Program.

(x) Identification of any particular 8(a) participant designated for consideration, including a brief justification, such as—

(A) The 8(a) participant, through its own efforts, marketed the requirement and caused it to be reserved for the 8(a) program; or

(B) The acquisition is a follow-on or renewal contract and the nominated 8(a) participant is the incumbent.

(xi) Bonding requirements, if applicable.

(xii) Identification of all 8(a) participants which have expressed an interest in being considered for the acquisition. This should include a list of all 8(a) contract-holders on an existing government-wide contract that is planned to be used to fill the requirement (see 8.104).

(xiii) Identification of all SBA field offices that have asked for the acquisition for the 8(a) program.

(xiv) A request, if appropriate, that a requirement with an estimated contract value under the applicable competitive threshold be awarded as an 8(a) competitive contract (see 19.108-7(d)). SBA has already authorized certain government-wide contracts (e.g. Federal Supply Schedule) to allow competition amongst the 8(a) contract-holders at any dollar value. To determine whether SBA has provided this authority for the contract planned to be used, refer to the ordering procedures for that contract.

(xv) A request, if appropriate, that a requirement with a contract value over the applicable competitive threshold be awarded as a sole source contract (see 19.108-7(b)).

(xvi) Any other pertinent and reasonably available data.

(2) An agency offering a construction requirement for which no specific offeror is nominated should submit it to the SBA District Office for the geographical area where the work is to be performed.

(3) An agency offering a construction requirement on behalf of a specific offeror should submit it to the SBA District Office servicing that concern.

(4) Sole source requirements, other than construction, should be forwarded directly to the district office that services the nominated 8(a) participant. If the contracting officer is not nominating a specific 8(a) participant, the offering letter should be forwarded to the district office servicing the geographical area in which the contracting office is located.

(5) All requirements for 8(a) competition, other than construction, should be forwarded to the district office servicing the geographical area in which the contracting office is located. All requirements for 8(a) construction competition should be forwarded to the district office servicing the geographical area in which all or the major portion of the construction is to

be performed. All requirements, including construction, must be synopsized through the GPE. For construction, the synopsis must include the geographical area of the competition set forth in the SBA's acceptance letter.

(c) *SBA acceptance*.

(1) Upon receipt of the contracting office's offering letter, SBA will determine whether to accept the requirement for the 8(a) program. SBA's decision whether to accept the requirement will be transmitted to the contracting office in writing within 10 working days of receipt of the offer if the contract is likely to exceed the simplified acquisition threshold and within two working days of receipt if the contract is at or below the simplified acquisition threshold. The contracting office may grant an extension of these time periods, if requested by SBA.

(i) For acquisitions exceeding the simplified acquisition threshold, if SBA does not respond to an offering letter within ten working days, the contracting office may seek SBA's acceptance through the Associate Administrator for Business Development. The contracting office may assume that SBA has accepted the requirement into the 8(a) program if it does not receive a reply from the Associate Administrator for Business Development within five calendar days of receipt of the contracting office's request.

(ii) For acquisitions not exceeding the simplified acquisition threshold, when the contracting office makes an offer to the 8(a) program on behalf of a specific 8(a) participant and does not receive a reply to its offering letter within two working days, the contracting office may assume the offer is accepted and proceed with award of an 8(a) contract.

(2) As part of the acceptance process, SBA will review the appropriateness of the NAICS code designation assigned to the requirement by the contracting officer.

(i) SBA will not challenge the NAICS code assigned to the requirement by the contracting officer if it is reasonable, even though other NAICS codes may also be reasonable.

(ii) If SBA and the contracting officer are unable to agree on a NAICS code designation for the requirement, SBA may refuse to accept the requirement for the 8(a) program, appeal the contracting officer's determination to the head of the agency pursuant to 19.108-9, or appeal the NAICS code designation to the SBA Office of Hearings and Appeals under subpart C of 13 CFR part 134.

(3) For sole source 8(a) awards, if an appropriate match exists, SBA will advise the contracting officer whether it will participate in contract negotiations or whether SBA will authorize the contracting officer to negotiate directly with the identified 8(a) participant. Where SBA has delegated its contract execution functions to a contracting agency, SBA will also identify that delegation in its acceptance letter. For a joint venture, SBA will determine eligibility as part of its acceptance of a sole-source requirement and will approve the joint venture agreement prior to award in accordance with 13 CFR 124.513(e).

(i) *Sole source award where the contracting officer nominates a specific 8(a) participant.* SBA will determine whether an appropriate match exists where the contracting officer identifies a particular participant for a sole source award.

(A) Once SBA determines that a procurement is suitable to be accepted as an 8(a) sole source contract, SBA will normally accept it on behalf of the 8(a) participant recommended by the contracting officer, provided that the 8(a) participant complies with the requirements of 13 CFR 124.503(c)(1).

(B) If an appropriate match does not exist, SBA will notify the 8(a) participant and the contracting officer, and may then nominate an alternate 8(a) participant.

(ii) *Sole source award where the contracting officer does not nominate a specific 8(a) participant.* When a contracting officer does not nominate an 8(a) participant for performance of a sole source 8(a) contract, SBA will select an 8(a) participant for possible award from among two or more eligible and qualified 8(a) participants. The selection will be based upon relevant factors, including business development needs, compliance with competitive business mix requirements (if applicable), financial condition, management ability, technical capability, and whether award will promote the equitable distribution of 8(a) contracts. (For construction requirements see 13 CFR 124.503(d)(1)).

19.108-5 Repetitive acquisitions.

In order for repetitive acquisitions to be awarded through the 8(a) program, there must be separate offers and acceptances. This allows the SBA to determine—

(a) Whether the requirement should be a competitive 8(a) award;

(b) A nominated 8(a) participant's eligibility, and whether or not it is the same 8(a) participant that performed the previous contract;

(c) The effect that contract award would have on the equitable distribution of 8(a) contracts; and

(d) Whether the requirement should continue under the 8(a) program.

19.108-6 Basic ordering agreements and blanket purchase agreements.

(a) The contracting office must submit an offering letter for, and SBA must accept, each order under a basic ordering agreement (BOA) or a blanket purchase agreement (BPA) (see 12.201-1), in addition to the agency offering and SBA accepting the BOA or BPA itself.

(b) SBA will not accept for award on a sole-source basis any order that would cause the total dollar amount of orders issued under a specific BOA or BPA to exceed the competitive threshold amount in 19.108-7.

(c) Once an 8(a) participant's program term expires, the participant otherwise exits the 8(a) program, or becomes other than small for the NAICS code assigned under the BOA or the BPA, SBA will not accept new orders under the BOA or BPA for the participant.

19.108-7 Competitive 8(a) and sole source 8(a) policy.

(a) *Competitive 8(a) policy.* An acquisition offered to the SBA under the 8(a) program must be awarded on the basis of competition limited to eligible 8(a) participants when—

(1) There is a reasonable expectation that at least two eligible and responsible 8(a) participants will submit offers and that award can be made at a fair market price; and

(2) The anticipated total value of the contract, including options, will exceed $8.5 million for acquisitions assigned manufacturing North American Industry Classification System (NAICS) codes and $5.5 million for all other acquisitions.

(b) *Above competitive thresholds*. Where an acquisition exceeds the competitive threshold (see paragraph (a)(2) of this section), the SBA may accept the requirement for a sole source 8(a) award only after the contracting officer has complied with the requirements for other than full and open competition in accordance with 6.103.

(c) *Prohibition on splitting requirements*. A proposed 8(a) requirement with an estimated value exceeding the applicable competitive threshold amount shall not be divided into several requirements for lesser amounts in order to use 8(a) sole source procedures for award to a single firm.

(d) *Below competitive thresholds*. (1) To ensure fair market pricing and to prepare 8(a) participants for competition, SBA has approved certain government-wide contracts for competition amongst the 8(a) contract-holders (see 19.111-2) at any dollar value, including below the competitive thresholds. Where an acquisition is below the competitive threshold (see paragraph (a)(2) of this section), contracting officers must first try conducting the acquisition as a competitive 8(a) order using these government-wide contracts before proceeding with a sole source 8(a) award. To determine whether SBA has provided approval for a particular government-wide contract, refer to the ordering procedures for that contract.

(2) The SBA Associate Administrator for Business Development may approve a contracting office's request for a competitive 8(a) award below the competitive thresholds when not using the contracts referenced in paragraph (d)(1). Such requests will be approved only on a limited basis and will be primarily granted where technical competitions are appropriate or where a large number of responsible 8(a) participants are available for competition. In determining whether a request to compete below the threshold will be approved, the SBA Associate Administrator for Business Development will, in part, consider the extent to which the contracting activity is supporting the 8(a) program on a noncompetitive basis. The agency may include recommendations for competition below the threshold in the offering letter or by separate correspondence to the SBA Associate Administrator for Business Development.

19.108-8 Limitations on subcontracting and nonmanufacturer rule.

(a) Limitations on subcontracting. To be awarded a contract or order under the 8(a) program, the 8(a) participant is required to perform—

(1) For services (except construction), at least 50 percent of the cost incurred for personnel with its own employees;

(2) For supplies or products (other than a procurement from a nonmanufacturer of such supplies or products), at least 50 percent of the cost of manufacturing the supplies or products (not including the cost of materials);

(3) For general construction, at least 15 percent of the cost with its own employees (not including the cost of materials); and

(4) For construction by special trade contractors, at least 25 percent of the cost with its own employees (not including the cost of materials).

(b) Compliance period for limitations on subcontracting. An 8(a) contractor is required to comply with the limitations on subcontracting—

(1) For a contract under the 8(a) program, either by the end of the base term and then by the end of each subsequent option period or by the end of the performance period for each order issued under the contract, at the contracting officer's discretion; and

(2) For an order competed exclusively among contractors who are 8(a) participants, by the end of the performance period for the order.

(c) Waiver. The applicable SBA District Director may waive the provisions in paragraph (b)(1) requiring a participant to comply with the limitations on subcontracting for each period of performance or for each order. Instead, the SBA District Director may permit the participant to subcontract in excess of the limitations on subcontracting where the SBA District Director makes a written determination that larger amounts of subcontracting are essential during certain stages of performance.

(1) The 8(a) participant is required to provide the SBA District Director written assurance that the participant will ultimately comply with the requirements of this section prior to contract completion. The contracting officer must review the written assurance and inform the 8(a) participant of their concurrence or nonconcurrence. The 8(a) participant can only submit the written assurance to the SBA District Director upon concurrence by the contracting officer.

(2) The contracting officer does not have the authority to waive the provisions of this section requiring an 8(a) participant to comply with the limitations on subcontracting for each period of performance or order, even if the agency has a Partnership Agreement with SBA.

(3) Where the 8(a) participant does not ultimately comply with the limitations on subcontracting by the end of the contract, SBA will not grant future waivers for the 8(a) participant.

(d) Nonmanufacturer rule. See 19.104-1(f) for application of the nonmanufacturer rule, inclusive of waivers and exceptions to the nonmanufacturer rule.

19.108-9 SBA appeals.

(a) The SBA Administrator may submit for determination to the agency head if the SBA and the contracting officer fail to agree on the decision to make a particular acquisition available for award under the 8(a) Program.

(b) The procedures at 19.102(f) apply to this section if there is disagreement between the contracting officer and the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.102(b)) regarding the matters in paragraph (a).

(c) If the SBA appeal is denied, the decision of the agency head must specify the reasons for the denial. The decision must be made a part of the contract file.

19.108-10 Contract clauses.

(a) The contracting officer must insert the clause at 52.219-11, Special 8(a) Contract Conditions, in contracts between the SBA and the agency when the acquisition is accomplished using sole source procedures in 19.208-7(a)(1) and (2).

(b) The contracting officer must insert the clause at 52.219-12, Special 8(a) Subcontract Conditions, in contracts between the SBA and its 8(a) contractor when the acquisition is accomplished using sole source procedures in 19.208-7(a)(1) and (2).

(c) The contracting officer must insert the clause at 52.219-17, Section 8(a) Award, in competitive solicitations and contracts when the acquisition is accomplished using the procedures of 19.208-1 and in sole source awards which utilize the alternative procedure in 19.208-7(a)(3).

(d) The contracting officer must insert the clause at 52.219-18, Notification of Competition Limited to Eligible 8(a) Participants, in competitive solicitations and contracts when the acquisition is accomplished using the procedures of 19.208-1. Use the clause at 52.219-18 with its Alternate I when competition is to be limited to 8(a) participants within one or more specific SBA districts pursuant to 19.108-4(b).

(e) For contracts or orders resulting from this subpart, see 19.104-3(c) for use of 52.219-14, Limitations on Subcontracting, and 19.104-3(e) for use of 52.219-33, Nonmanufacturer Rule.

19.108-11 Release requirements for non-8(a) procurement.

(a) Once a requirement has been accepted by SBA into the 8(a) program, any follow-on requirements (see definition at 13 CFR 124.3) must remain in the 8(a) program unless—

(1) There is a mandatory source (see 8.101 through 8.103);

(2) The follow-on will be set aside under the HUBZone, SDVOSB, or WOSB programs; or

(3) SBA agrees to release the requirement from the 8(a) program for a follow-on, non-8(a) procurement in accordance with 13 CFR 124.504(d) (see paragraph (b) of this section).

(b) To obtain release of a requirement from the 8(a) program, the contracting officer must make a written request to, and receive concurrence from, the SBA Associate Administrator for Business Development.

(c) (1) The written request to the SBA Associate Administrator for Business Development must indicate—

(i) Whether the agency has achieved its small disadvantaged business goal;

(ii) Whether the agency has achieved its HUBZone, SDVOSB, WOSB, or small business goal(s); and

(iii) Whether the requirement is critical to the business development of the 8(a) contractor that is currently performing the requirement.

(2) The requirement that a follow-on procurement must be released from the 8(a) program in order for it to be fulfilled outside the 8(a) program does not apply to task or delivery orders offered to and accepted into the 8(a) program, where the basic contract was not accepted into the 8(a) program.

19.109 Small business subcontracting plans.

(a) (1) Except as stated in paragraph (b) of this section, 15 U.S.C. 637(d) imposes the following requirements regarding subcontracting with small businesses and small business subcontracting plans:

(i) In negotiated acquisitions, each solicitation of offers to perform a contract that is expected to exceed $900,000 ($2 million for construction of any public facility) and that has subcontracting possibilities, must require the apparently successful offeror to submit an acceptable subcontracting plan. If the apparently successful offeror fails to negotiate a subcontracting plan acceptable to the contracting officer within the time limit prescribed by the contracting officer, the offeror will be ineligible for award. For a multiple-award contract with more than one North American Industry Classification System (NAICS) code, see paragraph (a)(2) of this section.

(ii) In sealed bidding acquisitions, each invitation for bids to perform a contract that is expected to exceed $900,000 ($2 million for construction of any public facility) and that has subcontracting possibilities, must require the bidder selected for award to submit a subcontracting plan. If the selected bidder fails to submit a plan within the time limit prescribed by the contracting officer, the bidder will be ineligible for award. For a multiple-award contract with more than one NAICS code, see paragraph (a)(2) of this section.

(2) For a multiple-award contract with more than one NAICS code, the solicitation referenced in paragraphs (a)(1)(i) and (ii) of this section shall require the apparently successful offeror to submit an acceptable subcontracting plan for either the distinct portion(s) or category(ies) of their proposal for which the offeror is other than small or for the entirety of their proposal, at the offeror's discretion. When determining the need for a subcontracting plan, the contracting officer must consider the cumulative dollar value of the portion(s) or category(ies) of the offeror's proposal for which the offeror is other than small.

(b) Subcontracting plans (see paragraph (a) of this section) are not required—

(1) From small business concerns;

(2) For personal services contracts; or

(3) For contracts or contract modifications that will be performed entirely outside of the United States and its outlying areas.

(c) (1) The contracting officer must determine whether subcontracting possibilities exist by considering relevant factors such as—

(i) Whether firms engaged in the business of furnishing the types of items to be acquired usually contract for performance of part of the work or maintain sufficient in-house capability to perform the work;

(ii) Whether there are likely to be product prequalification requirements; and

(iii) Whether the firm can acquire any portion of the work with minimal or no disruption to performance (with consideration given to the time remaining until contract completion), and at fair market value, when a plan is required under 19.302-1.

(2) If it is determined that there are no subcontracting possibilities, the determination must include a detailed rationale, be approved at a level above the contracting officer, and placed in the contract file.

(d) In solicitations for negotiated acquisitions, the contracting officer may require the submission of subcontracting plans with initial offers or at any other time prior to award. In determining when subcontracting plans should be required, as well as when and with whom plans should be negotiated, the contracting officer must consider the integrity of the competitive process, the goal of affording maximum practicable opportunity for small business and the socioeconomic categories to participate, and the burden placed on offerors.

(e) (1) Insert the clause at 52.219-8, Utilization of Small Business Concerns, in solicitations and contracts when the contract amount is expected to exceed the simplified acquisition threshold unless—

(i) A personal services contract is considered (see 37.104); or

(ii) The contract, together with all of its subcontracts, will be performed entirely outside of the United States and its outlying areas.

(2) (i) Insert the clause at 52.219-9, Small Business Subcontracting Plan, in solicitations and contracts that offer subcontracting possibilities, are expected to exceed $900,000 ($2 million for construction of any public facility), and are required to include the clause at 52.219-8, Utilization of Small Business Concerns, unless the acquisition is set aside or is to be accomplished under the 8(a) program. When—

(A) Contracting by sealed bidding rather than by negotiation, use the clause with its Alternate I;

(B) Contracting by negotiation, and subcontracting plans are required with initial proposals as provided for in 19.109(d), use the clause with its Alternate II; or

(C) The contract action will not be reported in the Federal Procurement Data System pursuant to part 4, use the clause with its Alternate III.

(ii) Insert the clause at 52.219-16, Liquidated Damages—Subcontracting Plan, in all solicitations and contracts containing the clause at 52.219-9, Small Business Subcontracting Plan, or the clause with its Alternate I or II.

(f) (1) The contracting officer may, when contracting by negotiation, insert in solicitations and contracts a clause substantially the same as the clause at 52.219-10, Incentive Subcontracting Program, when a subcontracting plan is required, and inclusion of a monetary incentive is, in the judgment of the contracting officer, necessary to increase subcontracting opportunities for small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, and is commensurate with the efficient and economical performance of the contract; unless the conditions in paragraph (f)(3) of this section are applicable. The contracting officer may vary the terms of the clause as specified in paragraph (f)(2) of this section.

(2) Various approaches may be used in the development of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns' subcontracting incentives. They can take many forms, from a fully quantified schedule of payments based on actual subcontract achievement to an award-fee approach employing subjective evaluation criteria (see paragraph (f)(3) of this section). The incentive should not reward the contractor for results other than those that are attributable to the contractor's efforts under the incentive subcontracting program.

(3) As specified in paragraph (f)(2) of this section, the contracting officer may include small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business subcontracting as one of the factors to be considered in determining the award fee in a cost-plus-award-fee contract; in such cases, however, the contracting officer must not use the clause at 52.219-10, Incentive Subcontracting Program.

(g) The contracting officer must provide the SBA's procurement center representative (or, if a procurement center representative is not assigned, see 19.102(b)) a reasonable period of time to review any solicitation requiring submission of a subcontracting plan and to submit advisory findings before the solicitation is issued.

(h) For evaluation requirements related to subcontracting plans, see FAR 19.206.

19.110 Price evaluation preference for HUBZone small business concerns.

(a) Use the price evaluation preference for HUBZone small business concerns in acquisitions conducted using full and open competition. Do not use the preference—

(1) Where price is not a selection factor because in this situation a price evaluation preference would not be considered (e.g., architect/engineer acquisitions); or

(2) Where all fair and reasonable offers are accepted (e.g., the award of multiple award schedule contracts).

(b) Insert the provision at 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns, in solicitations for acquisitions conducted using full and open competition.

(c) For use of clause 52.219-14, Limitations on Subcontracting, see the prescription at 19.104-3(c).

(d) For use of clause 52.219-33, Nonmanufacturer Rule, see the prescription at 19.104-3(e).

(e) For evaluation requirements related to the HUBZone price evaluation preference, see FAR 19.207.

19.111 Orders under multiple-award contracts.

19.111-1 Size.

(a) When placing orders under multiple-award contracts with a single NAICS code, the contracting officer must assign the order the same NAICS code and corresponding size standard designated in the contract.

(b) When placing orders under multiple-award contracts with more than one NAICS code, the contracting officer must assign the order the NAICS code and corresponding size standard designated in the contract for the distinct portion or

category against which the order is placed. If an order covers multiple portions or categories, select the NAICS code and corresponding size standard designated in the contract for the distinct portion or category that best represents the principal purpose of the order.

19.111-2 Set-asides.

(a) (1) In accordance with section 1331 of the Small Business Jobs Act of 2010 (15 U.S.C. 644(r)(2)), contracting officers may, at their discretion, set aside orders placed under multiple-award contracts for any of the small business concerns identified in 19.000(a)(3).

(2) A contracting officer's decision to set aside or not set aside an order for small business concerns is an exercise of discretion granted to agencies and not a basis for protest. However, this does not preclude the filing of a protest of such an order if such a protest would otherwise be authorized on a separate basis recognized in accordance with 16.505(a)(10)(i).

(b) The contracting officer must comply with the specific program eligibility requirements identified in this part in addition to the ordering procedures for a multiple-award contract (for orders placed against the Federal Supply Schedules Program, see subpart 8.4; for orders placed under all other multiple-award contracts, see subpart 16.5).

19.112 Reserves.

(a) In accordance with section 1331 of the Small Business Jobs Act of 2010 (15 U.S.C. 644(r)(3)) and 13 CFR 125.2(e)(4), contracting officers may, at their discretion when conducting multiple-award procurements using full and open competition, reserve one or more contract awards for any of the small business concerns identified in 19.000(a)(3), when market research indicates—

(1) A total set-aside is not feasible because there is no reasonable expectation of receiving offers that are competitive in terms of fair market prices, quality, and delivery from at least two responsible small business concerns identified in 19.000(a)(3), that can perform the entire requirement; and

(2) A partial set-aside is not feasible because—

(i) The contracting officer is unable to divide the requirement into distinct portions; or

(ii) There is no reasonable expectation that at least two responsible small business concerns identified in 19.000(a)(3) can perform any portion of the requirement competitively in terms of fair market price, quality, and delivery.

(b) A reserve will result in one of the following:

(1) One or more contract awards to any one or more types of small business concerns identified in 19.000(a)(3).

(2) In the case of a solicitation of a bundled requirement that will result in a multiple-award contract, an award to one or more small businesses with a Small Business Teaming Arrangement.

(c) The specific program eligibility requirements identified in this part apply.

(d) The limitations on subcontracting and the nonmanufacturer rule (see 52.219-14 and 52.219-33) do not apply to reserves at the contract level, but shall apply to orders that are set aside under 19.111-2.

(e) The contracting officer must insert the provision at 52.219-31, Notice of Small Business Reserve, in solicitations for multiple-award contracts that have reserves.

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Subpart 19.2 - Evaluation and Award

19.201 Small business size and socioeconomic status determination.

19.201-1 Representations.

(a) (1) To be eligible for award as a small business concern, an offeror is required to represent in good faith—

(i) (A) That it meets the small business size standard corresponding to the North American Industry Classification System (NAICS) code identified in the solicitation; or

(B) For a multiple-award contract where there is more than one NAICS code assigned, that it meets the small business size standard for each distinct portion or category (*e.g.,* line item numbers, Special Item Numbers (SINs), sectors, functional areas, or the equivalent) for which it submits an offer. If the small business concern submits an offer for the entire multiple-award contract, it must meet the size standard for each distinct portion or category (*e.g.,* line item number, SIN, sector, functional area, or equivalent); and

(ii) The Small Business Administration (SBA) has not issued a written determination stating otherwise pursuant to 13 CFR 121.1009.

(2) To be eligible for award as a small business concern under a socioeconomic program listed in this part, the small business concern has to be certified by SBA for that program (see 19.101(a)(2)(i)).

(b) (1) A joint venture may qualify as a small business concern if the joint venture complies with the requirements of 13 CFR 121.103(h) and 13 CFR 125.8(a) and (b).

(2) A joint venture may qualify for an award under the socioeconomic programs as described in 19.105, 19.106, 19.107, and 19.108.

(c) An offeror is required to represent its size in writing to the contracting officer at the time of initial offer, (whether or not the offer includes price or the price is evaluated), including offers for—

(1) Basic ordering agreements (see part 16); and

(2) Blanket purchase agreements (BPAs) issued pursuant to part 12.

(d) To be eligible for an award of an order under a basic ordering agreement or a BPA issued pursuant to part 12 as a small business concern identified in 19.000(a)(3), the offeror must be a small business concern identified in 19.000(a)(3) at the time of award of the order.

(e) Multiple-award contract representations:

(1) A business that represents as a small business concern at the time of its initial offer for the contract (whether or not the offer includes price or the price is evaluated (see 13 CFR 121.404(a)(1)(iv)), is considered a small business concern for each order issued under the contract.

(2) A business that represents as a small business concern at the time of its initial offer for a distinct portion or category as set forth in paragraph (a)(1)(i)(B) is considered a small business concern for each order issued under that distinct portion or category.

(f) For requirements related to rerepresenting size after award, see FAR 19.301.

(g) The contracting officer must accept an offeror's representation in a specific bid or proposal that it is a small business unless (1) another offeror or interested party challenges the concern's small business representation or (2) the contracting officer has a reason to question the representation. Challenges of and questions concerning a specific representation must be referred to the SBA in accordance with 19.201-2.

(h) An offeror's representation that it is a small business is not binding on the SBA. If an offeror's small business status is challenged, the SBA will evaluate the status of the concern and make a determination, which will be binding on the contracting officer, as to whether the offeror is a small business. A concern cannot become eligible for a specific award by taking action to meet the definition of a small business concern after the SBA has determined that it is not a small business.

19.201-2 Protesting a small business representation or rerepresentation.

(a) (1) The SBA regulations on small business size and size protests are found at 13 CFR part 121.

(2) An offeror, the contracting officer, SBA, or another interested party may protest the small business representation of an offeror in a specific offer for a contract. However, for competitive 8(a) contracts, the filing of a protest is limited to an offeror, the contracting officer, or SBA. See 13 CFR 121.1001(a).

(b) Any time after offers are received by the contracting officer, or in the case of bids, opened, the contracting officer may question the small business representation of any offeror in a specific offer by filing a contracting officer's protest (see paragraph (c) of this section).

(c) (1) Any contracting officer who receives a protest, whether timely or not, or who, as the contracting officer, wishes to protest the small business representation of an offeror, or rerepresentation of a contractor, must promptly forward the protest to the SBA Government Contracting Area Director at the Government Contracting Area Office serving the area in which the headquarters of the offeror is located.

(2) The protest, or confirmation if the protest was initiated orally, must be in writing and must contain the basis for the protest with specific, detailed evidence to support the allegation that the offeror is not small. The SBA will dismiss any protest that does not contain specific grounds for the protest.

(3) The protest must include a referral letter written by the contracting officer with information pertaining to the solicitation. The referral letter must include the following information to allow SBA to determine timeliness and standing:

(i) The protest and any accompanying materials.

(ii) A copy of the size self-certification.

(iii) Identification of the applicable size standard.

(iv) A copy of or an electronic link to the solicitation and any amendments.

(v) The name, address, telephone number, email address, and fax number of the contracting officer.

(vi) Identification of the bid opening date or the date of notification provided to unsuccessful offerors.

(vii) The date the contracting officer received the protest.

(viii) A complete address and point of contact for the protested concern.

(d) In order to affect a specific solicitation, a protest must be timely. SBA's regulations on timeliness are contained in 13 CFR 121.1004. SBA's regulations on timeliness related to protests of disadvantaged status are contained in 13 CFR part 124, subpart B.

(1) To be timely, a protest by any concern or other interested party must be received by the contracting officer by the close of business of the fifth business day after—

(i) Bid opening for sealed bid acquisitions; or

(ii) Receipt of the special notification from the contracting officer (see 15.503(a)(2)) that identifies the apparently successful offeror for negotiated acquisitions, including—

(A) Partial set-asides and reserves of multiple-award contracts; and

(B) Orders that are set-aside under an unrestricted multiple-award contract (except for orders and blanket purchase agreements placed against a Federal Supply Schedule contract (see 8.4 and paragraph (d)(5) of this section)); or

(iii) Receipt of notification using other communication means when written notification is not required.

(2) A protest may be made orally if it is confirmed in writing and received by the contracting officer within the 5-day period or by letter postmarked no later than 1 business day after the oral protest.

(3) A protest may be made in writing if it is delivered to the contracting officer by hand, mail, facsimile, email, express or overnight delivery service.

(4) Except as provided in paragraph (d)(6) of this section, a protest filed by the contracting officer or SBA is always considered timely whether filed before or after award.

(5) A protest under a GSA Multiple Award Schedule will be timely if received by SBA at any time prior to the expiration of the contract period, including renewals.

(6) A protest filed before bid opening, or notification to offerors of the selection of the apparent successful offeror, will be dismissed as premature by SBA.

(e) Upon receipt of a protest from or forwarded by the Contracting Office, the SBA will—

(1) Notify the contracting officer and the protester of the date it was received, and that the size of the concern being challenged is under consideration by the SBA; and

(2) Furnish to the concern whose representation is being protested a copy of the protest and a blank SBA Form 355, Application for Small Business Determination, by certified mail, return receipt requested.

(f) (1) Within 15 business days after receipt of a protest or request for a formal size determination or within any extension of time granted by the contracting officer the SBA Area Office will determine the size status of the challenged concern. The SBA Area Office will notify the contracting officer, the protester, and the challenged concern of its decision by a verifiable means, which may include facsimile, electronic mail, or overnight delivery service.

(2) Award may be made to a protested concern after the SBA Area Office has determined that the protested concern is an eligible small business or has dismissed all protests against it.

(3) If SBA's Office of Hearings and Appeals (OHA) subsequently overturns the Area Office's determination of eligibility or dismissal, and contract award has not been made, the contracting officer may apply the OHA decision to the procurement in question.

(g) (1) After receiving a protest involving an offeror being considered for award, the contracting officer must not award the contract until the SBA has made a size determination or 15 business days have expired since SBA's receipt of a protest, whichever occurs first; however, award must not be withheld when the contracting officer determines in writing that an award must be made to protect the public interest.

(2) If SBA has not made a determination within 15 business days, or within any extension of time granted by the contracting officer, the contracting officer may award the contract after determining in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the Government.

(3) SBA may, at its sole discretion, reopen a formal size determination to correct an error or mistake, if it is within the appeal period and no appeal has been filed with OHA or, a final decision has not been rendered by the SBA Area Office or OHA.

(4) If a protest is received that challenges the small business status of an offeror not being considered for award, the contracting officer is not required to suspend contract action. The contracting officer must forward the protest to the SBA (see paragraph (c)(1) of this section) with a notation that the concern is not being considered for award, and must notify the protester of this action.

(h) An appeal from an SBA size determination may be filed by any concern or other interested party whose protest of the small business representation of another concern has been denied by an SBA Government Contracting Area Director, any concern or other interested party that has been adversely affected by an SBA Government Contracting Area Director's decision, or the SBA Associate Administrator for the SBA program involved. The appeal must be filed with the Office of Hearings and Appeals, within the time limits and in strict accordance with the procedures contained in Subpart C of 13 CFR part 134. It is within the discretion of the SBA Judge whether to accept an appeal from a size determination. If a post-award appeal is submitted to OHA within the time limits specified in Subpart C of 13 CFR part 134, the contracting officer must consider suspending contract performance until an SBA Judge decides the appeal. SBA will inform the contracting officer of its ruling on the appeal. SBA's decision, if received before award, will apply to the pending acquisition. If the contracting officer has made a written determination in accordance with (g)(1) or (2) of this section, the contract has been awarded, the SBA rulings is received after award, and OHA finds the protested concern to be ineligible for award, the contracting officer must terminate the contract unless termination is not in the best interests of the Government, in keeping with the circumstances described in the written determination. However, the contracting officer must not exercise any options or award further task or delivery orders.

(i) SBA will dismiss untimely protests. A protest that is not timely, even though received before award, must be forwarded to the SBA Government Contracting Area Office (see paragraph (c)(1) of this section), with a notation the protest is not timely. A protest received by a contracting officer after award of a contract must be forwarded to the SBA Government Contracting Area Office with a notation that award has been made.

(j) When a concern is found to be other than small under a protest concerning a size status rerepresentation made in accordance with the clause at 52.219-28, Postaward Small Business Program Rerepresentation, a contracting officer may permit contract performance to continue, issue orders, or exercise option(s), because the contract remains a valid contract.

19.201-3 Small disadvantaged business status.

(a) The contracting officer may accept an offeror's representation that it is a small disadvantaged business (SDB) concern.

(b) The provision at 52.219-1, Small Business Program Representations is used to collect SDB data.

(c) A representation of SDB status on a Federal prime contract will be deemed a misrepresentation of SDB status if the firm does not meet the requirements of 13 CFR 124.1001.

(d) Any person or entity that misrepresents a firm's status as an SDB concern in order to obtain a contracting opportunity in accordance with section 8(d) of the Small Business Act, (15 U.S.C. 637(d)) will be subject to the penalties imposed by section 16(d) of the Small Business Act, (15 U.S.C. 645(d)), as well as any other penalty authorized by law.

(e) SBA may initiate the review of SDB status on any firm that has represented itself to be an SDB on a prime contract or subcontract to a Federal prime contract whenever it receives credible information calling into question the SDB status of the firm.

(f) Requests for an SBA review of SDB status may be forwarded to the Small Business Administration, in accordance with 13 CFR 124.1002(b).

(g) An SBA review of a subcontractor's SDB status differs from a formal protest.

19.201-4 Protesting a firm's status as a HUBZone small business concern.

(a) *Definition.* As used in this section—

Interested party has the meaning given in 13 CFR 126.103.

(b) (1) For sole-source procurements, SBA or the contracting officer may protest the prospective contractor's certified HUBZone status; for all other procurements, SBA, the contracting officer, or any other interested party may protest the apparent successful offeror's certified HUBZone status (see 13 CFR 126.800).

(2) The Director of SBA's Office of the HUBZone Program will determine whether the concern has certified HUBZone status. If SBA upholds the protest, SBA will remove the concern's HUBZone status in the Small Business Search (SBS). SBA's protest regulations are found in subpart H "Protests" at 13 CFR 126.800 through 126.805.

(c) Protests relating to small business size status are subject to the procedures of 19.201-2. An interested party seeking to protest both the small business size and HUBZone status of an apparent successful offeror shall file two separate protests. Protests relating to small business size status for the acquisition and the HUBZone eligibility requirements will be processed concurrently by SBA.

(d) (1) All protests must be in writing and must state all specific grounds for the protest (*i.e.,* why the protested concern did not meet the eligibility requirements at 13 CFR 126.200 at the time of the concern's application to SBA for certification as a HUBZone small business concern or at the time SBA certified or last recertified the concern as a HUBZone small business concern). Assertions that a protested concern is not a HUBZone small business concern, without setting forth specific facts or allegations, will not be considered by SBA (see 13 CFR 126.801(b)).

(2) Protests filed against a HUBZone joint venture must state one or, if applicable, both of the following:

(i) Why the HUBZone small business party to the joint venture did not meet the eligibility requirements at 13 CFR 126.200 at the time of its application to SBA for certification or at the time SBA certified or last recertified the concern as a HUBZone small business concern.

(ii) Why the joint venture did not meet the requirements at 13 CFR 126.616 at the time of submission of its offer for a HUBZone contract.

(3) SBA will consider protests for HUBZone set-aside or sole-source service contracts or orders, if a HUBZone prime contractor is unduly reliant on a small entity subcontractor that is not a similarly-situated entity as defined in 13 CFR 125.1, or if such subcontractor performs the primary and vital requirements of the contract. For allegations that the prime contractor is unduly reliant on an other-than-small subcontractor, see size protests at 19.201-2 and 13 CFR 121.103(h)(3), which treats the pair as joint venturers for size determination purposes (the "ostensible subcontractor rule").

(e) *Submission of a protest.*

(1) An interested party shall submit its written protest to the contracting officer—

(i) For sealed bids—

(A) By the close of business on the fifth business day after bid opening; or

(B) By the close of business on the fifth business day from the date of identification of the apparent successful offeror, if the price evaluation preference was not applied at the time of bid opening;

(ii) For negotiated acquisitions, by the close of business on the fifth business day after receipt of the special notification from the contracting officer (see part 15) of the apparently successful offeror, including—

(A) Orders placed under multiple-award contracts where the contracting officer requested rerepresentation for the order (see 13 CFR 126.801(d)(1)); and

(B) Orders set aside for HUBZone small businesses under multiple-award contracts that are not partially or totally set-aside or reserved for HUBZone small business concerns (see 13 CFR 126.801(d)(1)), except for orders and blanket purchase agreements placed against a Federal Supply Schedule contract (see part 8); or

(iii) By the close of business on the fifth business day after receipt of notification using other communication means when written notification is not required.

(2) Any protest received after the designated time limits is untimely, unless it is from the contracting officer or SBA.

(f) The contracting officer must forward all protests with a referral letter to the Director of SBA's Office of the HUBZone Program, by email to *hzprotests@sba.gov.* The referral letter must include the following—

(1) The solicitation number;

(2) The contracting officer's name and contact information;

(3) The type of HUBZone contract (*i.e.,* sole-source, set-aside, full and open competition with a HUBZone price evaluation preference, or reserve for HUBZone small business concerns under a multiple-award contract);

(4) For a procurement conducted using full and open competition with a HUBZone price evaluation preference, whether the protester's opportunity for award was affected by the preference;

(5) For a HUBZone set-aside, whether the protester submitted an offer;

(6) Whether the protested concern was the apparent successful offeror;

(7) Whether the procurement was conducted using sealed bid or negotiated procedures;
(8) The bid opening date, if applicable;
(9) The date the protester was notified of the apparent successful offeror;
(10) The date the contracting officer received the protest;
(11) The date the protested concern submitted its initial offer or quote to the contracting officer; and
(12) Whether a contract has been awarded, and if so, the date of award and contract number.

(g) SBA will notify the protester and the contracting officer of the date SBA received the protest.

(h) *Before SBA decision.*

(1) After receiving a protest involving the apparent successful offeror's status as a HUBZone small business concern, the contracting officer must either—

(i) Withhold award of the contract until SBA determines the status of the protested concern; or

(ii) Award the contract if—

(A) SBA does not issue its decision within 15 business days after receipt of the protest; and

(B) The contracting officer determines in writing that there is an immediate need to award the contract and that waiting for SBA's determination will be disadvantageous to the Government.

(2) SBA will determine the merits of the status protest within 15 business days after receipt of a protest, or within any extension of time granted by the contracting officer.

(i) *After SBA decision.* The SBA will notify the contracting officer, the protester, and the protested concern of the SBA determination. The determination is effective immediately and is final unless overturned on appeal by SBA's Associate Administrator, Office of Government Contracting and Business Development(AA/GC&BD).

(1) If the contracting officer has withheld contract award and SBA has determined that the protested concern is an eligible HUBZone or dismissed all protests against the protested concern, the contracting officer may award the contract to the protested concern. If the AA/GC&BD subsequently overturns the initial determination or dismissal, the contracting officer may apply the AA/GC&BD decision to the procurement in question.

(2) If the contracting officer has withheld award and the HUBZone Program Director has determined that the protested concern is ineligible, and a timely AA/GC&BD appeal has not been filed, then the contracting officer must not award the contract to the protested concern.

(3) If the contracting officer has made a written determination in accordance with (h)(1)(ii)(B) of this section, awarded the contract, and the Director of SBA's Office of the HUBZone Program's ruling sustaining the protest is received after award —

(i) The contracting officer must either—

(A) Terminate the contract; or

(B) *(1)* Make a written determination that termination is not in the best interests of the Government; and

(2) Not exercise any options or award further task or delivery orders under the contract.

(ii) SBA will remove the concern's designation as a certified HUBZone small business concern in the Small Business Search (SBS). The concern is not permitted to submit an offer as a HUBZone small business concern until SBA issues a decision that the ineligibility is resolved; and

(iii) After SBA updates the concern's designation as a HUBZone small business in SBS, the contracting officer must update the Federal Procurement Data System (FPDS) to reflect the final decision of the HUBZone Program Director if no appeal is filed.

(4) If the contracting officer has made a written determination in accordance with (h)(1)(ii)(B) of this section, awarded the contract, SBA has sustained the protest and determined that the concern is not a HUBZone small business, and a timely (AA/GC&BD) appeal has been filed, then the contracting officer must consider whether performance can be suspended until an (AA/GC&BD) decision is rendered.

(5) If the AA/GC&BD affirms the decision of the HUBZone Program Director, finding the protested concern is ineligible, and contract award has occurred—

(i) The contracting officer must either—

(A) Terminate the contract; or

(B) *(1)* Make a written determination that termination is not in the best interests of the Government; and

(2) Not exercise any options or award further task or delivery orders under the contract;

(ii) SBA will remove the concern's designation as a certified HUBZone small business concern in SBS. The concern is not permitted to submit an offer as a HUBZone small business concern until SBA issues a decision that the ineligibility is resolved or the AA/GC&BD finds the concern is eligible on appeal; and

(iii) After SBA updates the concern's designation as a HUBZone small business in SBS, the contracting officer must update FPDS to reflect the AA/GC&BD decision.

(6) A concern found to be ineligible during a HUBZone status protest is precluded from applying for HUBZone certification for 90 calendar days from the date of the SBA final decision.

(j) *Appeals of HUBZone status determinations.* The protested HUBZone small business concern, the protester, or the contracting officer may file appeals of protest determinations with SBA's AA/GC&BD. The AA/GC&BD must receive the appeal no later than 5 business days after the date of receipt of the protest determination. SBA will dismiss any untimely appeal.

(k) *The appeal must be in writing.* The appeal must identify the protest determination being appealed and must set forth a full and specific statement as to why the decision is erroneous or what significant fact the HUBZone Program Director failed to consider.

(l) (1) The party appealing the decision must provide notice of the appeal to—

(i) The contracting officer; and

(ii) The protested HUBZone small business concern or the original protester, as appropriate.

(2) SBA will not consider additional information or changed circumstances that were not disclosed at the time of the HUBZone Program Director's determination or that are based on disagreement with the findings and conclusions contained in the determination.

(m) The AA/GC&BD will make its decision within 5 business days of the receipt of the appeal, if practicable, and will base its decision only on the information and documentation in the protest record as supplemented by the appeal. SBA will provide a copy of the decision to the contracting officer, the protester, and the protested HUBZone small business concern. The SBA decision, if received before award, will apply to the pending acquisition. The AA/GC&BD's decision is the final decision.

19.201-5 Protesting a firm's status as a service-disabled veteran-owned small business concern.

(a) *Definition. Interested party,* as used in this section, has the meaning given in 13 CFR 134.1002(b).

(b) *General.* (1) For sole source acquisitions, the contracting officer, the Department of Veterans Affairs (VA), or SBA may protest the apparently successful offeror's service-disabled veteran-owned small business (SDVOSB) status. For all other acquisitions, any interested party may protest the apparently successful offeror's SDVOSB status.

(2) SBA's protest regulations are found in 13 CFR 128.500 and 13 CFR part 134.

(c) Protests relating to small business size status are subject to the procedures of 19.201-2. An interested party seeking to protest both the small business size and SDVOSB status of an apparent successful offeror shall file two separate protests.

(d) All protests must be in writing and must state all specific grounds for the protest.

(1) OHA will consider protests challenging the SDVOSB status or the ownership and control of a concern if—

(i) For status protests, the protester presents evidence supporting the contention that the owner(s) cannot provide documentation from the VA to show that they meet the definition of “service-disabled veteran” or “service-disabled veteran with a permanent and severe disability” as set forth in 13 CFR 128.102; or

(ii) For ownership and control protests, the protester presents evidence that the concern is not 51 percent owned and controlled by one or more service-disabled veterans. In the case of a veteran with a permanent and severe disability, the protester presents evidence that the concern is not controlled by the veteran, spouse, or permanent caregiver of such veteran; or

(iii) For set-aside or sole-source service contract or order ostensible subcontractor protests, the protester presents credible evidence of the alleged undue reliance on a small entity subcontractor that is not a similarly-situated entity as defined in 13 CFR 125.1, or credible evidence that the small non-similarly situated entity is performing the primary and vital requirements of the contract. For allegations that the prime contractor is unduly reliant on an other-than-small subcontractor, see size protests at 19.201-2, and 13 CFR 121.103(h)(3), which treats the pair as joint venturers for size determination purposes (the “ostensible subcontractor rule”); or

(iv) For joint venture protests, the protester presents evidence that the managing SDVOSB joint venture partner does not meet the requirements at 13 CFR 128.402.

(2) Assertions that a protested concern is not a SDVOSB concern, without setting forth specific facts or allegations, will not be considered by OHA (see 13 CFR 134.1005)

(e) *Protest by an interested party.* (1) An interested party (except contracting officers should see paragraph (f)(1) of this section) shall submit its protest to the contracting officer—

(i) To be received by close of business on the fifth business day after bid opening for sealed bid acquisitions;

(ii) To be received by close of business on the fifth business day after receipt of the special notification from the contracting officer (see part 15) that identifies the apparently successful offeror for negotiated acquisitions, including—

(A) Orders placed under multiple-award contracts where the contracting officer requested rerepresentation for the order (see 13 CFR 134.1004(a)(3)(ii)); and

(B) Orders set aside for service-disabled veteran-owned small businesses under multiple-award contracts that are not partially or totally set aside or reserved for SDVOSB concerns (see 13 CFR 134.1004(a)(3)(i)), except for orders and blanket purchase agreements placed against a Federal Supply Schedule contract (see part 8);

(iii) To be received by close of business on the fifth business day after notification by the contracting officer of the intended awardee for an order that is set aside for SDVOSBs under a multiple-award contract that was not totally or partially set aside or reserved for SDVOSB concerns. This paragraph (e)(1)(iii) does not apply to an order issued against a Federal Supply Schedule (FSS) contract;

(iv) To be received by the close of the fifth business day after notification by the contracting officer of the intended awardee for a blanket purchase agreement that is set aside for SDVOSBs under a multiple-award contract that was not totally or partially set aside or reserved for SDVOSB concerns. This paragraph (e)(1)(iv) does not apply to a blanket purchase agreement issued under a FSS contract; or

(v) To be received by the close of business on the fifth business day after receipt of notification using other communication means when written notification is not required.

(2) Any protest received after the designated time limits is untimely, except—

(i) The VA or SBA may file an SDVOSB status protest at any time; and

(ii) The contracting officer, SBA, or VA may file an SDVOSB status protest at any time after the apparent awardee has been identified or after bid opening, whichever applies.

(f) *Forwarding protests to SBA.* (1) The contracting officer must forward all protests to the U.S. Small Business Administration, Office of Hearings and Appeals, 409 Third Street SW, Washington, DC 20416, or by email at *OHAfilings@sba.gov,* marked "Attn: SDVOSB Status Protest" (see 13 CFR 134.1004(c)).

(2) The protest shall include a referral letter written by the contracting officer with information pertaining to the solicitation. The referral letter must include the following information to allow OHA to determine timeliness and standing:

(i) The solicitation number (or an electronic link to or a paper copy of the solicitation).

(ii) The name, address, telephone number, and email address of the contracting officer.

(iii) Whether the contract was sole-source or set-aside.

(iv) Whether the protestor submitted an offer.

(v) Whether the protested concern was the apparent successful offeror.

(vi) When the protested concern submitted its initial offer that included price.

(vii) Whether the acquisition was conducted using sealed bid or negotiated procedures.

(viii) The bid opening date, if applicable.

(ix) The date the contracting officer received the protest.

(x) The date the protestor received notification about the apparent successful offeror, if applicable.

(xi) Whether a contract has been awarded.

(g) *Notification by OHA.* OHA will notify the protester, the protested concern, SBA's Director of Government Contracting (D/GC), SBA Counsel, and the contracting officer of the date OHA received the protest.

(h) *Before OHA decision.* (1) After receiving a protest involving the apparent successful offeror's status as an SDVOSB concern, the contracting officer must either—

(i) Withhold award of the contract until OHA determines the status of the protested concern; or

(ii) Award the contract after receipt of the protest but before OHA issues its decision if the contracting officer determines in writing that an award must be made to protect the public interest. The contracting officer must notify OHA and SBA D/GC in writing of the determination and a copy must be included in the contract file.

(2) OHA will determine the merits of the status protest.

(3) OHA does not have a standard timeline for issuing decisions.

(i) *After OHA decision.* OHA will notify the contracting officer, the protester, and the protested concern of its decision. The decision is effective immediately and is final.

(1) If the contracting officer has withheld contract award and OHA has determined that the protested concern is an eligible SDVOSB or dismissed all protests against the protested concern, then the contracting officer may award the contract to the protested concern.

(2) If the contracting officer has withheld contract award, and OHA has sustained the protest and determined that the concern is not an SDVOSB, then the contracting officer must not award the contract to the protested concern.

(3) If the contracting officer has made a written determination in accordance with paragraph (h)(1)(ii) of this section, the contract has been awarded, and the OHA decision to sustain the protest is received after award—

(i) The contracting officer must terminate the contract, unless the contracting officer has made a written determination that termination is not in the best interests of the Government. However, the contracting officer must not exercise any options or award further task or delivery orders;

(ii) The contracting officer must update FPDS to reflect the final OHA decision; and

(iii) The concern must remove its designation in the System for Award Management (SAM) as an SDVOSB concern within 2 days of the OHA decision. SBA will update the concern's SDVOSB status in SAM if the concern fails to do so. The concern shall not submit an offer as a SDVOSB concern or an SDVOSB concern eligible under the SDVOSB Program, until the concern is designated as an SDVOSB by SBA in the SBA Veteran Small Business Certification Program database at *https://veterans.certify.sba.gov.*

(4) A concern found to be ineligible may not submit future offers as an SDVOSB concern until the concern is designated as an SDVOSB by SBA in the SBA Veteran Small Business Certification Program database at *https://veterans.certify.sba.gov.*

19.201-6 Protesting a firm's status as an economically disadvantaged women-owned small business concern or women-owned small business concern eligible under the Women-Owned Small Business Program.

(a) *Definition. Interested party,* as used in this section, has the meaning given in 13 CFR 127.102.

(b) (1) For sole source acquisitions, the contracting officer or SBA may protest the offeror's status as an economically disadvantaged women-owned small business (EDWOSB) concern or as a WOSB concern eligible under the WOSB Program. For all other acquisitions, an interested party (see 13 CFR 127.102) may protest the apparent successful offeror's EDWOSB or WOSB status.

(2) SBA's protest regulations are found in subpart F "Protests" at 13 CFR 127.600 through 127.605.

(c) Protests relating to small business size status are subject to the procedures of 19.201-2. An interested party seeking to protest both the small business size and WOSB or EDWOSB status of an apparent successful offeror shall file two separate protests.

(d) All protests shall be in writing and must state all specific grounds for the protest.

(1) SBA will consider protests challenging the status of a concern if—

(i) The protest presents evidence that the concern is not at least 51 percent owned and controlled by one or more women who are United States citizens;

(ii) The protest presents evidence that the concern is not at least 51 percent owned and controlled by one or more economically disadvantaged women who are United States citizens, when it is in connection with an EDWOSB contract; or

(iii) For WOSB or EDWOSB set-aside or sole-source service contracts or orders, the protest presents evidence that the prime contractor is unduly reliant on a small entity subcontractor that is not a similarly-situated entity as defined in 13 CFR 125.1, or a protest alleging that such subcontractor is performing the primary and vital requirements of a set-aside or sole-source WOSB or EDWOSB contract. For allegations that the prime contractor is unduly reliant on an other-than-small subcontractor, see size protests at 19.201-2, and 13 CFR 121.103(h)(3), which treats the pair as joint venturers for size determination purposes (the "ostensible subcontractor rule").

(2) Assertions that a protested concern is not an EDWOSB or WOSB concern eligible under the WOSB Program, without setting forth specific facts or allegations, will not be considered by SBA (see 13 CFR 127.603(a)).

(e) *Protest by an interested party.* (1) An offeror shall submit its protest to the contracting officer—

(i) To be received by the close of business by the fifth business day after bid opening for sealed bid acquisitions;

(ii) To be received by the close of business by the fifth business day after receipt of the special notification from the contracting officer (see part 15) that identifies the apparently successful offeror for negotiated acquisitions including—

(A) Orders placed under multiple-award contracts where the contracting officer requested rerepresentation for the order (see 13 CFR 127.603(c)(1)); and

(B) Orders set aside for EDWOSB or WOSB concerns under multiple-award contracts that are not partially or totally set aside or reserved for EDWOSB or WOSB concerns (see 13 CFR 127.603(c)(1)), except for orders and blanket purchase agreements placed against a Federal Supply Schedule contract (see part 8); or

(iii) To be received by the close of business on the fifth business day after receipt of notification using other communication means when written notification is not required.

(2) Any protest received after the designated time limit is untimely, unless it is from the contracting officer or SBA.

(f) (1) The contracting officer must forward all protests to SBA. The protests are to be submitted to SBA's Director for Government Contracting by email at *wosbprotest@sba.gov*.

(2) The protest shall include a referral letter written by the contracting officer with information pertaining to the solicitation. The referral letter must include the following information to allow SBA to determine timeliness and standing:

(i) The solicitation number or electronic link to or a paper copy of the solicitation.

(ii) The name, address, telephone number, email address, and facsimile number of the contracting officer.

(iii) Whether the protestor submitted an offer.

(iv) Whether the protested concern was the apparent successful offeror.

(v) When the protested concern submitted its offer.

(vi) Whether the acquisition was conducted using sealed bid or negotiated procedures.

(vii) The bid opening date, if applicable.

(viii) The date the contracting officer received the protest.

(ix) The date the protestor received notification about the apparent successful offeror, if applicable.

(x) Whether a contract has been awarded.

(g) SBA will notify the protester and the contracting officer of the date SBA received the protest.

(h) *Before SBA decision.* (1) After receiving a protest involving the apparent successful offeror's status as an EDWOSB or WOSB concern eligible under the WOSB Program, the contracting officer must either—

(i) Withhold award of the contract until SBA determines the status of the protested concern; or

(ii) Award the contract after receipt of the protest but before SBA issues its decision if the contracting officer determines in writing that an award must be made to protect the public interest.

(2) SBA will determine the merits of the status protest within 15 business days after receipt of a protest, or within any extension of that time granted by the contracting officer.

(3) If SBA does not issue its determination within 15 business days, or within any extension of time granted, the contracting officer may award the contract after determining in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the Government. This determination must be provided to the SBA Director for Government Contracting and a copy must be included in the contract file.

(i) *After SBA decision.* SBA will notify the contracting officer, the protester, and the protested concern of its determination. The determination is effective immediately and is final unless overturned on appeal by OHA pursuant to 13 CFR part 134.

(1) If the contracting officer has withheld contract award and SBA has denied or dismissed the protest, the contracting officer may award the contract to the protested concern. If OHA subsequently overturns the SBA Director for Government Contracting's determination or dismissal, the contracting officer may apply the OHA decision to the procurement in question.

(2) If the contracting officer has withheld contract award, SBA has sustained the protest and determined that the concern is not eligible under the WOSB Program, and no OHA appeal has been filed, then the contracting officer must not award the contract to the protested concern.

(3) If the contracting officer has made a written determination in accordance with (h)(1)(ii) or (h)(3) of this section, awarded the contract, and SBA's ruling is received after award, and no OHA appeal has been filed, then—

(i) The contracting officer must terminate the contract, unless the contracting officer has made a written determination that termination is not in the best interests of the Government. However, the contracting officer must not exercise any options or award further task or delivery orders;

(ii) The contracting officer must update the FPDS to reflect the final SBA decision; and

(iii) SBA will remove the concern's designation in the Small Business Search (SBS) as an EDWOSB or WOSB concern eligible under the WOSB Program. The concern shall not submit an offer as an EDWOSB concern or WOSB concern eligible under the WOSB Program, until SBA issues a decision that the ineligibility is resolved.

(4) If the contracting officer has made a written determination in accordance with (h)(1)(ii) or (h)(3) of this section, contract award has occurred, SBA has sustained the protest and determined that the concern is not eligible under the WOSB Program, and a timely OHA appeal has been filed, then the contracting officer must consider whether performance can be suspended until an OHA decision is rendered.

(5) If OHA affirms the SBA Director for Government Contracting's determination finding the protested concern is ineligible, then—

(i) The contracting officer must terminate the contract, unless the contracting officer has made a written determination that termination is not in the best interests of the Government. However, the contracting officer must not exercise any options or award further task or delivery orders;

(ii) The contracting officer must update the FPDS to reflect OHA's decision; and

(iii) SBA will remove the concern's designation in SBS as an EDWOSB or WOSB concern eligible under the WOSB Program. The concern shall not submit an offer as an EDWOSB concern or WOSB concern eligible under the WOSB Program, until SBA issues a decision that the ineligibility is resolved or OHA finds the concern is eligible on appeal.

(j) *Appeals of EDWOSB or WOSB concerns eligible under the WOSB Program status determinations.*

(1) The protested EDWOSB concern or WOSB concern eligible under the WOSB program, the protester, or the contracting officer may file an appeal of a WOSB or EDWOSB status protest determination with OHA.

(2) OHA must receive the appeal no later than 10 business days after the date of receipt of the protest determination. SBA will dismiss an untimely appeal.

(3) See subpart G "Rules of Practice for Appeals From Women-Owned Small Business Concerns (WOSB) and Economically Disadvantaged WOSB Concern (EDWOSB) Protests" at 13 CFR 134.701 through 134.715 for SBA's appeals regulations.

(k) *The appeal must be in writing.* The appeal must identify the protest determination being appealed and must set forth a full and specific statement as to why the EDWOSB concern or WOSB concern eligible under the WOSB program protest determination is alleged to be based on a clear error of fact or law, together with an argument supporting such allegation.

(l) The party appealing the decision must provide notice of the appeal to—

(1) The contracting officer;

(2) Director, Office of Government Contracting, U.S. Small Business Administration, by email at *wosbprotest@sba.gov*;

(3) The protested EDWOSB concern or WOSB concern eligible under the WOSB program, or the original protester, as appropriate; and

(4) SBA's Office of General Counsel, Associate General Counsel for Procurement Law, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416, or email at *OPLService@sba.gov.*

(m) OHA will make its decision within 15 business days of the receipt of the appeal, if practicable. SBA will provide a copy of the decision to the contracting officer, the protester, and the protested EDWOSB concern or WOSB concern eligible under the WOSB program. The OHA decision is the final agency decision and is binding on the parties.

19.201-7 Protesting an 8(a) participant's eligibility or size status.

(a) The eligibility of an 8(a) participant for a sole source or competitive 8(a) requirement may not be challenged by another 8(a) participant or any other party, either to SBA or any administrative forum as part of a bid or other contract protest (see 13 CFR 124.517).

(b) The size status of an 8(a) participant nominated for an 8(a) sole source contract may not be protested by another 8(a) participant or any other party.

(c) The size status of the apparent successful offeror for competitive 8(a) awards may be protested. The filing of a size status protest is limited to—

(1) Any offeror whom the contracting officer has not eliminated for reasons unrelated to size;

(2) The contracting officer; or

(3) The SBA District Director in either the district office serving the geographical area in which the contracting activity is located or the district office that services the apparent successful offeror, or the Associate Administrator for Business Development.

(d) Protests of competitive 8(a) awards shall follow the procedures at 19.201-2. For additional information, refer to 13 CFR 121.1001.

(e) If the size status of an 8(a) participant nominated for award of an 8(a) sole source contract is called into question, a request for a formal size determination may be submitted to SBA pursuant to 13 CFR 121.1001(b)(2)(ii) by—

(1) The 8(a) participant nominated for award of the particular sole source contract;

(2) The contracting officer who has been delegated SBA's 8(a) contract execution functions, where applicable, or the SBA program official with authority to execute the 8(a) contract;

(3) The SBA District Director in the district office that services the 8(a) participant or the Associate Administrator for Business Development; or

(4) The SBA Inspector General.

(f) SBA's Government Contracting Area Director will issue a formal size determination within 15 business days, if possible, after SBA receives the request for a formal size determination.

(g) An appeal of an SBA size determination shall follow the procedures at 19.201-2.

19.202 Encouraging small business responses.

Contracting officers must provide to any small business concern, upon its request—

(a) A copy of solicitations with respect to any contract to be awarded;

(b) The name and telephone number of an agency contact to answer questions related to the prospective contract; and

(c) Adequate citations to each major Federal law or agency rule with which the business concern must comply in performing the contract, other than laws or agency rules with which the small business must comply even when doing business with entities other than the Government.

19.203 Equal low bids.

(a) In the event of equal low bids (see 14.408-6), make awards first to small business concerns that are also labor surplus area concerns, and second to small business concerns that are not also labor surplus area concerns.

(b) Insert the provision at 52.219-2, Equal Low Bids, in solicitations when contracting by sealed bidding and—

(1) The contract is for supplies to be delivered or services to be performed in the United States or its outlying areas; or

(2) The contracting officer has applied this part in accordance with 19.000(b)(1)(ii).

19.204 Certificate of Competency.

A Certificate of Competency (COC) is the certificate SBA issues stating that, for the purpose of receiving and performing a specific Government contract, the holder is responsible with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, tenacity, and limitations on subcontracting.

(a) The COC program empowers SBA to certify to Government contracting officers regarding all elements of responsibility of any small business concern to receive and perform a specific Government contract. The COC program does not extend to questions concerning regulatory requirements that other Federal agencies impose and enforce.

(b) The COC program applies to all Government acquisitions except for 8(a) sole-source awards. If a contracting officer determines an apparent successful small business offeror to be nonresponsible, the contracting officer must refer that small business to SBA for a possible COC, even if the next acceptable offer is from a small business. Contracting officers, including those located overseas, must comply with this section for U.S. small business concerns.

(c) When a solicitation requires a small business to comply with the limitations on subcontracting, a contracting officer's finding that a small business cannot comply with the limitation must be treated as an element of responsibility and must be subject to the COC process.

(d) When a contracting officer determines and documents that an apparent successful small business offeror lacks one or more elements of responsibility listed in the introductory text of this section (for sureties see 28.101-3(f) and 28.203-1(e)), the contracting officer must—

(1) Withhold contract award; and

(2) Refer the matter to the appropriate SBA Government Contracting Area Office (Area Office) serving the area where the offeror’s headquarters is located, in accordance with agency procedures.

(e) The referral must include—

(1) A notice that a small business concern has been determined to be nonresponsible, specifying the element(s) of responsibility the contracting officer found lacking; and

(2) If applicable, a copy of the following:

(i) Solicitation.

(ii) Final offer submitted by the apparent successful offeror whose responsibility is at issue.

(f) The contracting officer must withhold award for a period of 15 business days following receipt by the appropriate SBA Area Office of a referral that includes all required documentation.

(g) In order to determine whether to issue or deny a COC, SBA conducts a review in accordance with 13 CFR 125.5. At the completion of the COC review process, SBA will notify the concern and the contracting officer that the COC is denied or is being issued.

(h) If new information causes the contracting officer to determine that the concern referred to the SBA is actually responsible to perform the contract, and award has not already been made under paragraph (j) of this section, the contracting officer must—

(1) Reverse the determination of nonresponsibility;

(2) Notify the SBA of this action;

(3) Withdraw the referral; and

(4) Proceed to award the contract.

(i) SBA COCs are final with respect to all elements of responsibility of prospective small business contractors. An SBA-certified concern must not be required to meet any other requirements of responsibility. Where SBA issues a COC, the contracting officer may decide not to award to that offeror for reasons unrelated to responsibility.

(j) The contracting officer must award the contract to another appropriately selected and responsible offeror if SBA has not issued a COC within 15 business days after receiving the referral.

19.205 Evaluating and awarding set-asides.

(a) If the contracting officer receives only one acceptable offer from a responsible small business concern in response to a set-aside, the contracting officer should make an award to that firm.

(b) If the contracting officer receives no acceptable offers from responsible small business concerns for a small business set-aside under 19.104, the set-aside must be withdrawn and the requirement, if still valid, must be resolicited on an unrestricted basis.

(c) Except as authorized by law, do not award a contract as a small business or socioeconomic status category set-aside if the cost to the awarding agency exceeds the fair market price. The fair market price is the price achieved in accordance with the reasonable price guidelines in 15.404-1(b).

(d) (1) If, before award of a contract involving a small business set-aside, the contracting officer considers that award would be detrimental to the public interest (e.g., payment of more than a fair market price), the contracting officer may withdraw the small business set-aside.

(2) The contracting officer must prepare a written statement supporting any withdrawal or modification of a small business set-aside and include it in the contract file.

(3) If a small business set-aside acquisition is not awarded, the determination to set the acquisition aside is automatically dissolved. The required supplies and/or services for which no award was made may be acquired by using other methods, as appropriate.

19.206 Evaluating small business subcontracting plans.

19.206-1 Types of subcontracting plans.

(a) Contractors may establish, on a plant or division-wide basis, a master subcontracting plan (see 19.001) that contains all the elements required by the clause at 52.219-9, Small Business Subcontracting Plan, except goals. Master subcontracting plans shall be effective for a 3-year period after approval by the contracting officer; however, it is incumbent upon contractors to maintain and update master subcontracting plans. Changes required to update master subcontracting plans are not effective until approved by the contracting officer. A master subcontracting plan, when incorporated in an individual plan, shall apply to that contract throughout the life of the contract.

(b) An individual subcontracting plan contains all the elements required by the clause at 52.219-9, Small Business Subcontracting Plan, and separate statements and goals based on total subcontract dollars for the basic contract and for each option.

(c) A commercial subcontracting plan is the preferred type of subcontracting plan for contractors furnishing commercial products and commercial services. The subcontracting goals established for a commercial plan shall include all indirect costs with the exception of those such as the following: Employee salaries and benefits; payments for petty cash; depreciation; interest; income taxes; property taxes; lease payments; bank fees; fines, claims, and dues; original equipment manufacturer relationships during warranty periods (negotiated up front with the product); utilities and other services purchased from a municipality or an entity solely authorized by the municipality to provide those services in a particular geographical region; and philanthropic contributions. Once a contractor's commercial plan has been approved, the Government must not require another subcontracting plan from the same contractor while the plan remains in effect, as long as the product or service being provided by the contractor continues to meet the definition of a commercial product or commercial service. The contractor shall—

(1) Submit the commercial plan to either the first contracting officer awarding a contract subject to the plan during the contractor's fiscal year, or, if the contractor has ongoing contracts with commercial plans, to the contracting officer responsible for the contract with the latest completion date. The contracting officer must negotiate the commercial plan for the Government. The approved commercial plan shall remain in effect during the contractor's fiscal year for all Government contracts in effect during that period;

(2) Submit a new commercial plan, 30 working days before the end of the Contractor's fiscal year, to the contracting officer responsible for the uncompleted Government contract with the latest completion date. The contractor must provide to

each contracting officer responsible for an ongoing contract subject to the plan, the identity of the contracting officer that will be negotiating the new plan;

(3) When the new commercial plan is approved, provide a copy of the approved plan to each contracting officer responsible for an ongoing contract that is subject to the plan; and

(4) Comply with the reporting requirements stated in the clause at 52.219-9, Small Business Subcontracting Plan, by submitting one SSR that includes all indirect costs, except as described in paragraph (d) of this section, in SPR, for all contracts covered by its commercial plan. This report will be monitored in SPR by the agency that approved the plan. The report shall be submitted within 45 days after the end of the Government's fiscal year.

19.206-2 Elements of the subcontracting plan.

(a) Each subcontracting plan required under 19.109(a) must include the elements listed in paragraph (d) of the clause at 52.219-9, Small Business Subcontracting Plan.

(b) According to 15 U.S.C. 657r(a), a mentor with an SBA-approved mentor-protégé agreement (see 13 CFR 125.9) that awards a subcontract to its protégé may apply the costs incurred for training it provides to its protégé toward its subcontracting plan goals, if the protégé is a covered territory business or the protégé’s principal office is located in the Commonwealth of Puerto Rico.

19.206-3 Reviewing the subcontracting plan.

The contracting officer must review the subcontracting plan for adequacy, ensuring that it includes the required information, goals, and assurances (see paragraph (d) of the clause at 52.219-9).

(a) No detailed standards apply to every subcontracting plan. Instead, the contracting officer must consider each plan in terms of the circumstances of the particular acquisition, including—

(1) Previous involvement of small business concerns as prime contractors or subcontractors in similar acquisitions;

(2) Proven methods of involving small business concerns as subcontractors in similar acquisitions; and

(3) The relative success of methods the contractor intends to use to meet the goals and requirements of the plan, as evidenced by records maintained by contractors.

(b) If, under a sealed bid solicitation, a bidder submits a plan that does not cover each of the required elements (see paragraph (d) of the clause at 52.219-9), the contracting officer must advise the bidder of the deficiency and request submission of a revised plan by a specific date. If the bidder does not submit a plan that includes the required elements by the deadline, the bidder is ineligible for award. If the plan, although responsive, indicates the bidder's intention not to comply with its obligations under the clause at 52.219-8, Utilization of Small Business Concerns, the contracting officer may find the bidder nonresponsible.

(c) In negotiated acquisitions, the contracting officer must determine whether the plan is acceptable based on the negotiation of each of the required elements of the plan (see paragraph (d) of the clause at 52.219-9). Subcontracting goals should be set at a level that the parties reasonably expect can result from the offeror’s good faith efforts to use small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business subcontractors as much as possible. The contracting officer must take particular care to ensure that the offeror has not submitted unreasonably low goals to minimize exposure to liquidated damages and to avoid the administrative burden of demonstrating good faith efforts. Also, the contracting officer should pay close attention to identifying steps that, if taken, would be considered a good faith effort (see 19.302-2(b) and (c)). Do not negotiate increased goals if a higher goal will significantly increase the Government's cost or make it hard to meet acquisition objectives. An incentive subcontracting clause (see 52.219-10, Incentive Subcontracting Program), may be used when additional and unique contract effort, such as providing technical assistance, could significantly increase subcontract awards to small business, small disadvantaged business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business concerns.

(d) To determine whether a proposed subcontracting plan is acceptable, the contracting officer should:

(1) Find information about, and evaluate, the offeror's past performance in awarding subcontracts for the same or similar products or services to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. If information is not available on a specific type of product or service, evaluate the offeror's overall past performance and consider the performance of other contractors on similar efforts.

(2) According to 15 U.S.C. 637(d)(4)(F)(iii), ensure that the goals offered are attainable in relation to—

(i) The subcontracting opportunities available to the contractor, commensurate with the efficient and economical performance of the contract;

(ii) The pool of eligible subcontractors available to fulfill the subcontracting opportunities; and

(iii) The actual performance of such contractor in fulfilling the subcontracting goals specified in prior plans.

(3) Ensure that the subcontracting goals are consistent with the offeror's certified cost or pricing data or data other than certified cost or pricing data.

(4) Evaluate the offeror's make-or-buy policy or program to ensure that it does not conflict with the offeror's proposed subcontracting plan and is in the Government's interest. If the contract involves products or services that are particularly specialized or not generally available in the commercial market, consider the offeror's current capacity to perform the work and the possibility of reduced subcontracting opportunities.

(5) Evaluate subcontracting potential, considering the offeror's make-or-buy policies or programs, the nature of the supplies or services to be subcontracted, the known availability of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns in the geographical area where the work will be performed, and the potential contractor's long-standing contractual relationship with its suppliers.

(6) Advise the offeror of available sources of information on potential small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business subcontractors, as well as any specific concerns known to be potential subcontractors. If the offerors proposed goals are questionable, the contracting officer must emphasize that the information should be used to develop realistic and acceptable goals.

(7) Obtain advice and recommendations from the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.102(b)) and the agency small business specialist.

(e) In making an award that requires a subcontracting plan, the contracting officer must:

(1) Consider the contractor's compliance with the subcontracting plans submitted on previous contracts as a factor to determine contractor responsibility.

(2) Assure that a subcontracting plan was submitted when required.

(3) Notify the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.102(b)) of the opportunity to review the proposed contract (including the plan and supporting documentation). The notice must be issued in sufficient time to provide the representative a reasonable time to review the material and submit advisory recommendations to the contracting officer. Failure of the representative to respond in a reasonable period of time shall not delay contract award.

(4) Determine any fee that may be payable if an incentive is used in conjunction with the subcontracting plan.

(5) Ensure that an acceptable plan is incorporated into and made a material part of the contract.

(f) Letter contracts and similar undefinitized contracts, which would otherwise meet the requirements of 19.109(a), must contain at least a preliminary basic plan addressing the requirements of paragraph (d) of the clause at 52.219-9 and in such cases require the negotiation of the final plan within 90 days after award or before definitization, whichever occurs first.

19.207 Evaluating offers using the HUBZone price evaluation preference.

The contracting officer must give offers from HUBZone small business concerns a price evaluation preference by adding a factor of 10 percent to all offers, except—

(a) Offers from HUBZone small business concerns that have not waived the evaluation preference; or

(b) Otherwise successful offers from small business concerns.

19.208 Evaluating and awarding under the 8(a) Program.

19.208-1 Procedures for competitive 8(a).

(a) Offers must be solicited from those sources identified in accordance with 19.108-4(c).

(b) The SBA will determine the eligibility of the apparent successful offeror. Eligibility is based on section 8(a) program criteria (see 13 CFR 124.501(g) and 19.208-6(c)).

(1) In either negotiated or sealed bid competitive 8(a) acquisitions SBA will determine the eligibility of the apparent successful offeror and advise the contracting office within 5 working days after receipt of the contracting office's request for an eligibility determination.

(i) If SBA determines that the apparent successful offeror is ineligible, the contracting officer will then send to SBA the identity of the next highest evaluated offeror for an eligibility determination. The process is repeated until SBA determines that an identified offeror is eligible for award.

(ii) If the contracting officer believes that the apparent successful offeror (or the offeror SBA has determined eligible for award) is not responsible to perform the contract, the contracting officer must refer the matter to SBA for Certificate of Competency consideration under 19.204.

(2) For a two-step design-build procurement, an 8(a) participant must be eligible for award under the 8(a) program on the initial date for receipt of phase one offers specified in the solicitation (see 13 CFR 124.507(d)(3)).

(3) In any case in which an 8(a) participant is determined to be ineligible, SBA will notify the 8(a) participant of that determination.

(c) Any party with information questioning the eligibility of an 8(a) participant to continue participation in the 8(a) program or for the purposes of a specific 8(a) award may submit such information to the SBA in accordance with 13 CFR 124.112(c).

(d) (1) SBA does not certify joint ventures, as entities, into the 8(a) program.

(2) A contracting officer may consider a joint venture for contract award. SBA does not approve joint ventures for competitive awards (but see 13 CFR 124.501(g) for SBA's determination of participant eligibility).

19.208-2 Contract negotiation.

(a) *Sole source*.

(1) The SBA may not accept for negotiation a sole-source 8(a) contract that exceeds $30 million unless the requesting agency has completed a justification in accordance with the requirements of 6.104.

(2) The SBA is responsible for initiating negotiations with the agency within the time established by the agency. If the SBA does not initiate negotiations within the agreed time and the agency cannot allow additional time, the agency may, after notifying the SBA, proceed with the acquisition from other sources.

(3) The SBA should participate, whenever practicable, in negotiating the contracting terms. When mutually agreeable, the SBA may authorize the contracting officer to negotiate directly with the 8(a) participant. Whether or not direct negotiations take place, the SBA is responsible for approving the resulting contract before award.

(4) An 8(a) participant must represent that it is a small business in accordance with the size standard corresponding to the NAICS code assigned to the contract.

(5) A concern must be a current participant in the 8(a) program at the time of an 8(a) sole-source award.

(6) An 8(a) participant owned by an Alaska Native Corporation, Indian Tribe, Native Hawaiian Organization, or Community Development Corporation may not receive an 8(a) sole-source award that is a follow-on contract to an 8(a) contract, if the predecessor contract was performed by another 8(a) participant (or former 8(a) participant) owned by the same Alaska Native Corporation, Indian Tribe, Native Hawaiian Organization, or Community Development Corporation. See 13 CFR 124.109 through 124.111.

(b) *Competitive*. In competitive 8(a) acquisitions, including follow-on 8(a) acquisitions, subject to part 15, the contracting officer conducts negotiations directly with the competing 8(a) participants. Conducting competitive negotiations among eligible 8(a) participants prior to SBA's formal acceptance of the acquisition for the 8(a) program may be grounds for the SBA's not accepting the acquisition for the 8(a) program (see 19.108-4).

19.208-3 Pricing the 8(a) contract.

(a) The contracting officer must price the 8(a) contract in accordance with subpart 15.4. If required by subpart 15.4, the SBA shall obtain certified cost or pricing data from the 8(a) contractor. If the SBA requests audit assistance to determine the proposed price to be fair and reasonable in a sole source acquisition, the contracting activity must furnish it to the extent it is available.

(b) An 8(a) contract, sole source or competitive, may not be awarded if the price of the contract results in a cost to the contracting agency which exceeds a fair market price.

(c) If requested by the SBA, the contracting officer must make available the data used to estimate the fair market price within 10 working days.

(d) The negotiated contract price and the estimated fair market price are subject to the concurrence of the SBA. In the event of a disagreement between the contracting officer and the SBA, the SBA may appeal in accordance with 19.208-8.

19.208-4 Estimating the fair market price.

(a) The contracting officer must estimate the fair market price of the work to be performed by the 8(a) contractor.

(b) In estimating the fair market price for an acquisition other than those covered in paragraph (c) of this section, the contracting officer must use cost or price analysis and consider commercial prices for similar products and services, available in-house cost estimates, data (including certified cost or pricing data) submitted by the SBA or the 8(a) contractor, and data obtained from any other Government agency.

(c) In estimating a fair market price for a repeat purchase, the contracting officer must consider prices for similar products and services, recent award prices for the same items or work if there is comparability in quantities, conditions, terms, and performance times. The estimated price should be adjusted to reflect differences in specifications, plans, transportation costs, packaging and packing costs, and other circumstances. Price indices may be used as guides to determine the changes in labor and material costs. Comparison of commercial prices for similar items may also be used.

19.208-5 Preaward survey.

The contracting officer should request a preaward survey of the 8(a) participant whenever considered useful. If the results of the preaward survey or other information available to the contracting officer raise substantial doubt as to the participant's ability to perform, the contracting officer must refer the matter to SBA for Certificate of Competency consideration under 19.204.

19.208-6 Effect of exiting the 8(a) program on eligibility for award.

(a) Except as provided in paragraph (c) of this section, when a contractor exits the 8(a) program, it is no longer eligible to receive new 8(a) contracts.

(b) If an 8(a) contractor is suspended from the program (see 13 CFR 124.305), it may not receive any new 8(a) contracts unless the head of the contracting agency makes a determination that it is in the best interest of the Government to issue the award and SBA adopts that determination.

(c) A contractor that has completed its term of participation in the 8(a) program may be awarded a competitive 8(a) contract if it was an 8(a) participant eligible for award of the contract on the initial date specified for receipt of offers contained in the solicitation, and if the contractor continues to meet all other applicable eligibility criteria (see 13 CFR 124.507(d)).

(d) SBA's regulations on exiting the 8(a) program are found at 13 CFR 124.301 through 124.305, and 13 CFR 124.507(d).

19.208-7 Preparing the contracts.

(a) *Sole source*.

(1) The contract to be awarded by the agency to the SBA shall be prepared in accordance with agency procedures and in the same detail as would be required in a contract with a business concern. The contracting officer must use the Standard Form 26 as the award form, except for construction contracts, in which case the Standard Form 1442 must be used as required in 36.701(a).

(2) The contracting officer must prepare the contract that the SBA will award to the 8(a) participant in accordance with agency procedures, as if awarding the contract directly to the 8(a) participant, except for the following:

(i) The award form must cite 41 U.S.C. 3304(a)(5) or 10 U.S.C. 3204(a)(5) (as appropriate) as the authority for use of other than full and open competition.

(ii) Appropriate clauses must be included, as necessary, to reflect that the contract is between the SBA and the 8(a) contractor.

(iii) The following items shall be inserted by the SBA—

(A) The SBA contract number.

(B) The effective date.

(C) The typed name of the SBA's contracting officer.

(D) The signature of the SBA's contracting officer.

(E) The date signed.

(iv) The SBA will obtain the signature of the 8(a) contractor prior to signing and returning the prime contract to the contracting officer for signature. The SBA will make every effort to obtain signatures and return the contract, and any subsequent bilateral modification, to the contracting officer within a maximum of 10 working days.

(3) Except in procurements where the SBA will make advance payments to its 8(a) contractor, the agency contracting officer may, as an alternative to the procedures in paragraphs (a) and (b) of this subsection, use a single contract document for

both the prime contract between the agency and the SBA and its 8(a) contractor. The single contract document must contain the information in paragraphs (a)(2)(i), (ii), and (iii) of this subsection. Appropriate blocks on the Standard Form (SF) 26 or 1442 will be asterisked and a continuation sheet appended as a tripartite agreement which includes the following:

(i) Agency acquisition office, prime contract number, name of agency contracting officer and lines for signature, date signed, and effective date.

(ii) The SBA office, the SBA contract number, name of the SBA contracting officer, and lines for signature and date signed.

(iii) Name and lines for the 8(a) contractor's signature and date signed.

(4) For acquisitions not exceeding the simplified acquisition threshold, the contracting officer may use the alternative procedures in paragraph (a)(3) of this subsection with the appropriate simplified acquisition forms.

(b) *Competitive*.

(1) The contract will be prepared in accordance with 14.408-1(d), except that appropriate blocks on the Standard Form 26 or 1442 will be asterisked and a continuation sheet appended as a tripartite agreement which includes the following:

(i) The agency contracting activity, prime contract number, name of agency contracting officer, and lines for signature, date signed, and effective date.

(ii) The SBA office, the SBA subcontract number, name of the SBA contracting officer and lines for signature and date signed.

(2) The process for obtaining signatures shall be as specified in paragraph (a)(2)(iv) of this section.

19.208-8 SBA appeals.

(a) The SBA Administrator may submit the following matters for determination to the agency head if the SBA and the contracting officer fail to agree on them:

(1) A contracting officer's decision to reject a specific 8(a) participant for award of an 8(a) contract after SBA's acceptance of the requirement for the 8(a) program.

(2) The terms and conditions of a proposed 8(a) contract, including the contracting officer's NAICS code designation and estimate of the fair market price.

(b) The procedures at 19.102(f) apply to this section if there is disagreement between the contracting officer and the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.102(b)) regarding the matters in paragraph (a).

(c) If the SBA appeal is denied, the decision of the agency head must specify the reasons for the denial, including the reasons why the selected participant was determined incapable of performance, if appropriate. The decision shall be made a part of the contract file.

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Subpart 19.3 - Postaward

19.301 Small business size rerepresentations.

(a) A contractor that represented itself as a small business concern before contract award must rerepresent its size status in accordance with the clause at 52.219-28, Postaward Small Business Program Rerepresentation, for the North American Industry Classification System (NAICS) code(s) in the contract upon the occurrence of any of the following:

(1) Within 30 days after execution of a novation agreement or within 30 days after modification of the contract to include the clause at 52.219-28, Post-Award Small Business Program Rerepresentation, if the novation agreement was executed prior to inclusion of this clause in the contract.

(2) Within 30 days after a merger or acquisition of the contractor that does not require novation or within 30 days after modification of the contract to include the clause at 52.219-28, Post-Award Small Business Program Rerepresentation, if the merger or acquisition occurred prior to inclusion of this clause in the contract.

(3) For long-term contracts—

(i) Within 60 to 120 days prior to the end of the fifth year of the contract; and

(ii) Within 60 to 120 days prior to the date specified in the contract for exercising any option thereafter.

(b) A contractor must rerepresent its size status in accordance with the size standard in effect at the time of its rerepresentation that corresponds to the NAICS code that was initially assigned to the contract. For multiple-award contracts where there is more than one NAICS code assigned, the contractor is required to rerepresent its size status for each NAICS code assigned to the contract.

(c) After a contractor rerepresents it is other than small in accordance with 52.219-28, the agency may no longer include the value of options exercised, modifications issued, orders issued, or purchases made under blanket purchase agreements on that contract in its small business prime contracting goal achievements. Agencies should issue a modification to the contract capturing the rerepresentation and report it to FPDS within 30 days after notification of the rerepresentation.

(d) A change in size status does not change the terms and conditions of the contract. However, the contracting officer may require a subcontracting plan for a contract containing 52.219-9, Small Business Subcontracting Plan, if a prime contractor's size status changes from small to other than small as a result of a size rerepresentation (see 19.109(c)(3)).

(e) A contractor that represented itself as other than small before contract award may, but is not required to, rerepresent its size status when—

(1) The conditions in paragraph (a) of this section apply; and

(2) The contractor qualifies as a small business concern under the applicable size standard in effect at the time of its rerepresentation.

19.302 Small business subcontracting plans.

19.302-1 Getting a plan after award.

(a) (1) The contracting officer must require the contractor to submit a subcontracting plan for the contract if—

(i) A contract modification causes the value of a contract without a subcontracting plan to exceed the subcontracting plan threshold (see 19.109(a)); and

(ii) The contracting officer determines that subcontracting opportunities exist.

(2) For a multiple-award contract with more than one NAICS code, the modification referenced in paragraph (a)(1) of this section must require the contractor to submit an acceptable subcontracting plan for either the distinct portion(s) or category(ies) of the contract for which the contractor is other than small or for the entirety of their contract, at the contractor's discretion. When determining the need for a subcontracting plan, the contracting officer must consider the cumulative dollar value of the portion(s) or category(ies) of the contract for which the contractor is other than small.

(3) See 19.109 for guidance on which contracts are exempt and how to determine if subcontracting opportunities exist.

(b) (1) If a subcontracting plan is required by paragraph (a) of this section or in accordance with 19.301(d), incorporate into the contract the clause at 52.219-9, Small Business Subcontracting Plan, with its Alternate IV.

(2) Insert the clause at 52.219-16, Liquidated Damages—Subcontracting Plan, in contracts containing the clause at 52.219-9, Small Business Subcontracting Plan, with its Alternate IV.

(c) If the contracting officer adds a subcontracting plan to the contract due to a modification as required by paragraph (a) of this section or as a result of a size rerepresentation (see 19.301(d)), the subcontracting goals apply from the date of incorporation of the subcontracting plan into the contract. The contractor's achievements must be reported on a cumulative basis from the date of incorporation of the subcontracting plan into the contract.

(d) A contract may not have more than one subcontracting plan. However, a contracting officer may establish separate subcontracting goals for each order under an indefinite-delivery, indefinite-quantity contract. When a contract modification exceeds the subcontracting plan threshold (see 19.109(a)) or an option is exercised, the goals of an existing subcontracting plan shall be amended to reflect any new subcontracting opportunities not envisioned at the time of contract award. These goal changes do not apply retroactively.

19.302-2 Compliance with the plan.

(a) The contracting officer must monitor the prime contractor's compliance with its subcontracting plan by ensuring that the contractor submits subcontracting reports in the SPR within 45 days after the report ending date (e.g., by November 14th for the fiscal year ended September 30th).

(1) In order to be eligible as a subcontractor under a subcontracting plan, a concern is required to represent itself as a small business or small disadvantaged business or be certified by SBA as a veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, or woman-owned small business.

(i) To represent itself as a small business or small disadvantaged business, a concern must meet the appropriate definition in 2.101.

(ii) (A) Unless the prime contractor has reason to question the representations, it may accept a subcontractor's written representations of its size and socioeconomic status as a small business or small disadvantaged business, if the subcontractor represents that the representations with its offer are current, accurate, and complete as of the date of the offer for the subcontract; or

(B) Unless the prime contractor has reason to question the representation, it may accept a subcontractor's representations of its size and socioeconomic status as a small business or small disadvantaged business in the System for Award Management (SAM) if—

(1) The subcontractor is registered in SAM; and

(2) The subcontractor represents that the size and socioeconomic status representations made in SAM are current, accurate, and complete as of the date of the offer for the subcontract.

(3) The prime contractor may not require that the subcontractor register in SAM for the purposes of representing size or socioeconomic status in connection with a subcontract.

(iii) A prime contractor acting in good faith is not liable for misrepresentations made by its subcontractors regarding the subcontractor's size or socioeconomic status.

(iv) The contractor, the contracting officer, or any other interested party can challenge a subcontractor's size status representation by filing a protest, in accordance with 13 CFR 121.1001 through 121.1008. Protests challenging the socioeconomic status of a HUBZone small business concern must be filed in accordance with 13 CFR 126.801.

(2) (i) In accordance with 43 U.S.C. 1626, the following procedures apply:

(A) Subcontracts awarded to an ANC or Indian tribe count toward the subcontracting goals for small business and small disadvantaged business concerns, regardless of the size or SBA certification status of the ANC or Indian tribe.

(B) If one or more subcontractors are in the subcontract tier between the prime contractor and the ANC or Indian tribe, then the ANC or Indian tribe is required to designate the appropriate contractor(s) to receive credit for the subcontract toward its small business and small disadvantaged business subcontracting goals.

(1) In most cases, the appropriate contractor is the contractor that awarded the subcontract to the ANC or Indian tribe.

(2) If the ANC or Indian tribe designates more than one contractor to count the subcontract toward its goals, the ANC or Indian tribe is required to designate only a portion of the total subcontract award to each contractor. The sum of the amounts designated to various contractors cannot exceed the total value of the subcontract.

(3) The ANC or Indian tribe is required to give a copy of the written designation to the contracting officer, the prime contractor, and the subcontractors in between the prime contractor and the ANC or Indian tribe within 30 days of the date of the subcontract award.

(4) If the contracting officer does not receive a copy of the ANC's or the Indian tribe's written designation within 30 days of the subcontract award, the contracting officer will consider the contractor that awarded the subcontract to the ANC or Indian tribe the designated contractor.

(ii) A contractor acting in good faith may rely on the written representation of an ANC or an Indian tribe as to the status of the ANC or Indian tribe unless an interested party challenges its status or the contracting officer has independent reason to question its status. In the event of a challenge of a representation of an ANC or Indian tribe, the interested parties shall follow the procedures in part 26.

(3) As authorized by 15 U.S.C. 637(d)(12), agencies may credit certain costs incurred by a mentor firm in providing developmental assistance to a protégé firm under the DoD Mentor-Protégé Program as if they were subcontract awards to a protégé firm for the purpose of determining whether the mentor firm meets the applicable goals under any subcontracting plan entered into with any executive agency. However, the mentor-protégé agreement must have been approved by the Director, Small Business Programs of the cognizant DoD military department or defense agency, before developmental assistance costs may be credited against subcontract goals. A list of approved agreements may be obtained at *https://business.defense.gov/Programs/Mentor-Protege-Program/*

(b) The contracting officer must assess whether the prime contractor made a good faith effort to comply with its small business subcontracting plan.

(1) If, at completion of the basic contract or any option, a contractor has failed to comply with the requirements of its subcontracting plan, which includes meeting its subcontracting goals, the contracting officer must review all available information for an indication that the contractor has not made a good faith effort to comply with the plan. If no such indication is found, the contracting officer must document the file accordingly.

(2) If the contracting officer decides, according to paragraph (b)(1) of this section, that the contractor failed to make a good faith effort to comply with its subcontracting plan, 15 U.S.C. 637(d)(9) states that the contractor is in material breach of its contract. Further, 15 U.S.C. 637(d)(4)(F) directs that the contractor must pay liquidated damages. Accordingly, the contracting officer must initiate action to assess liquidated damages.

(i) The contracting officer must give the contractor written notice under the clause at 52.219-16, Liquidated Damages—Subcontracting Plan. The notice must—

(A) Specify the material breach and indicate that it may be included in the contractor's past performance rating;

(B) Advise the contractor of the possibility that it may have to pay liquidated damages to the Government;

(C) Give the contractor an opportunity to respond to the notice (within 15 working days or longer, as necessary) to show the good faith efforts it made before the contracting officer issues the final decision; and

(D) Specify that the contractor’s failure to respond may be taken as an admission that no valid explanation exists.

(ii) If, after consideration of all the pertinent data and the contractor’s response to the notice in paragraph (b)(2)(i) of this section, the contracting officer finds that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer must issue a final decision to the contractor to that effect, require the contractor to pay liquidated damages, and state the amount to pay. The contracting officer's final decision must state that the contractor has the right to appeal under the clause in the contract entitled Disputes. The contracting officer must follow procedures in the clause at 52.219-16, Liquidated Damages—Subcontracting Plan.

(iii) The amount of damages attributable to the contractor's failure to comply must be equal to the actual dollar amount by which the contractor failed to achieve each subcontracting goal.

(iv) Liquidated damages must be in addition to any other remedies that the Government may have.

(c) (1) In determining whether a contractor failed to make a good faith effort to comply with its subcontracting plan, a contracting officer must look to the totality of the contractor's actions, consistent with the information and assurances provided in its plan. The fact that the contractor failed to meet its subcontracting goals does not, in and of itself, constitute a failure to make a good faith effort. The contracting officer may consider any of the following, though not all inclusive, to be indicators of a good faith effort:

(i) Breaking out work to be subcontracted into economically feasible units, as appropriate, to facilitate small business participation.

(ii) Conducting market research to identify potential small business subcontractors through all reasonable means, such as searching SAM, posting notices or solicitations on SBA's SUBNet, participating in business matchmaking events, and attending preproposal conferences.

(iii) Soliciting small business concerns as early in the acquisition process as practicable to allow them sufficient time to submit a timely offer for the subcontract.

(iv) Providing interested small businesses with adequate and timely information about plans, specifications, and requirements for performance of the prime contract to assist them in submitting a timely offer for the subcontract.

(v) Negotiating in good faith with interested small businesses.

(vi) Directing small businesses that need additional assistance to SBA.

(vii) Assisting interested small businesses in obtaining bonding, lines of credit, required insurance, necessary equipment, supplies, materials, or services.

(viii) Utilizing the available services of small business associations; local, state, and Federal small business assistance offices; and other organizations.

(ix) Participating in a formal mentor-protégé program with one or more small business protégés that results in developmental assistance to the protégés.

(x) Although failing to meet the subcontracting goal in one socioeconomic category, exceeding the goal by an equal or greater amount in one or more of the other categories.

(xi) Fulfilling all of the requirements of the subcontracting plan.

(2) When considered in the context of the contractor's total effort in accordance with its plan, the contracting officer may consider any of the following, though not all inclusive, to be indicators of a failure to make a good faith effort:

(i) Failure to attempt through market research to identify, contact, solicit, or consider for contract award small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business concerns, through all reasonable means including outreach, industry days, or the use of Federal systems such as SBA's Dynamic Small Business Search or SUBNet systems.

(ii) Failure to designate and maintain a company official to administer the subcontracting program and monitor and enforce compliance with the plan.

(iii) Failure to submit an acceptable ISR, or the SSR, using the SPR, or as provided in agency regulations, by the report due dates specified in 52.219-9, Small Business Subcontracting Plan.

(iv) Failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan including subcontracting flowdown requirements.

(v) Adoption of company policies or documented procedures that have as their objectives the frustration of the objectives of the plan.

(vi) Failure to pay small business subcontractors in accordance with the terms of the contract with the prime contractor.

(vii) Failure to correct substantiated findings from Federal subcontracting compliance reviews or participate in subcontracting plan management training offered by the Government.

(viii) Failure to provide the contracting officer with a written explanation if the contractor fails to acquire articles, equipment, supplies, services, or materials or obtain the performance of construction work.

(ix) Falsifying records of subcontract awards to small business concerns.

(d) With respect to commercial plans approved under the clause at 52.219-9, Small Business Subcontracting Plan, the contracting officer that approved the plan must—

(1) Perform the functions of the contracting officer under this subsection on behalf of all agencies with contracts covered by the commercial plan;

(2) Determine whether or not the goals in the commercial plan were achieved and, if they were not achieved, review all available information for an indication that the contractor has not made a good faith effort to comply with the plan, and document the results of the review;

(3) If a determination is made to assess liquidated damages, in order to calculate and assess the amount of damages, the contracting officer must ask the contractor to provide—

(i) Contract numbers for the Government contracts subject to the plan;

(ii) The total Government sales during the contractor's fiscal year; and

(iii) The amount of payments made under the Government contracts subject to that plan that contributed to the contractor's total sales during the contractor's fiscal year; and

(4) When appropriate, assess liquidated damages on the Government's behalf, based on the pro rata share of subcontracting attributable to the Government contracts. A copy of the contracting officer's final decision assessing liquidated damages must be provided to other contracting officers with contracts subject to the commercial plan.

(5) Every contracting officer with a contract that is subject to a commercial plan shall include in the contract file a copy of the approved plan and a copy of the final decision assessing liquidating damages, if applicable.

(e) The contracting officer must assess the prime contractor's written explanation concerning its failure to use a small business concern in the performance of the contract in the same scope, amount, and quality used in preparing and submitting the bid or proposal, if applicable.

19.302-3 Other postaward responsibilities.

After a contract or contract modification containing a subcontracting plan is awarded or an existing subcontracting plan is amended, the contracting officer must do the following:

(a) Notify the SBA of the award by sending a copy of the award document to the Area Director, Office of Government Contracting, in the SBA area office where the contract will be performed.

(b) Forward a copy of each commercial plan and any associated approvals to the Area Director, Office of Government Contracting, in the SBA area office where the contractor's headquarters is located.

(c) Give to the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.102(b)) a copy of—

(1) Any subcontracting plan submitted in response to a sealed bid solicitation; and

(2) The final negotiated subcontracting plan that was incorporated into a negotiated contract or contract modification.

(d) Notify the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.102(b)) of the opportunity to review subcontracting plans in connection with contract modifications.

(e) Forward a copy of each plan, or a determination that there is no requirement for a subcontracting plan, to the cognizant contract administration office.

(f) Agencies shall assign responsibilities for monitoring subcontract reports for anomalies, discrepancies, and errors.

19.303 8(a) Program contracts.

19.303-1 Contract administration.

(a) The contracting officer must assign contract administration functions, as required, based on the location of the 8(a) contractor (see Federal Directory of Contract Administration Services Components, available via the Internet at *https://piee.eb.mil/pcm/xhtml/unauth/index.xhtml*.

(b) The agency must distribute copies of the contract(s) in accordance with part 4. All contracts and modifications, if any, must be distributed to both the SBA and the 8(a).

(c) To the extent consistent with the contracting activity's capability and resources, 8(a) contractors furnishing requirements shall be afforded production and technical assistance, including, when appropriate, identification of causes of deficiencies in their products and suggested corrective action to make such products acceptable.

(d) For 8(a) contracts exceeding 5 years including options, the contracting officer must verify in SBS or SAM that the concern is an SBA-certified 8(a) participant no more than 120 days prior to the end of the fifth year of the contract. If the concern is not an SBA-certified 8(a) participant, the contracting officer must not exercise the option (see 13 CFR 124.521(e)(2)).

(e) An 8(a) contract, whether in the base or an option year, must be terminated for convenience if the 8(a) contractor to which it was awarded transfers ownership or control of the firm or if the contract is transferred or novated for any reason to another firm, unless the Administrator of the SBA waives the requirement for contract termination (13 CFR 124.515). The Administrator may waive the termination requirement only if certain conditions exist. Moreover, a waiver of the requirement for termination is permitted only if the 8(a) contractor's request for waiver is made to the SBA prior to the actual relinquishment of ownership or control, except in the case of death or incapacity where the waiver must be submitted within 60 calendar days after such an occurrence. The clauses in the contract entitled “Special 8(a) Contract Conditions” and “Special 8(a) Subcontract Conditions” require the SBA and the 8(a) subcontractor to notify the contracting officer when ownership of the firm is being transferred. When the contracting officer receives information that an 8(a) contractor is planning to transfer ownership or control to another firm, the contracting officer must take action immediately to preserve the option of waiving the termination requirement. The contracting officer must determine the timing of the proposed transfer and its effect on contract performance and mission support. If the contracting officer determines that the SBA does not intend to waive the termination requirement, and termination of the contract would severely impair attainment of the agency's program objectives or mission, the contracting officer must immediately notify the SBA in writing that the agency is requesting a waiver. Within 15 business days thereafter, or such longer period as agreed to by the agency and the SBA, the agency head must either confirm or withdraw the request for waiver. Unless a waiver is approved by the SBA, the contracting officer must terminate the contract for convenience upon receipt of a written request by the SBA. This requirement for a convenience termination does not affect the Government's right to terminate for default if the cause for termination of an 8(a) contract is other than the transfer of ownership or control.

19.303-2 Exiting the 8(a) program.

When a contractor exits the 8(a) program, it remains under contractual obligation to complete existing contracts, and any priced options that may be exercised.

19.303-3 Indefinite-delivery contracts.

(a) Separate offers and acceptances are not required for individual orders under multiple-award contracts (including the Federal Supply Schedules managed by GSA, multi-agency contracts or Governmentwide acquisition contracts, or indefinite-delivery, indefinite-quantity (IDIQ) contracts) that have been set aside for exclusive competition among 8(a) contractors, and the individual order is to be competed among all 8(a) contract holders. SBA's acceptance of the original contract is valid for the term of the contract. Offers and acceptances are required for individual orders under multiple-award contracts that have not been set aside for exclusive competition among 8(a) contractors.

(b) The contracting officer may issue an order on a sole source basis when—

(1) The multiple-award contract was set aside for exclusive competition among 8(a) participants;

(2) The order has an estimated value less than or equal to the dollar thresholds set forth at 19.108-7(a)(2); and

(3) The offering and acceptance procedures at 19.108-4(b) and (c) are followed.

(c) An 8(a) contractor may continue to accept new orders under the contract, even if it exits the 8(a) program, or becomes other than small for the NAICS code(s) assigned to the contract.

(d) Agencies may continue to take credit toward their prime contracting small disadvantaged business or small business goals for orders awarded to 8(a) contractors, even after the contractor's 8(a) program term expires, the contractor otherwise exits the 8(a) program, or the contractor becomes other than small for the NAICS code(s) assigned under the 8(a) contract. However, if an 8(a) contractor rerepresents that it is other than small for the NAICS code(s) assigned under the contract in accordance with 19.301 or, where ownership or control of the 8(a) contractor has changed and SBA has granted a waiver to allow the contractor to continue performance (see 13 CFR 124.515), the agency may not credit any subsequent orders awarded to the contractor towards its small disadvantaged business or small business goals.

PART 20 - RESERVED

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PART 21 - RESERVED

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PART 22 - APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

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As used in this part-

Administrator or Administrator, Wage and Hour Division, as used in this part, means the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210 or an authorized representative.

Agency labor advisor means an individual responsible for advising contracting agency officials on Federal contract labor matters.

e98 means the Department of Labor's approved electronic application (https://www.sam.gov), whereby a contracting officer submits pertinent information to the Department of Labor and requests a Service Contract Labor Standards statute wage determination directly from the Wage and Hour Division.

Normal workweek, as used in this subpart, means, generally, a workweek of 40 hours. Outside the United States and its outlying areas, a workweek longer than 40 hours is considered normal if—

(1) The workweek does not exceed the norm for the area, as determined by local custom, tradition, or law; and

(2) The hours worked in excess of 40 in the workweek are not compensated at a premium rate of pay.

Secretary means the Secretary of Labor, U.S. Department of Labor, unless specified otherwise.

Service contract means any Government contract, or subcontract thereunder, the principal purpose of which is to furnish services in the United States through the use of service employees, except as exempted by 41 U.S.C. chapter 67, Service Contract Labor Standards; see 22.1002-1(c) through (f). See 29 CFR 4.130 for an illustrative list of services covered by the Service Contract Labor Standards statute.

Service employee means any person engaged in the performance of a service contract other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541. The term "service employee" includes all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

Wage Determinations at SAM.gov means the Government internet website for both Construction Wage Rate Requirements statute and Service Contract Labor Standards statute wage determinations available at https://www.sam.gov.

Subpart 22.1 – Basic Labor Policies

22.101-1 Labor relations.

Agencies must maintain sound relations with industry and labor to ensure—

(a) Prompt receipt of information involving labor relations that may adversely affect the Government acquisition process; and

(b) That the Government obtains needed supplies and services without delay. All matters regarding labor relations must be handled in accordance with agency procedures.

22.101-2 Overtime.

Contractors must perform all contracts, so far as practicable, without using overtime, particularly as a regular employment practice, except when lower overall costs to the Government will result or when it is necessary to meet urgent program needs. Any approved overtime, extra-pay shifts, and multishifts should be scheduled to achieve these objectives.

22.102 Presolicitation.

22.102-1 Overtime.

Solicitations normally must not specify delivery or performance schedules that may require overtime at Government expense.

22.102-2 Contract clause.

(a) The head of the contracting activity may designate programs or requirements for which it is necessary that contractors be required to notify the Government of actual or potential labor disputes that are delaying or threaten to delay the timely contract performance. Insert the clause 52.222-1, Notice to the Government of Labor Disputes, in solicitations and contracts that involve programs or requirements that have been so designated.

(b) The contracting officer must include the clause at 52.222-2, Payment for Overtime Premiums, in solicitations and contracts when a cost-reimbursement contract is contemplated and the contract amount is expected to exceed the simplified acquisition threshold; unless (a) a cost-reimbursement contract for operation of vessels is contemplated, or (b) a cost-plus-

incentive-fee contract that will provide a swing from the target fee of at least plus or minus 3 percent and a contractor's share of at least 10 percent is contemplated.

22.103 Evaluation and award.

(a) In negotiating contracts, contracting officers should, consistent with the Government's needs, attempt to--

(1) ascertain the extent that offers are based on the payment of overtime and shift premiums and

(2) negotiate contract prices or estimated costs without these premiums or obtain the requirement from other sources.

(b) When it becomes apparent during negotiations of applicable contracts (see 22.102-2(b)) that overtime will be required in contract performance, the contracting officer must secure from the contractor a request for all overtime to be used during the life of the contract, to the extent that the overtime can be estimated with reasonable certainty. The contractor's request must contain the information required by paragraph (b) of the clause at 52.222-2, Payment for Overtime Premiums.

22.104 Postaward.

22.104-1 General.

(a) Agencies must remain impartial concerning any dispute between labor and contractor management and not undertake the conciliation, mediation, or arbitration of a labor dispute. To the extent practicable, agencies should ensure that the parties to the dispute use all available methods for resolving the dispute, including the services of the National Labor Relations Board, Federal Mediation and Conciliation Service, the National Mediation Board and other appropriate Federal, State, local, or private agencies.

(b) The head of the contracting activity may designate programs or requirements for which it is necessary that contractors be required to notify the Government of actual or potential labor disputes that are delaying or threaten to delay the timely contract performance.

(c) The office administering the contract must report, in accordance with agency procedures, any potential or actual labor disputes that may interfere with performing any contracts under its cognizance. If a contract contains the clause at 52.222-1, Notice to the Government of Labor Disputes, the contractor also must report any actual or potential dispute that may delay contract performance.

22.104-2 Overtime approvals.

(a) The contracting officer must review the contractor's request for overtime. Approval of the use of overtime may be granted by an agency approving official after determining in writing that overtime is necessary to—

(1) Meet essential delivery or performance schedules;

(2) Make up for delays beyond the control and without the fault or negligence of the contractor; or

(3) Eliminate foreseeable extended production bottlenecks that cannot be eliminated in any other way.

(b) Approval by the designated official of use and total dollar amount of overtime is required before inclusion of an amount in paragraph (a) of the clause at 52.222-2, Payment for Overtime Premiums.

(c) Contracting officer approval of payment of overtime premiums is required for time-and-materials and labor-hour contracts (see paragraph (a)(8) of the clause at 52.232-7, Payments Under Time-and-Materials and Labor-Hour Contracts).

(d) No approvals are required for paying overtime premiums under other types of contracts.

(e) Approvals by the agency approving official (see paragraph (a) of this section) may be for an individual contract, project, program, plant, division, or company, as practical.

(f) During contract performance, contractor requests for overtime exceeding the amount authorized by paragraph (a) of the clause at 52.222-2, Payment for Overtime Premiums, must be submitted as stated in paragraph (b) of the clause to the office administering the contract. That office will review the request and if it approves, send the request to the contracting officer. If the contracting officer determines that the requested overtime should be approved in whole or in part, the contracting officer must request the approval of the agency's designated approving official and modify paragraph (a) of the clause to reflect any approval.

(g) Overtime premiums at Government expense should not be approved when the contractor is already obligated, without the right to additional compensation, to meet the required delivery date.

(h) When the use of overtime is authorized under a contract, the office administering the contract and the auditor should periodically review the use of overtime to ensure that it is allowable in accordance with the criteria in part 31. Only overtime premiums for work in those departments, sections, etc., of the contractor's plant that have been individually evaluated and the necessity for overtime confirmed shall be considered for approval.

(i) Approvals for using overtime shall ordinarily be prospective, but, if justified by emergency circumstances, approvals may be retroactive.

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Subpart 22.2 - Convict Labor.

22.201 Presolicitation.

22.201-1 General.

Executive Order 11755, December 29, 1973, as amended by Executive Order 12608, September 9, 1987, and Executive Order 12943, December 13, 1994, does not prohibit the contractor, in performing the contract, from employing certain persons as stated in paragraph (b) of the clause at 52.222-3, Convict Labor.

22.201-2 Contract clause.

Insert the clause at 52.222-3, Convict Labor, in solicitations and contracts above the micro-purchase threshold, when the contract will be performed in the United States, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, or the U.S. Virgin Islands; unless—

(a) The contract will be subject to 41 U.S.C. chapter 65 (see subpart 22.6 and 22.602), which contains a separate prohibition against the employment of convict labor;

(b) The supplies or services are to be purchased from Federal Prison Industries, Inc. (see subpart 8.6); or

(c) The acquisition involves the purchase, from any State prison, of finished supplies that may be secured in the open market or from existing stocks, as distinguished from supplies requiring special fabrication.

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Subpart 22.3 - Contract Work Hours and Safety Standards Act

22.301 Presolicitation.

22.301-1 General.

(a) The statute at 40 U.S.C. chapter 37, Contract Work Hours and Safety Standards, requires that certain contracts contain a clause specifying that no laborer or mechanic doing any part of the work contemplated by the contract shall be required or permitted to work more than 40 hours in any workweek unless paid for all such overtime hours at not less than 1 1⁄2 times the basic rate of pay.

(b) The Secretary under 40 U.S.C. 3706, upon the Secretary's initiative or at the request of any Federal agency, may provide reasonable limitations and allow variations, tolerances, and exemptions to and from any or all provisions of the statute (see 29 CFR 5.15).

(c) The Secretary may make variations, tolerances, and exemptions from the regulatory requirements of applicable parts of 29 CFR when the Secretary finds that such action is necessary and proper in the public interest or to prevent injustice and undue hardship (see 29 CFR 5.14).

(d) In this subpart, the term "laborers or mechanics" includes apprentices, trainees, helpers, watchmen, guards, firefighters, fireguards, and workmen who perform services in connection with dredging or rock excavation in rivers or harbors, but does not include any employee employed as a seaman.

22.301-2 Contract clause.

Insert the clause at 52.222-4, Contract Work Hours and Safety Standards—Overtime Compensation, in solicitations and contracts when the contract may require or involve the employment of laborers or mechanics. However, do not include the clause in solicitations and contracts—

(a) Valued at or below $200,000;

(b) For commercial products and commercial services;

(c) For transportation or the transmission of intelligence;

(d) To be performed outside the United States, Puerto Rico, American Samoa, Guam, the U.S. Virgin Islands, Johnston Island, Wake Island, and the outer Continental Shelf as defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331) (29 CFR 5.15);

(e) For work to be done solely in accordance with 41 U.S.C. chapter 65 (see subpart 22.6 and 22.602);

(f) For supplies that include incidental services that do not require substantial employment of laborers or mechanics; or

(g) Exempt under regulations of the Secretary of Labor (29 CFR 5.15).

22.302 Postaward.

(a) When an overtime computation discloses underpayments, the responsible contractor or subcontractor must pay the affected employee any unpaid wages and pay liquidated damages to the Government.

(b) The contracting officer must assess liquidated damages at the rate specified at 29 CFR 5.5(b)(2) per affected employee for each calendar day on which the employer required or permitted the employee to work in excess of the standard workweek of 40 hours without paying overtime wages required by the statute. In accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 Note), the Department of Labor adjusts this civil monetary penalty for inflation no later than January 15 each year.

(c) If the contractor or subcontractor fails or refuses to comply with overtime pay requirements of the statute and the funds withheld by Federal agencies for labor standards violations do not cover the unpaid wages due laborers and mechanics and the liquidated damages due the Government, make payments in the following order—

(1) Pay laborers and mechanics the wages they are owed (or prorate available funds if they do not cover the entire amount owed); and

(2) Pay liquidated damages.

(d) If the head of an agency finds that the administratively determined liquidated damages due under paragraph (a) of this section are incorrect, or that the contractor or subcontractor inadvertently violated the statute despite the exercise of due care, the agency head may—

(1) Reduce the amount of liquidated damages assessed for liquidated damages of $500 or less;

(2) Release the contractor or subcontractor from the liability for liquidated damages of $500 or less; or

(3) Recommend that the Secretary reduce or waive liquidated damages over $500.

(e) The procedures required for construction contracts in 22.404-2 also apply to investigations of alleged violations of the Contract Work Hours and Safety Standards on other than construction contracts.

Subpart 22.4 - Labor Standards for Contracts Involving Construction.

22.401 Definitions.

As used in this subpart -

Apprentice means a person—

(1) Employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer, and Labor Services (OATELS), or with a State Apprenticeship Agency recognized by OATELS; or

(2) Who is in the first 90 days of probationary employment as an apprentice in an apprenticeship program, and is not individually registered in the program, but who has been certified by the OATELS or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice.

Construction, alteration, or repair means all types of work done by laborers and mechanics employed by the construction contractor or construction subcontractor on a particular building or work at the site thereof, including without limitations—

(1) Altering, remodeling, installation (if appropriate) on the site of the work of items fabricated off-site;

(2) Painting and decorating;

(3) Manufacturing or furnishing of materials, articles, supplies, or equipment on the site of the building or work;

(4) Transportation of materials and supplies between the site of the work within the meaning of paragraphs (1)(i) and (ii) of the "site of the work" definition, and a facility which is dedicated to the construction of the building or work and is deemed part of the site of the work within the meaning of paragraph (2) of the "site of the work" definition; and

(5) Transportation of portions of the building or work between a secondary site where a significant portion of the building or work is constructed, which is part of the "site of the work" definition in paragraph (1)(ii), and the physical place or places where the building or work will remain (paragraph (1)(i) in the "site of the work" definition).

Laborers or mechanics —

(1) Means—

(i) Workers, utilized by a contractor or subcontractor at any tier, whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial;

(ii) Apprentices, trainees, helpers, and, in the case of contracts subject to the Contract Work Hours and Safety Standards statute, watchmen, guards, firefighters, fireguards, and workmen who perform services in connection with dredging or rock excavation in rivers or harbors (but does not include any employee employed as a seaman);

(iii) Working foremen who devote more than 20 percent of their time during a workweek performing duties of a laborer or mechanic, and who do not meet the criteria of 29 CFR part 541, for the time so spent; and

(iv) Every person performing the duties of a laborer or mechanic, regardless of any contractual relationship alleged to exist between the contractor and those individuals; and

(2) Does not include workers whose duties are primarily executive, supervisory (except as provided in paragraph (1)(iii) of this definition), administrative, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in 29 CFR part 541 are not deemed to be laborers or mechanics.

Public building or *public work* means building or work, the construction, prosecution, completion, or repair of which, as defined in this section, is carried on directly by authority of, or with funds of, a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.

Site of the work —

(1) Means—

(i) *The primary site of the work.* The physical place or places where the construction called for in the contract will remain when work on it is completed; and

(ii) *The secondary site of the work, if any.* Any other site where a significant portion of the building or work is constructed, provided that such site is—

(A) Located in the United States; and

(B) Established specifically for the performance of the contract or project;

(2) Except as provided in paragraph (3) of this definition, includes fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc., provided—

(i) They are dedicated exclusively, or nearly so, to performance of the contract or project; and

(ii) They are adjacent or virtually adjacent to the "primary site of the work" as defined in paragraphs (1)(i) of "the secondary site of the work" as defined in paragraph (1)(ii) of this definition;

(3) Does not include permanent home offices, branch plant establishments, fabrication plants, or tool yards of a contractor or subcontractor whose locations and continuance in operation are determined wholly without regard to a particular Federal contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, yards, etc., of a commercial or material supplier which are established by a supplier of materials for the project before opening of bids and not on the project site, are not included in the "site of the work." Such permanent, previously established facilities are not a part of the "site of the work", even if the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

Trainee means a person registered and receiving on-the-job training in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer, and Labor Services (OATELS), as meeting its standards for on-the-job training programs and which has been so certified by that Administration.

Wages means the basic hourly rate of pay; any contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a bona fide fringe benefit fund, plan, or program; and the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program, which was communicated in writing to the laborers and mechanics affected. The fringe benefits enumerated in the Construction Wage Rate Requirements statute include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing; unemployment benefits; life insurance, disability insurance, sickness insurance, or accident insurance; vacation or holiday pay; defraying costs of apprenticeship or other similar programs; or other bona fide fringe benefits. Fringe benefits do not include benefits required by other Federal, State, or local law.

22.402 Presolicitation.

22.402-1 Applicability.

(a) *Contracts in excess of $2,000 for construction work.*

(1) The requirements of this subpart apply—

(i) Only if the construction work is, or reasonably can be foreseen to be, performed at a particular site so that wage rates can be determined for the locality, and only to construction work that is performed by laborers and mechanics at the site of the work;

(ii) To dismantling, demolition, or removal of improvements if a part of the construction contract, or if construction at that site is anticipated by another contract as provided in subpart 37.3;

(iii) To the manufacture or fabrication of construction materials and components conducted in connection with the construction and on the site of the work by the contractor or a subcontractor under a contract otherwise subject to this subpart; and

(iii) To painting of public buildings or public works, whether performed in connection with the original construction or as alteration or repair of an existing structure.

(2) The requirements of this subpart do not apply to—

(i) The manufacturing of components or materials off the site of the work or their subsequent delivery to the site by the commercial supplier or materialman;

(ii) Contracts requiring construction work that is so closely related to research, experiment, and development that it cannot be performed separately, or that is itself the subject of research, experiment, or development (see paragraph (b) of this section for applicability of this subpart to research and development contracts or portions thereof involving construction, alteration, or repair of a public building or public work);

(iii) Employees of railroads operating under collective bargaining agreements that are subject to the Railway Labor Act; or

(iv) Employees who work at contractors' or subcontractors' permanent home offices, fabrication shops, or tool yards not located at the site of the work. However, if the employees go to the site of the work and perform construction activities there, the requirements of this subpart are applicable for the actual time so spent, not including travel unless the employees transport materials or supplies to or from the site of the work.

(b) *Nonconstruction contracts in excess of $2,000 involving some construction work.*

(1) The requirements of this subpart apply to construction work to be performed as part of nonconstruction contracts (supply, service, research and development, etc.) if—

(i) The construction work is to be performed on a public building or public work;

(ii) The contract contains specific requirements for a substantial amount of construction work exceeding the monetary threshold for application of the Construction Wage Rate Requirements statute (the word *substantial* relates to the type and quantity of construction work to be performed and not merely to the total value of construction work as compared to the total value of the contract); and

(iii) The construction work is physically or functionally separate from, and is capable of being performed on a segregated basis from, the other work required by the contract.

(2) The requirements of this subpart do not apply if—

(i) The construction work is incidental to the furnishing of supplies, equipment, or services (for example, the requirements do not apply to simple installation or alteration at a public building or public work that is incidental to furnishing supplies or equipment under a supply contract; however, if a substantial and segregable amount of construction, alteration, or repair is required, such as for installation of heavy generators or large refrigerator systems or for plant modification or rearrangement, the requirements of this subpart apply); or

(ii) The construction work is so merged with nonconstruction work or so fragmented in terms of the locations or time spans in which it is to be performed, that it is not capable of being segregated as a separate contractual requirement.

22.402-2 Copeland Act.

(a) The Copeland (Anti-Kickback) Act (18 U.S.C. 874 and 40 U.S.C. 3145) makes it unlawful to induce, by force, intimidation, threat of procuring dismissal from employment, or otherwise, any person employed in the construction or repair of public buildings or public works, financed in whole or in part by the United States, to give up any part of the compensation to which that person is entitled under a contract of employment.

(b) The Copeland Act also requires each contractor and subcontractor to furnish weekly a statement of compliance with respect to the wages paid each employee during the preceding week.

22.402-3 Construction Wage Rate Requirements statute.

(a) 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction), formerly known as the Davis-Bacon Act, provides that contracts in excess of $2,000 to which the United States or the District of Columbia is a party for construction, alteration, or repair (including painting and decorating) of public buildings or public works within the United States, must contain a clause (see 52.222-6) that no laborer or mechanic employed directly upon the site of the work shall receive less than the prevailing wage rates as determined by the Secretary of Labor.

(b) The contracting officer must incorporate only the appropriate wage determinations in solicitations and contracts and must designate the work to which each determination or part thereof applies.

(1) If a general wage determination is not available on Wage Determinations at *SAM.gov*, a contracting agency must submit requests for project wage determinations on SF 308 to the Department of Labor (See 29 CFR 1.5 for additional information).

(i) A project wage determination will expire in 180 calendar days from the date of the determination.

(ii) If the award is not made by then, the contracting officer must ask for an extension of the determination.

(2) The contracting officer must not include project wage determinations in contracts or options other than those for which they are issued.

(c) If a solicitation is issued before the wage determination for the primary site of the work is obtained, a notice must be included in the solicitation that the schedule of minimum wage rates to be paid under the contract will be issued as an amendment to the solicitation.

(d) If there is any doubt as to the proper application of wage rate schedules to the types or types of construction involved, the contracting officer must seek help from the Administrator, Wage and Hour Division.

(e) The Secretary of Labor has established an Administrative Review Board which decides appeals of final decisions made by the Department of Labor concerning Construction Wage Rate Requirements statute wage determinations. A contracting agency or other interested party may file a petition for review under the procedures in 29 CFR Part 7 if reconsideration by the Administrator has been sought pursuant to 29 CFR 1.8 and denied.

22.402-4 Solicitation provision and contract clauses implementing labor standards for contracts involving construction.

(a) Insert the following clauses in solicitations and contracts in excess of $2,000 for construction within the United States:

(1) 52.222-6, Construction Wage Rate Requirements.

(2) 52.222-7, Withholding of Funds.
(3) 52.222-8, Payrolls and Basic Records.
(4) 52.222-9, Apprentices and Trainees.
(5) 52.222-10, Compliance with Copeland Act Requirements.
(6) 52.222-11, Subcontracts (Labor Standards).
(7) 52.222-12, Contract Termination—Debarment.
(8) 52.222-13, Compliance with Construction Wage Rate Requirements and Related Regulations.
(9) 52.222-14, Disputes Concerning Labor Standards.
(10) 52.222-15, Certification of Eligibility.

(b) Insert the clause 52.222-16, Approval of Wage Rates, in solicitations and contracts in excess of $2,000 for cost-reimbursement construction to be performed within the United States, except for contracts with a State or political subdivision thereof.

(c) A contract that is not primarily for construction may contain a requirement for some construction work to be performed in the United States. If under 22.402-1(b) the requirements of this subpart apply to the construction work, insert in such solicitations and contracts the applicable construction labor standards clauses required in this section and identify the item or items of construction work to which the clauses apply.

(d) Insert the clause at 52.222-30, Construction Wage Rate Requirements—Price Adjustment (None or Separately Specified Pricing Method), in solicitations and contracts if the contract is expected to be—

(1) A fixed-price contract subject to the Construction Wage Rate Requirements statute that will contain option provisions by which the contracting officer may extend the term of the contract, and the contracting officer determines the most appropriate contract price adjustment method is the method at 22.404-1(h)(6)(i) or (ii); or

(2) A cost-reimbursable type contract subject to the Construction Wage Rate Requirements statute that will contain option provisions by which the contracting officer may extend the term of the contract.

(e) Insert the clause at 52.222-31, Construction Wage Rate Requirements—Price Adjustment (Percentage Method), in solicitations and contracts if the contract is expected to be a fixed-price contract subject to the Construction Wage Rate Requirements statute that will contain option provisions by which the contracting officer may extend the term of the contract, and the contracting officer determines the most appropriate contract price adjustment method is the method at 22.404-1(h)(6)(iii).

(f) Insert the clause at 52.222-32, Construction Wage Rate Requirements—Price Adjustment (Actual Method), in solicitations and contracts if the contract is expected to be a fixed-price contract subject to the Construction Wage Rate Requirements statute that will contain option provisions by which the contracting officer may extend the term of the contract, and the contracting officer determines the most appropriate method to establish contract price is the method at 22.404-1(h)(6)(iv).

(g) Insert the provision at 52.222-5, Construction Wage Rate Requirements—Secondary Site of the Work, in solicitations in excess of $2,000 for construction within the United States.

22.402-5 Executive Orders 13658 and 14026.

Executive Order (E.O.) 13658 established minimum wages for certain workers at $10.10 per hour. The E.O. 13658 rate has increased each year since 2015, rising to $11.25 on January 1, 2022. As of January 30, 2022, E.O. 13658 is superseded by E.O. 14026 to the extent that it is inconsistent with E.O. 14026; the minimum wage rate for certain workers is increased to $15.00 per hour. The wage rate is subject to annual increases by an amount determined by the Secretary of Labor. See subpart 22.19. The clause at 52.222-55, Minimum Wages for Contractor Workers under Executive Order 14026, requires the E.O. 14026 minimum wage rate to be paid if it is higher than other minimum wage rates, such as the subpart 22.4 statutory wage determination amount.

22.403 Evaluation and award.

(a) (1) The Department of Labor may modify a wage determination to make it current by specifying only the items being changed or by reissuing the entire determination with changes incorporated.

(2) All project wage determination modifications expire on the same day as the original determination. The need to include a modification of a project wage determination for the primary site of the work in a solicitation is determined by the time of receipt of the modification by the contracting agency. Therefore, the contracting agency must annotate the modification of the project wage determination with the date and time immediately upon receipt.

(3) The need for inclusion of the modification of a general wage determination for the primary site of the work in a solicitation is determined by the date the modified wage determination is published on the Wage Determinations at *SAM.gov*, or by the date the agency receives actual written notice of the modification from the Department of Labor, whichever occurs first. (Note the distinction between receipt by the agency (modification is effective) and receipt by the contracting officer, which may occur later.) During the course of the solicitation, the contracting officer must monitor the Wage Determinations at *SAM.gov* website to determine whether the applicable wage determination has been revised. Revisions published on the Wage Determinations at *SAM.gov* website or otherwise communicated to the contracting officer within the timeframes prescribed at 22.403(b) and (c) are applicable and must be included in the resulting contract. Monitoring can be accomplished by use of the Wage Determinations at *SAM.gov* website's "Alert Service".

(b) The following applies when contracting by sealed bidding:

(1) A written action modifying a wage determination must be effective if:

(i) It is received by the contracting agency, or is published on the Wage Determinations at *SAM.gov*, 10 or more calendar days before the date of bid opening; or

(ii) It is received by the contracting agency, or is published on the Wage Determinations at *SAM.gov*, less than 10 calendar days before the date of bid opening, unless the contracting officer finds that there is not reasonable time available before bid opening to notify the prospective bidders. (If the contracting officer finds that there is not reasonable time to notify bidders, a written report of the finding must be placed in the contract file and must be made available to the Department of Labor upon request.)

(2) All written actions modifying wage determinations received by the contracting agency after bid opening, or modifications to general wage determinations published on the Wage Determinations at *SAM.gov* after bid opening, shall not be effective and shall not be included in the solicitation (but see paragraph (b)(6) of this section).

(3) If an effective modification of the wage determination for the primary site of the work is received by the contracting officer before bid opening, the contracting officer must postpone the bid opening, if necessary, to allow a reasonable time to amend the solicitation to incorporate the modification and permit bidders to amend their bids. If the modification does not change the wage rates and would not warrant amended bids, the contracting officer must amend the solicitation to include the number and date of the modification.

(4) If an effective modification of the wage determination for the primary site of the work is received by the contracting officer after bid opening, but before award, the contracting officer must—

(i) award the contract, incorporate the new determination to be effective on the date of contract award, and equitably adjust the contract price for any increased or decreased cost of performance resulting from any changed wage rates;

(ii) award the contract and modify it to include the number and date of the new determination, if the new determination for the primary site of the work does not change any wage rates; or

(iii) cancel the solicitation, but only in accordance with 14.404-1.

(5) If an effective modification is received by the contracting officer after award, the contracting officer must modify the contract to incorporate the wage modification retroactive to the date of award and equitably adjust the contract price for any increased or decreased cost of performance resulting from any changed wage rates. If the modification does not change any wage rates and would not warrant contract price adjustment, the contracting officer must modify the contract to include the number and date of the modification.

(6) If an award is not made within 90 days after bid opening, any modification to a general wage determination which is published on the Wage Determinations at *SAM.gov* before award, shall be effective for any resultant contract unless an extension of the 90-day period is obtained from the Administrator, Wage and Hour Division. An agency head may request such an extension from the Administrator. The request must be supported by a written finding, which must include a brief statement of factual support, that the extension is necessary and proper in the public interest to prevent injustice, undue hardship, or to avoid serious impairment in the conduct of Government business. The contracting officer must follow the procedures in paragraph (b)(4) of this section.

(c) The following applies when contracting by negotiation:

(1) All written actions modifying wage determinations received by the contracting agency before contract award, or modifications to general wage determinations published on the Wage Determinations at *SAM.gov* before award, shall be effective.

(2) If an effective wage modification is received by the contracting officer before award, the contracting officer must—

(i) If the new determination for the primary site of the work changes any wage rates, amend the solicitation to incorporate the new determination and furnish the wage rate information to all prospective offerors that were sent a solicitation if the closing date for receipt of proposals has not yet occurred, or to all offerors that have not been eliminated

from the competition if the closing date has passed. All offerors to whom wage rate information has been furnished must be given reasonable opportunity to amend their proposals; or

(ii) If the new determination for the primary site of the work does not change any wage rates, amend the solicitation to include the number and date of the new determination and award the contract.

(3) If an effective wage modification is received by the contracting officer after award, the contracting officer must follow the procedures in paragraph (b)(5) of this section.

(d) If a solicitation is amended after issuance to add the wage determination for the primary site of the work (see 22.402-3(c))—

(1) In sealed bidding, bids may not be opened until a reasonable time after the wage determination for the primary site of the work has been furnished to all bidders.

(2) In negotiated acquisitions, the contracting officer may open proposals and conduct negotiations before obtaining the wage determination for the primary site of the work. However, the contracting officer must incorporate the wage determination for the primary site of the work into the solicitation before submission of best and final offers.

(e) The following written notifications by the Department of Labor must be effective immediately if received by the contracting officer prior to award:

(1) A wage determination found to contain clerical errors;

(2) A solicitation includes the wrong wage determination or the wrong rate schedule; or

(3) A wage determination is withdrawn by the Administrative Review Board.

(f) For appealing a denial of reconsideration of a wage determination see 22.402-3(e).

22.404 Postaward.

22.404-1 Administration.

(a) (1) The contracting officer must furnish to the contractor, Department of Labor Form WH-1321, Notice to Employees Working on Federal and Federally Financed Construction Projects, for posting with the wage rates. The name, address, and telephone number of the Government officer responsible for the administration of the contract must be indicated in the poster to inform workers to whom they may submit complaints or raise questions concerning labor standards.

(2) In accordance with the requirements of the clause at 52.222-11, Subcontracts (Labor Standards), the contractor and subcontractors at any tier are required to submit a fully executed SF 1413, Statement and Acknowledgment, upon award of each subcontract.

(b) Before construction begins, the contracting officer must inform the contractor of the labor standards clauses and wage determination requirements of the contract and of the contractor's and any subcontractor's responsibilities under the contract. Unless it is clear that the contractor is fully aware of the requirements, the contracting officer must issue an explanatory letter and/or arrange a conference with the contractor promptly after award of the contract.

(c) (1) If contract award is made without the required wage determination (i.e., incorporating no determination, containing a clearly inapplicable general wage determination, or containing a project determination which is inapplicable because of an inaccurate description of the project or its location), the contracting officer must—

(i) Modify the contract to incorporate the required wage determination (retroactive to the date of award), and equitably adjust the contract price if appropriate; or

(ii) Terminate the contract.

(2) If a required wage determination (valid determination in effect on the date of award) is not available, the contracting officer must expeditiously request a wage determination from the Department of Labor, including a statement explaining the circumstances and giving the date of the contract award.

(d) If any laborer or mechanic is to be employed in a classification that is not listed in the wage determination applicable to the contract, the contracting officer, pursuant to the clause at 52.222-6, Construction Wage Rate Requirements, must require that the contractor submit to the contracting officer, Standard Form (SF) 1444, Request for Authorization of Additional Classification and Rate, which, along with other pertinent data, contains the proposed additional classification and minimum wage rate including any fringe benefits payments.

(1) Upon receipt of SF 1444 from the contractor, the contracting officer must review the request to determine whether it meets the following criteria:

(i) The classification is appropriate and the work to be performed by the classification is not performed by any classification contained in the applicable wage determination.

(ii) The classification is utilized in the area by the construction industry.

(iii) The proposed wage rate, including any fringe benefits, bears a reasonable relationship to the wage rates in the wage determination in the contract.

(2) If the criteria in paragraph (d)(1) of this section are met and the contractor and the laborers or mechanics to be employed in the additional classification (if known) or their representatives agree to the proposed additional classification, and the contracting officer approves, the contracting officer must submit a report (including a copy of SF 1444) of that action to the Administrator, Wage and Hour Division, for approval, modification, or disapproval of the additional classification and wage rate (including any amount designated for fringe benefits); or

(3) If the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed additional classification, or if the criteria are not met, the contracting officer must submit a report (including a copy of SF 1444) giving the views of all interested parties and the contracting officer's recommendation to the Administrator, Wage and Hour Division, for determination of appropriate classification and wage rate.

(4) (i) Within 30 days of receipt of the information, the Administrator, Wage and Hour Division, will complete action and so advise the contracting officer, or will notify the contracting officer that additional time is necessary.

(ii) Upon receipt of the Department of Labor's action, the contracting officer must forward a copy of the action to the contractor, directing that the classification and wage rate be posted in accordance with paragraph (a) of the clause at 52.222-6 and that workers in the affected classification receive no less than the minimum rate indicated from the first day on which work under the contract was performed in the classification.

(e) In each option to extend the term of the contract, if any laborer or mechanic is to be employed during the option in a classification that is not listed (or no longer listed) on the wage determination incorporated in that option, the contracting officer must require that the contractor submit a request for conformance using the procedures noted in paragraph (d) of this section.

(f) (1) The contracting officer must examine the payrolls and payroll statements submitted in accordance with the clause at 52.222-8, to ensure compliance with the contract requirements. The contracting agency must retain payrolls and statements of compliance for 3 years after completion of the contract and make them available when requested by the Department of Labor at any time during that period. Submitted payrolls must not be returned to a contractor or subcontractor for any reasons, but copies thereof may be furnished to the contractor or subcontractor who submitted them, or to a higher tier contractor or subcontractor. Particular attention should be given to-

(i) The correctness of classifications and rates;

(ii) Fringe benefits payments;

(iii) Hours worked;

(iv) Deductions; and

(v) Disproportionate employment ratios of laborers, apprentices, or trainees, to journeyman.

(2) Contractor payroll records in the Government's possession must be carefully protected from any public disclosure which is not required by law, since payroll records may contain information in which the contractor's employees have a privacy interest, as well as information in which the contractor may have a proprietary interest that the Government may be obliged to protect. Questions concerning release of this information may involve the Freedom of Information Act (FOIA).

(3) (i) The contracting officer must review the contractor's employment and payment records of apprentices and trainees made available pursuant to the clause at 52.222-8, Payrolls and Basic Records, to ensure that the contractor has complied with the clause at 52.222-9, Apprentices and Trainees.

(ii) If a contractor has classified employees as apprentices or trainees without complying with the requirements of the clause at 52.222-9, the contracting officer must reject the classification and require the contractor to pay the affected employees at the rates applicable to the classification of the work actually performed.

(g) For purposes of the clause at 52.222-6, if the interested parties (i.e. contractor, contracting officer, and employees or their representative) cannot agree on the “cash equivalent,” the contracting officer must submit the question for final determination to the Department of Labor as prescribed by agency procedures. The information submitted must include—

(1) A comparison of the payments, contributions, or costs in the wage determination with those made or proposed as equivalents by the contractor; and

(2) The comments and recommendations of the contracting officer

(h) The following applies when modifying a contract to exercise an option to extend the term of a contract:

(1) Each time the contracting officer exercises an option to extend the term of a contract for construction, or a contract that includes substantial and segregable construction work, the contracting officer must modify the contract to incorporate the most current wage determination.

(2) A modified wage determination is effective if—

(i) The contracting agency receives a written action from the Department of Labor prior to exercise of the option, or within 45 days after submission of a wage determination request whichever is later; or

(ii) The Department of Labor publishes the modification to a general wage determination on the Wage Determinations at *SAM.gov* before exercise of the option.

(3) If the contracting officer receives an effective modified wage determination either before or after execution of the contract modification to exercise the option, the contracting officer must modify the contract to incorporate the modified wage determination, and any changed wage rates, effective as of the date that the option to extend was effective.

(4) The contracting officer must select the most current wage determination(s) from the same schedule(s) as the wage determination(s) incorporated into the contract.

(5) If a contract with an option to extend the term of the contract has indefinite-delivery or indefinite-quantity construction requirements, the contracting officer must incorporate the wage determination incorporated into the contract at the exercise of the option into task orders issued during that option period. The wage determination will be effective for the complete period of performance of those task orders without further revision.

(6) The contracting officer must include in fixed-price contracts a clause that specifies one of the following methods, suitable to the interest of the Government, to provide an allowance for any increases or decreases in labor costs that result from the inclusion of the current wage determination at the exercise of an option to extend the term of the contract:

(i) The contracting officer may provide the offerors the opportunity to bid or propose separate prices for each option period. The contracting officer must not further adjust the contract price as a result of the incorporation of a new or revised wage determination at the exercise of each option to extend the term of the contract. Generally, this method is used in construction-only contracts (with options to extend the term) that are not expected to exceed a total of 3 years.

(ii) The contracting officer may include in the contract a separately specified pricing method that permits an adjustment to the contract price or contract labor unit price at the exercise of each option to extend the term of the contract. At the time of option exercise, the contracting officer must incorporate a new wage determination into the contract, and must apply the specific pricing method to calculate the contract price adjustment. An example of a contract pricing method that the contracting officer might separately specify is incorporation in the solicitation and resulting contract of the pricing data from an annually published unit pricing book (*e.g.*, the U.S. Army Computer-Aided Cost Estimating System or similar commercial product), which is multiplied in the contract by a factor proposed by the contractor (*e.g.*, .95 or 1.1). At option exercise, the contracting officer incorporates the pricing data from the latest annual edition of the unit pricing book, multiplied by the factor agreed to in the basic contract. The contracting officer must not further adjust the contract price as a result of the incorporation of the new or revised wage determination.

(iii) The contracting officer may provide for a contract price adjustment based solely on a percentage rate determined by the contracting officer using a published economic indicator incorporated into the solicitation and resulting contract. At the exercise of each option to extend the term of the contract, the contracting officer will apply the percentage rate, based on the economic indicator, to the portion of the contract price or contract unit price designated in the contract clause as labor costs subject to the provisions of the Construction Wage Rate Requirements statute. The contracting officer must insert 50 percent as the estimated portion of the contract price that is labor unless the contracting officer determines, prior to issuance of the solicitation, that a different percentage is more appropriate for a particular contract or requirement. This percentage adjustment to the designated labor costs must be the only adjustment made to cover increases in wages and/or benefits resulting from the incorporation of a new or revised wage determination at the exercise of the option.

(iv) The contracting officer may provide a computation method to adjust the contract price to reflect the contractor's actual increase or decrease in wages and fringe benefits (combined) to the extent that the increase is made to comply with, or the decrease is voluntarily made by the contractor as a result of incorporation of, a new or revised wage determination at the exercise of the option to extend the term of the contract. Generally, this method is appropriate for use only if contract requirements are predominately services subject to the Service Contract Labor Standards statute and the construction requirements are substantial and segregable. The methods used to adjust the contract price for the service requirements and the construction requirements would be similar.

(i) For appealing a denial of reconsideration of a wage determination see 22.402-3(e).

22.404-2 Enforcement.

(a) *Policy.* Contracting agencies are responsible for ensuring the full and impartial enforcement of labor standards in the administration of construction contracts. Contracting agencies must maintain an effective program that must include—

(1) Ensuring that contractors and subcontractors are informed, before commencement of work, of their obligations under the labor standards clauses of the contract;

(2) Adequate payroll reviews, on-site inspections, and employee interviews to determine compliance by the contractor and subcontractors, and prompt initiation of corrective action when required;

(3) Prompt investigation and disposition of complaints; and

(4) Prompt submission of all reports required by the regulations on labor standards for contracts involving construction in this part.

(b) *Compliance checking.* The contracting officer must make checks and investigations on all contracts covered by this subpart as may be necessary to ensure compliance with the labor standards requirement of the contract.

(1) *Regular compliance checks.* Regular compliance checking includes the following activities:

(i) Employee interviews to determine correctness of classifications, rates of pay, fringe benefits payments, and hours worked. (See Standard Form 1445.)

(ii) On-site inspections to check type of work performed, number and classification of workers, and fulfillment of posting requirements.

(iii) Payroll reviews to ensure that payrolls of prime contractors and subcontractors have been submitted on time and are complete and in compliance with contract requirements.

(iv) Comparison of the information in this paragraph (b) with available data, including daily inspector's report and daily logs of construction, to ensure consistency.

(2) *Special compliance checks.* Situations that may require special compliance checks include—

(i) Inconsistencies, errors, or omissions detected during regular compliance checks; or

(ii) Receipt of a complaint alleging violations. If the complaint is not specific enough, the complainant must be so advised and invited to submit additional information.

(c) *Investigations*.

(1) *Contracting agency investigations*. Contracting agencies must conduct an investigation when a compliance check indicates that substantial or willful violations may have occurred or violations have not been corrected.

(i) The investigation must—

(A) Include all aspects of the contractor's compliance with contract labor standards requirements;

(B) Not be limited to specific areas raised in a complaint or uncovered during compliance checks; and

(C) Use personnel familiar with labor laws and their application to contracts.

(ii) Do not disclose contractor employees' oral or written statements taken during an investigation or the employee's identity to anyone other than an authorized Government official without that employee's prior signed consent.

(iii) Send a written request to the Administrator, Wage and Hour Division, to obtain—

(A) Investigation and enforcement instructions; or

(B) Available pertinent Department of Labor files.

(iv) Obtain permission from the Department of Labor before disclosing material obtained from Labor Department files, other than computations of back wages and liquidated damages and summaries of back wages due, to anyone other than Government contract administrators.

(v) The contracting officer must review the investigation report on receipt and make preliminary findings. The contracting officer normally must not base adverse findings solely on employee statements that the employee does not wish to have disclosed. However, if the investigation establishes a pattern of possible violations that are based on employees' statements that are not authorized for disclosure, the pattern itself may support a finding of noncompliance.

(vi) After completing the review, the contracting officer must—

(A) Provide the contractor any written preliminary findings and proposed corrective actions, and notice that the contractor has the right to request that the basis for the findings be made available and to submit written rebuttal information.

(B) Upon request, provide the contractor with rationale for the findings. However, under no circumstances will the contracting officer permit the contractor to examine the investigation report. Also, the contracting officer must not disclose the identity of any employee who filed a complaint or who was interviewed, without the prior consent of the employee.

(C)

(1) The contractor may rebut the findings in writing within 60 days after it receives a copy of the preliminary findings. The rebuttal becomes part of the official investigation record. If the contractor submits a rebuttal, evaluate the preliminary findings and notify the contractor of the final findings.

(2) If the contracting officer does not receive a timely rebuttal, the contracting officer must consider the preliminary findings final.

(D) If appropriate, request the contractor to make restitution for underpaid wages and assess liquidated damages. If the request includes liquidated damages, the request must state that the contractor has 60 days to request relief from such assessment.

(vii) After taking the actions prescribed in paragraphs (c)(1)(v) and (c)(1)(vi) of this subsection—

(A) The contracting officer must prepare and forward a report of any violations, including findings and supporting evidence, to the agency head. Standard Form 1446, Labor Standards Investigation Summary Sheet, is the first page of the report; and

(B) The agency head must process the report as follows:

(1) The contracting officer must send a detailed enforcement report to the Administrator, Wage and Hour Division, within 60 days after completion of the investigation, if—

(i) A contractor or subcontractor underpaid by $1,000 or more;

(ii) The contracting officer believes that the violations are aggravated or willful (or there is reason to believe that the contractor has disregarded its obligations to employees and subcontractors under the Construction Wage Rate Requirements statute);

(iii) The contractor or subcontractor has not made restitution; or

(iv) Future compliance has not been assured.

(2) If the Department of Labor expressly requested the investigation and none of the conditions in paragraph (c)(1)(vii)(B)(*1*) of this subsection exist, submit a summary report to the Administrator, Wage and Hour Division. The report must include—

(i) A summary of any violations;

(ii) The amount of restitution paid;

(iii) The number of workers who received restitution;

(iv) The amount of liquidated damages assessed under the Contract Work Hours and Safety Standards statute;

(v) Corrective measures taken; and

(vi) Any information that may be necessary to review any recommendations for an appropriate adjustment in liquidated damages.

(3) If none of the conditions in paragraphs (c)(1)(vii)(B)(*1*) or (*2*) of this subsection are present, close the case and retain the report in the appropriate contract file.

(4) If substantial evidence is found that violations are willful and in violation of a criminal statute, (generally 18 U.S.C. 874 or 1001), forward the report (supplemented if necessary) to the Attorney General of the United States for prosecution if the facts warrant. Notify the Administrator, Wage and Hour Division, when the report is forwarded for the Attorney General's consideration.

(2) *Department of Labor investigations.* The Department of Labor will furnish the contracting officer an enforcement report detailing violations found and any corrective action taken by the contractor, in investigations that disclose—

(i) Underpayments totaling $1,000 or more;

(ii) Aggravated or willful violations (or, when the contracting officer believes that the contractor has disregarded its obligations to employees and subcontractors under the Construction Wage Rate Requirements statute); or

(iii) Potential assessment of liquidated damages under the Contract Work Hours and Safety Standards statute.

(3) *Other investigations.* The Department of Labor will provide a letter summarizing the findings of the investigation to the contracting officer for all investigations that are not described in paragraph (c)(2) of this subsection.

(4) *Cooperation*.

(i) The contracting agency must cooperate with representatives of the Department of Labor in the inspection of records, interviews with workers, and all other aspects of investigations undertaken by the Department of Labor.

(ii) When requested, the contracting agency must furnish to the Secretary any available information on contractors, subcontractors, current and previous contracts, and the nature of the contract work.

(iii) If a Department of Labor representative undertakes an investigation at a construction project, the contracting officer must inquire into the scope of the investigation, and request to be notified immediately of any violations discovered under the Construction Wage Rate Requirements statute, the Contract Work Hours and Safety Standards statute, or the Copeland (Anti-Kickback) Act.

(d) *Report*. A semiannual report on compliance with and enforcement of the construction labor standards requirements of the Construction Wage Rate Requirements statute and Contract Work Hours and Safety Standards statute is required from each contracting agency. The reporting periods are October 1 through March 31 and April 1 through September 30.

The reports must only contain information as to the enforcement actions of the contracting agency and must be prepared as prescribed in Department of Labor memoranda and submitted to the Department of Labor within 30 days after the end of the reporting period. This report has been assigned interagency report control number 1482-DOL-SA.

(e) *Withholding payment*.

(1) If the contractor fails to submit copies of its or its subcontractors' payrolls promptly under clause 52.222-8, the contracting officer must, from any payment due to the contractor, from any current Federal contract or Federally assisted contract with the same prime contractor that is subject to either the Construction Wage Rate Requirements statute or Contract Work Hours and Safety Standards statute requirements, withhold approval of an amount that the contracting officer considers necessary to protect the interest of the Government and the employees of the contractor or any subcontractor.

(2)

(i) If the contracting officer believes a violation exists (see paragraph (a) of this subsection), or upon request of the Department of Labor, the contracting officer must withhold from payments due the contractor an amount equal to the estimated wage underpayment and estimated liquidated damages due the United States under the Contract Work Hours and Safety Standards statute. (See 22.302.)

(ii) Use withheld funds as provided in paragraph (g) of this subsection to satisfy assessed liquidated damages, and unless the contractor makes restitution, validated wage underpayments.

(f) *Suspension of contract payments.* If a contractor or subcontractor fails or refuses to comply with the labor standards clauses of the Construction Wage Rate Requirements statute and related statutes, the agency, upon its own action or upon the written request of the Department of Labor, must suspend any further payment, advance, or guarantee of funds until the violations cease or until the agency has withheld sufficient funds to compensate employees for back wages, and to cover any liquidated damages due.

(g) *Disposition of contract payments withheld or suspended —*

(1) *Forwarding wage underpayments to the Secretary.* Upon final administrative determination, if the contractor or subcontractor has not made restitution, the contracting officer must follow the Department of Labor guidance published in Wage and Hour Division, All Agency Memorandum (AAM) No. 215, Streamlining Claims for Federal Contractor Employees Act. The AAM No. 215 can be obtained at *http://www.dol.gov/whd/govcontracts/dbra.htm;* under Guidance there is a link for All Agencies Memoranda (AAMs).

(2) *Returning of withheld funds to contractor.* When funds withheld exceed the amount required to satisfy validated wage underpayments and assessed liquidated damages, return the funds to the contractor.

(3) *Liquidated damages*. Upon final administrative determination, the contracting officer must dispose of funds withheld or collected for liquidated damages in accordance with agency procedures.

(h) *Reporting terminations*. If a contract or subcontract is terminated for violation of the labor standards clauses, the contracting agency must submit a report to the Administrator, Wage and Hour Division. The report must include the number of the terminated contract.

(i) *Disputes*.

(1) Disputes between the contracting officer and contractors concerning construction contract labor standards enforcement will be settled by the Department of Labor.

(2) The Administrator, Wage and Hour Division, will respond directly to the contractor or subcontractor, with a copy to the contracting agency. The contractor or subcontractor may appeal the Administrator's findings in accordance with the procedures outlined in Labor Department Regulations (29 CFR 5.11). Hearings before administrative law judges are conducted in accordance with 29 CFR part 6, and hearings before the Labor Department Administrative Review Board are conducted in accordance with 29 CFR part 7.

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Subpart 22.5 - Project Labor Agreements for Federal Construction Projects.

22.500 Scope.

This subpart prescribes policies and procedures to implement Executive Order 14063, Use of Project Labor Agreements for Federal Construction Projects, dated February 4, 2022 (3 CFR, 2023 Comp., pp 335-338).

22.501 Definitions.

As used in this subpart --

Construction means construction, reconstruction, rehabilitation, modernization, alteration, conversion, extension, repair, or improvement of buildings, structures, highways, or other real property.

Labor organization means a labor organization as defined in 29 U.S.C. 152(5) of which building and construction employees are members.

Large-scale construction project means a Federal construction project within the United States for which the total estimated cost of the construction contract to the Federal Government is $35 million or more.

Project labor agreement means a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project and is an agreement described in 29 U.S.C. 158(f).

22.502 Presolicitation.

22.502-1 Policy.

(a) Executive Order (E.O.) 14063, Use of Project Labor Agreements for Federal Construction Projects, requires agencies to use project labor agreements in large-scale construction projects to promote economy and efficiency in the administration and completion of Federal construction projects.

(b) When awarding a contract in connection with a large-scale construction project, agencies must require use of project labor agreements for contractors and subcontractors engaged in construction on the project, unless an exception at 22.502-2(d) applies.

(c) An agency may require the use of a project labor agreement on projects where the total cost to the Federal Government is less than that for a large-scale construction project, if appropriate.

(1) An agency may, if appropriate, require that every contractor and subcontractor engaged in construction on the project agree, for that project, to negotiate or become a party to a project labor agreement with one or more labor organizations if the agency decides that the use of project labor agreements will—

(i) Advance the Federal Government's interest in achieving economy and efficiency in Federal procurement, producing labor-management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters; and

(ii) Be consistent with law.

(2) Agencies may consider the following factors in deciding whether the use of a project labor agreement is appropriate for a construction project where the total cost to the Federal Government is less than that for a large-scale construction project:

(i) The project will require multiple construction contractors and/or subcontractors employing workers in multiple crafts or trades.

(ii) There is a shortage of skilled labor in the region in which the construction project will be sited.

(iii) Completion of the project will require an extended period of time.

(iv) Project labor agreements have been used on comparable projects undertaken by Federal, State, municipal, or private entities in the geographic area of the project.

(v) A project labor agreement will promote the agency's long term program interests, such as facilitating the training of a skilled workforce to meet the agency's future construction needs.

(vi) Any other factors that the agency decides are appropriate.

(d) For indefinite-delivery indefinite-quantity (IDIQ) contracts the use of a project labor agreement may be required on an order-by-order basis rather than for the entire contract. For an order at or above $35 million an agency must require the use of a project labor agreement unless an exception applies. See 22.502-2(d)(3) and 22.502-3(b)(3).

22.502-2 General requirements.

(a) *General.* Project labor agreements established under this subpart must fully conform to all statutes, regulations, and Executive orders.

(b) *Requirements.* A project labor agreement must—

(1) Bind all contractors and subcontractors engaged in construction on the construction project to comply with the project labor agreement;

(2) Allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;

(3) Contain guarantees against strikes, lockouts, and similar job disruptions;

(4) Set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the term of the project labor agreement;

(5) Provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and

(6) Include any additional requirements as the agency deems necessary to satisfy its needs.

(c) *Labor organizations.* An agency may not require contractors or subcontractors to enter into a project labor agreement with any particular labor organization.

(d) *Exceptions to project labor agreement requirements —*

(1) *Exception.* The senior procurement executive may grant an exception from the requirements at 22.502-1(b), providing a specific written explanation of why at least one of the following conditions exists with respect to the particular contract:

(i) Requiring a project labor agreement on the project would not advance the Federal Government's interests in achieving economy and efficiency in Federal procurement. The exception must be based on one or more of the following factors:

(A) The project is of short duration and lacks operational complexity.

(B) The project will involve only one craft or trade.

(C) The project will involve specialized construction work that is available from only a limited number of contractors or subcontractors.

(D) The agency's need for the project is of such an unusual and compelling urgency that a project labor agreement would be impracticable.

(ii) Market research indicates that requiring a project labor agreement on the project would substantially reduce the number of potential offerors to such a degree that adequate competition at a fair and reasonable price could not be achieved. (See 10.002(b)(1) and 36.104). A likely reduction in the number of potential offerors is not, by itself, sufficient to except a contract from coverage under this authority unless it is coupled with the finding that the reduction would not allow for adequate competition at a fair and reasonable price.

(iii) Requiring a project labor agreement on the project would otherwise be inconsistent with Federal statutes, regulations, Executive orders, or Presidential memoranda.

(2) *Considerations.* When determining whether the exception in paragraph (d)(1)(ii) of this subsection applies, contracting officers must consider current market conditions and the extent to which price fluctuations may be attributable to factors other than the requirement for a project labor agreement (*e.g.,* costs of labor or materials, supply chain costs). Agencies may rely on price analysis conducted on recent competitive proposals for construction projects of a similar size and scope.

(3) *Timing of the exception —*

(i) *Contracts other than IDIQ contracts.* The exception must be granted for a particular contract by the solicitation date.

(ii) *IDIQ contracts.* An exception must be granted prior to the solicitation date if the basis for the exception cited would apply to all orders. Otherwise, exceptions must be granted for each order by the time of the notice of the intent to place an order (*e.g.,* 16.505(b)(1)).

22.502-3 Solicitation provision and contract clause.

When a project labor agreement is used for a construction project, the contracting officer must—

(a) (1) Insert the provision at 52.222-33, Notice of Requirement for Project Labor Agreement, in solicitations containing the clause 52.222-34, Project Labor Agreement.

(2) Use the provision with its Alternate I if the agency will require the submission of a project labor agreement from only the apparent successful offeror, prior to contract award.

(3) Use the provision with its Alternate II if an agency allows submission of a project labor agreement after contract award except when Alternate III is used.

(4) Use the provision with its Alternate III when Alternate II of 52.222-34 is used.

(b) (1) Insert the clause at 52.222-34, Project Labor Agreement, in solicitations and contracts associated with the construction project.

(2) Use the clause with its Alternate I if an agency allows submission of the project labor agreement after contract award except when Alternate II is used.

(3) Use the clause with its Alternate II in IDIQ contracts when the agency will have project labor agreements negotiated on an order-by-order basis and anticipates one or more orders may not use a project labor agreement.

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Subpart 22.6 - Contracts for Materials, Supplies, Articles, and Equipment.

22.601 Presolicitation.

22.601-1 Statutory requirement.

Except for the exemptions at 22.601-3, all contracts subject to 41 U.S.C. chapter 65 (the statute), and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation (all the stock of which is beneficially owned by the United States) for the manufacture or furnishing of materials, supplies, articles, and equipment (referred to in this subpart as supplies) in any amount exceeding $20,000, must include or incorporate by reference the stipulations required by the statute pertaining to such matters as minimum wages, maximum hours, child labor, convict labor, and safe and sanitary working conditions.

22.601-2 Applicability.

The requirements of this subpart apply to contracts (including for this purpose, indefinite-delivery contracts, basic ordering agreements, and blanket purchase agreements) for the manufacture or furnishing of supplies that—

(a) Will be performed in the United States, Puerto Rico, or the U.S. Virgin Islands;

(b) Exceed or may exceed $20,000; and

(c) Are not exempt under 22.601-3.

22.601-3 Exemptions.

(a) Contracts for acquisition of the following supplies are statutorily exempt from the requirements of this subpart:

(1) Any item in those situations where the contracting officer is authorized by the express language of a statute to purchase "in the open market" generally (such as commercial products and commercial services, see part 12); or where a specific purchase is made under the conditions described in 6.302-2 in circumstances where immediate delivery is required by the public exigency.

(2) Perishables, including dairy, livestock, and nursery products.

(3) Agricultural or farm products processed for first sale by the original producers.

(4) Agricultural commodities or the products thereof purchased under contract by the Secretary of Agriculture.

(b) Contracts for the following acquisitions are regulatorily exempt from the requirements of this subpart (see 41 CFR 50-201.603):

(1) Public utility services.

(2) Supplies manufactured outside the United States, Puerto Rico, and the U.S. Virgin Islands.

(3) Purchases against the account of a defaulting contractor where the stipulations of the statute were not included in the defaulted contract.

(4) Newspapers, magazines, or periodicals, contracted for with sales agents or publisher representatives, which are to be delivered by the publishers thereof.

(c) (1) Upon the request of the agency head, the Secretary may exempt specific contracts or classes of contracts from the inclusion or application of one or more of the statute's stipulations; *provided,* that the request includes a finding by the agency head stating the reasons why the conduct of Government business will be seriously impaired unless the exemption is granted.

(2) Those requests for exemption that relate solely to safety and health standards must be transmitted to the Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, Washington, DC 20210. All other requests must be transmitted to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210.

22.601-4 Rulings and interpretations of the statute.

As authorized by the statute, the Secretary of Labor has issued rulings and interpretations concerning the administration of the statute (see 41 CFR 50-206). The substance of certain rulings and interpretations is as follows:

(a) If a contract for $20,000 or less is subsequently modified to exceed $20,000, the contract becomes subject to the statute for work performed after the date of the modification.

(b) If a contract for more than $20,000 is subsequently modified by mutual agreement to $20,000 or less, the contract is not subject to the statute for work performed after the date of the modification.

(c) If a contract awarded to a prime contractor contains a provision whereby the prime contractor is made an agent of the Government, the prime contractor is required to include the stipulations of the statute in contracts in excess of

$20,000 awarded for and on behalf of the Government for supplies that are to be used in the construction and equipment of Government facilities.

(d) If a contract subject to the statute is awarded to a contractor operating Government-owned facilities, the stipulations of the statute affect the employees of that contractor the same as employees of contractors operating privately owned facilities.

(e) Indefinite-delivery contracts, including basic ordering agreements and blanket purchase agreements, are subject to the statute unless it can be determined in advance that the aggregate amount of all orders estimated to be placed thereunder for 1 year after the effective date of the agreement will not exceed $20,000. A determination must be made annually thereafter if the contract or agreement is extended, and the contract or agreement modified if necessary.

22.601-5 Solicitation provisions and contract clauses.

Insert the clause at 52.222-20, Contracts for Materials, Supplies, Articles, and Equipment, in solicitations and contracts covered by the statute (see 22.601-2 and 22.601-3).

22.602 Postaward.

In the event of a violation of a stipulation required under 41 U.S.C. Chapter 65, the contracting officer must, in accordance with agency procedures, notify the appropriate regional office of the DOL, Wage and Hour Division (see 29 CFR part 1, Appendix B), and furnish any information available.

Subpart 22.7 – Reserved.

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Subpart 22.8 – Reserved.

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Subpart 22.9 - Nondiscrimination Because of Age.

22.901 Presolicitation.

22.901-1 General.

Executive Order 11141, February 12, 1964 (29 FR 2477), states that the Government policy is as follows:

(a) Contractors and subcontractors must not, in connection with employment, advancement, or discharge of employees, or the terms, conditions, or privileges of their employment, discriminate against persons because of their age except upon the basis of a bona fide occupational qualification, retirement plan, or statutory requirement.

(b) Contractors and subcontractors, or persons acting on their behalf, must not specify in solicitations or advertisements for employees to work on Government contracts, a maximum age limit for employment unless the specified maximum age limit is based upon a bona fide occupational qualification, retirement plan, or statutory requirement.

(c) Agencies will bring this policy to the attention of contractors. The use of contract clauses is not required.

22.902 Postaward.

Agencies must bring complaints regarding a contractor's compliance with the policy in Executive Order 11141 to that contractor's attention (in writing, if appropriate), stating the policy, indicating that the contractor's compliance has been questioned, and requesting that the contractor take any appropriate steps that may be necessary to comply.

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Subpart 22.10 - Service Contract Labor Standards.

22.1000 Scope.

This subpart prescribes policies and procedures implementing the provisions of 41 U.S.C. chapter 67, Service Contract Labor Standards (formerly known as the Service Contract Act of 1965) and related Secretary of Labor regulations and instructions (29 CFR parts 4, 6, 8, and 1925).

22.1001 Definitions.

As used in this subpart—

Contractor includes a subcontractor at any tier whose subcontract is subject to the provisions of the statute.

Multiple year contracts means contracts having a term of more than 1 year regardless of fiscal year funding. The term includes multi-year contracts (see 17.102).

United States means the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, Johnston Island, Wake Island, and the outer Continental Shelf as defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331, et seq.), but does not include any other place subject to U.S. jurisdiction or any U.S. base or possession within a foreign country (29 CFR 4.112).

22.1002 Presolicitation.

22.1002-1 Applicability.

(a) [Reserved]

(b) This subpart applies to all Government contracts, the principal purpose of which is to furnish services in the United States through the use of service employees, except as exempted in paragraphs (c) through (g) of this subsection, or any subcontract at any tier thereunder. More information on “principal purpose” can be found here.

(c) The Service Contract Labor Standards statute does not apply to—

(1) Any contract for construction, alteration, or repair of public buildings or public works, including painting and decorating;

(2) Any work required to be done in accordance with the provisions of 41 U.S.C. chapter 65;

(3) Any contract for transporting freight or personnel by vessel, aircraft, bus, truck, express, railroad, or oil or gas pipeline where published tariff rates are in effect;

(4) Any contract for furnishing services by radio, telephone, or cable companies subject to the Communications Act of 1934;

(5) Any contract for public utility services;

(6) Any employment contract providing for direct services to a Federal agency by an individual or individuals; or

(7) Any contract for operating postal contract stations for the U.S. Postal Service.

(d) In addition to the statutory exemptions cited in paragraph (c) of this subsection, the Secretary has exempted the following types of contracts from all provisions of the Service Contract Labor Standards statute:

(1) Contracts entered into by the United States with common carriers for the carriage of mail by rail, air (except air star routes), bus, and ocean vessel, where such carriage is performed on regularly scheduled runs of the trains, airplanes, buses, and vessels over regularly established routes and accounts for an insubstantial portion of the revenue therefrom.

(2) Any contract entered into by the U.S. Postal Service with an individual owner-operator for mail service if it is not contemplated at the time the contract is made that the owner-operator will hire any service employee to perform the services under the contract except for short periods of vacation time or for unexpected contingencies or emergency situations such as illness, or accident.

(3) Contracts for the carriage of freight or personnel if such carriage is subject to rates covered by section 10721 of the Interstate Commerce Act.

(e) (1) The Secretary has exempted from the Service Contract Labor Standards statute contracts and subcontracts in which the primary purpose is to furnish maintenance, calibration, or repair of the following types of equipment, if the conditions at paragraph (e)(2) of this subsection are met:

(i) Automated data processing equipment and office information/word processing systems.

(ii) Scientific equipment and medical apparatus or equipment if the application of micro-electronic circuitry or other technology of at least similar sophistication is an essential element (for example, Product or Service Code (PSC) 6515, “Medical and Surgical Instruments, Equipment, and Supplies;” PSC 6525, “Imaging Equipment and Supplies: Medical,

Dental, Veterinary;" PSC 6630, "Chemical Analysis Instruments;" and PSC 6655, "Geophysical Instruments," are largely composed of the types of equipment exempted in this paragraph).

(iii) Office/business machines not otherwise exempt pursuant to paragraph (c)(1)(i) of this subsection, if such services are performed by the manufacturer or supplier of the equipment.

(2) The exemption at paragraph (e)(1) of this subsection applies if all the following conditions are met for a contract (or a subcontract):

(i) The items of equipment to be serviced under the contract are used regularly for other than Government purposes and are sold or traded by the contractor in substantial quantities to the general public in the course of normal business operations.

(ii) The services will be furnished at prices which are, or are based on, established catalog or market prices for the maintenance, calibration, or repair of such equipment. As defined at 29 CFR 4.123(e)(1)(ii)(B)—

(A) An established catalog price is a price included in a catalog price list, schedule, or other form that is regularly maintained by the manufacturer or the contractor, is either published or otherwise available for inspection by customers, and states prices at which sales currently, or were last, made to a significant number of buyers constituting the general public.

(B) An established market price is a current price, established in the usual course of trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or contractor.

(iii) The contractor will use the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the contractor uses for these employees and equivalent employees servicing the same equipment of commercial customers.

(iv) The apparent successful offeror certifies to the conditions in paragraph (c)(2)(i) through (iii) of the provision at 52.222-48, Exemption from Application of the Service Contract Labor Standards to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Certification.

(3) (i) For source selections where the contracting officer has established a competitive range, if the contracting officer determines that one or more of the conditions in paragraphs (e)(2)(i) through (iii) of an offeror's certification will not be met, the contracting officer must identify the deficiency to the offeror before receipt of the final proposal revisions. Unless the offeror provides a revised offer acknowledging applicability of the Service Contract Labor Standards statute or demonstrating to the satisfaction of the contracting officer an ability to meet all required conditions for exemption, the offer will not be further considered for award.

(ii) The contracting officer must determine in writing the applicability of this exemption to the contract before contract award. If the apparent successful offeror will meet all conditions in paragraph (e)(2) of this subsection, the contracting officer must make an affirmative determination and award the contract without the otherwise applicable Service Contract Labor Standards clause(s).

(iii) If the apparent successful offeror does not certify to the conditions in paragraph (e)(2)(i) through (iii) of this subsection, the contracting officer must incorporate in the contract the Service Contract Labor Standards clause (see 22.1002-2(b)) and, if the contract will exceed $2,500, the appropriate Department of Labor wage determination (see 22.1002-3).

(4) (i) If the Department of Labor determines after award of the contract that any condition for exemption in paragraph (e)(2) of this subsection has not been met, the exemption shall be deemed inapplicable, and the contract must become subject to the Service Contract Labor Standards statute, effective as of the date of the Department of Labor determination. In such case, the procedures at 29 CFR 4.123(e)(1)(iv) and 29 CFR 4.5(c) must be followed.

(ii) If the Department of Labor determines that any conditions in paragraph (e)(2) of this subsection have not been met with respect to a subcontract, the exemption must be deemed inapplicable. The contractor may be responsible for ensuring that the subcontractor complies with the Service Contract Labor Standards statute, effective as of the date of the subcontract award.

(f) (1) Except as provided in paragraph (f)(5) of this subsection, the Secretary has exempted from the Service Contract Labor Standards statute contracts and subcontracts in which the primary purpose is to provide the following services, if the conditions in paragraph (f)(2) of this subsection are met:

(i) Automobile or other vehicle (*e.g.*, aircraft) maintenance services (other than contracts or subcontracts to operate a Government motor pool or similar facility).

(ii) Financial services involving the issuance and servicing of cards (including credit cards, debit cards, purchase cards, smart cards, and similar card services).

(iii) Hotel/motel services for conferences, including lodging and/or meals, that are part of the contract or subcontract for the conference (which must not include ongoing contracts for lodging on an as needed or continuing basis).

(iv) Maintenance, calibration, repair, and/or installation (where the installation is not subject to the Construction Wage Rate Requirements statute, as provided in 29 CFR 4.116(c)(2)) services for all types of equipment where the services are obtained from the manufacturer or supplier of the equipment under a contract awarded on a sole source basis.

(v) Transportation by common carrier of persons by air, motor vehicle, rail, or marine vessel on regularly scheduled routes or via standard commercial services (not including charter services).

(vi) Real estate services, including real property appraisal services, related to housing Federal agencies or disposing of real property owned by the Government.

(vii) Relocation services, including services of real estate brokers and appraisers to assist Federal employees or military personnel in buying and selling homes (which must not include actual moving or storage of household goods and related services).

(2) The exemption for the services in paragraph (f)(1) of this subsection applies if all the following conditions are met for a contract (or for a subcontract):

(i) (A) Except for services identified in paragraph (f)(1)(iv) of this subsection, the contractor will be selected for award based on other factors in addition to price or cost, with the combination of other factors at least as important as price or cost; or

(B) The contract will be awarded on a sole source basis.

(ii) The services under the contract are offered and sold regularly to non-Governmental customers, and are provided by the contractor (or subcontractor in the case of an exempt subcontract) to the general public in substantial quantities in the course of normal business operations.

(iii) The contract services are furnished at prices that are, or are based on, established catalog or market prices. As defined at 29 CFR 4.123(e)(2)(ii)(C)—

(A) An established catalog price is a price included in a catalog, price list, schedule, or other form that is regularly maintained by the contractor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and

(B) An established market price is a current price, established in the usual course of trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or contractor.

(iv) Each service employee who will perform the services under the contract will spend only a small portion of his or her time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the Government contract.

(v) The contractor will use the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the contractor uses for these employees and equivalent employees servicing commercial customers.

(vi) The contracting officer (or contractor with respect to a subcontract) determines in advance before issuing the solicitation, based on the nature of the contract requirements and knowledge of the practices of likely offerors, that all or nearly all offerors will meet the conditions in paragraph (f)(2)(ii) through (v) of this subsection. If the services are currently being performed under contract, the contracting officer (or contractor with respect to a subcontract) must consider the practices of the existing contractor in making a determination regarding the conditions in paragraphs (f)(2)(ii) through (v) of this subsection.

(vii) (A) The apparent successful offeror certifies that the conditions in paragraphs (f)(2)(ii) through (v) will be met; and

(B) For other than sole source awards, the contracting officer determines that the same certification is obtained from substantially all other offerors that are—

(1) In the competitive range, if discussions are to be conducted (see FAR 15.306(c)); or

(2) Considered responsive, if award is to be made without discussions (see FAR 15.306(a)).

(3) (i) If the apparent successful offeror does not certify to the conditions, the contracting officer must insert in the contract the applicable Service Contract Labor Standards clause(s) (see 22.1002-2(b)) and, if the contract will exceed $2,500, the appropriate Department of Labor wage determination (see 22.1002-3).

(ii) The contracting officer must award the contract without the otherwise applicable Service Contract Labor Standards clause(s) if—

(A) The apparent successful offeror certifies to the conditions in paragraphs (f)(2)(ii) through (v) of this subsection;

(B) The contracting officer determines that the same certification is obtained from substantially all other offerors that are—

(1) In the competitive range, if discussions are to be conducted (see FAR 15.306); or

(2) Considered responsive, if award is to be made without discussions (see FAR 15.306(a)); and

(C) The contracting officer has no reason to doubt the certification.

(iii) If the conditions in paragraph (f)(3)(ii) of this subsection are not met, then the contracting officer must resolicit, amending the solicitation by removing the exemption provision from the solicitation as prescribed at 22.1002-2(e)(3). The contract will include the applicable Service Contract Labor Standards clause(s) as prescribed at 22.1002-2(b) and, if the contract will exceed $2,500, the appropriate Department of Labor wage determination (see 22.1002-3).

(4) (i) If the Department of Labor determines after award of the contract that any conditions for exemption at paragraph (f)(2) of this subsection have not been met, the exemption shall be deemed inapplicable, and the contract must become subject to the Service Contract Labor Standards statute. In such case, the procedures at 29 CFR 4.123(e)(2)(iii) and 29 CFR 4.5(c) must be followed.

(ii) If the Department of Labor determines that any conditions in paragraph (f)(2) of this subsection have not been met with respect to a subcontract, the exemption must be deemed inapplicable. The contractor may be responsible for ensuring that the subcontractor complies with the Service Contract Labor Standards statute, effective as of the date of the subcontract award.

(5) The exemption at paragraph (f)(1) of this subsection does not apply to solicitations and contracts (subcontracts)—

(i) Awarded under 41 U.S.C. chapter 85, Committee for Purchase from People Who Are Blind or Severely Disabled (see part 8).

(ii) For the operation of a Government facility, or part of a Government facility (but may be applicable to subcontracts for services); or

(iii) Subject to 41 U.S.C. 6707(c) (see 22.1002-3(b)(2)).

(g) See 29 CFR 4.123 for a listing of administrative exemptions, tolerances, and variations. Requests for limitations, variances, tolerances, and exemptions from the Service Contract Labor Standards statute must be submitted in writing through contracting channels and the agency labor advisor to the Wage and Hour Administrator.

(h) If the contracting officer questions the applicability of the Service Contract Labor Standards statute to an acquisition, the contracting officer must request the advice of the agency labor advisor. Unresolved questions must be submitted in a timely manner to the Administrator, Wage and Hour Division, for determination.

22.1002-2 Solicitation provisions and contract clauses.

(a) (1) Service contracts over $2,500 must contain mandatory provisions regarding minimum wages and fringe benefits (see coverage on wage determinations at 22.1002-3), safe and sanitary working conditions, notification to employees of the minimum allowable compensation (see 22.1003), and equivalent Federal employee classifications and wage rates (see paragraph (c) of this subsection).

(2) Under 41 U.S.C. 6707(d), service contracts may not exceed 5 years.

(b) (1) Insert the clause at 52.222-41, Service Contract Labor Standards, in solicitations and contracts (except as provided in paragraph (b)(2) of this subsection) if the contract is subject to the Service Contract Labor Standards statute and is—

(i) Over $2,500; or

(ii) For an indefinite dollar amount and the contracting officer does not know in advance that the contract amount will be $2,500 or less.

(2) The contracting officer must not insert the clause at 52.222-41 (or any of the associated Service Contract Labor Standards statute clauses as prescribed in this subsection for possible use when 52.222-41 applies) in the resultant contract if —

(i) The solicitation includes the provision at—

(A) 52.222-48, Exemption from Application of the Service Contract Labor Standards to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Certification; or

(B) 52.222-52, Exemption from Application of the Service Contract Labor Standards to Contracts for Certain Services—Certification; and

(ii) The contracting officer has made the determination, in accordance with paragraphs (e)(3) or (f)(3) of subsection 22.1002-1, that the Service Contract Labor Standards statute does not apply to the contract. (In such case, insert the clause at 52.222-51, Exemption from Application of the Service Contract Labor Standards to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements, or 52.222-53, Exemption from Application of the Service Contract Labor Standards to Contracts for Certain Services—Requirements, in the contract, in accordance with the prescription at paragraph (e)(2)(ii) or (e)(4)(ii) of this subsection).

(c) (1) Insert the clause at 52.222-42, Statement of Equivalent Rates for Federal Hires, in solicitations and contracts if the contract amount is expected to be over $2,500 and the Service Contract Labor Standards statute is applicable.

(2) The statement required under the clause must set forth those wage rates and fringe benefits that would be paid by the contracting activity to the various classes of service employees expected to be utilized under the contract if 5 U.S.C. 5332 (General Schedule—white collar) and/or 5 U.S.C. 5341 (Wage Board—blue collar) were applicable.

(d) (1) Insert the clause at 52.222-43, Fair Labor Standards Act and Service Contract Labor Standards—Price Adjustment (Multiple Year and Option Contracts), or another clause which accomplishes the same purpose, in solicitations and contracts if the contract is expected to be a fixed-price, time-and-materials, or labor-hour service contract containing the clause at 52.222-41, Service Contract Labor Standards, and is a multiple year contract or is a contract with options to renew which exceeds the simplified acquisition threshold. The clause may be used in contracts that do not exceed the simplified acquisition threshold. The clause at 52.222-43, Fair Labor Standards Act and Service Contract Labor Standards—Price Adjustment (Multiple Year and Option Contracts), applies to both contracts subject to area prevailing wage determinations and contracts subject to the incumbent contractor's collective bargaining agreement in effect during this contract's preceding contract period (see 22.1002-3(a) and (b)). Contracting officers must ensure that contract prices or contract unit price labor rates are adjusted only to the extent that a contractor's increases or decreases in applicable wages and fringe benefits are made to comply with the requirements set forth in the clauses at 52.222-43 (subparagraphs (d) (1), (2) and (3)), or 52.222-44 (subparagraphs (b) (1) and (2)).

(2) The contracting officer must insert the clause at 52.222-44, Fair Labor Standards Act and Service Contract Labor Standards—Price Adjustment, in solicitations and contracts if the contract is expected to be a fixed-price, time-and-materials, or labor-hour service contract containing the clause at 52.222-41, Service Contract Labor Standards, exceeds the simplified acquisition threshold, and is not a multiple year contract or is not a contract with options to renew. The clause may be used in contracts that do not exceed the simplified acquisition threshold. The clause at 52.222-44, Fair Labor Standards Act and Service Contract Labor Standards—Price Adjustment, applies to both contracts subject to area prevailing wage determinations and contracts subject to contractor collective bargaining agreements (see 22.1002-3(a) and (b)).

(3) The clauses prescribed in paragraph (d)(1) of this subsection cover situations in which revised minimum wage rates are applied to contracts by operation of law, or by revision of a wage determination in connection with (i) exercise of a contract option or (ii) extension of a multiple year contract into a new program year.

(e) (1) Insert the provision at 52.222-48, Exemption from Application of the Service Contract Labor Standards to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Certification, in solicitations that—

(i) Include the clause at 52.222-41, Service Contract Labor Standards; and

(ii) The contract may be exempt from the Service Contract Labor Standards statute in accordance with 22.1002-1(e).

(2) The contracting officer must insert the clause at 52.222-51, Exemption from Application of the Service Contract Labor Standards to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements—

(i) In solicitations that include the provision at 52.222-48; and

(ii) In resulting contracts in which the contracting officer has determined, in accordance with 22.1002-1(e)(3), that the Service Contract Labor Standards statute does not apply.

(3) (i) Except as provided in paragraph (e)(3)(ii) of this subsection, the contracting officer must insert the provision at 52.222-52, Exemption from Application of the Service Contract Labor Standards to Contracts for Certain Services—Certification, in solicitations that—

(A) Include the clause at 52.222-41, Service Contract Labor Standards, and

(B) The contract may be exempt from the Service Contract Labor Standards statute in accordance with 22.1002-1(f).

(ii) When resoliciting in accordance with 22.1002-1(f)(3)(iii), amend the solicitation by removing the provision at 52.222-52 from the solicitation.

(4) The contracting officer must insert the clause at 52.222-53, Exemption from Application of the Service Contract Labor Standards to Contracts for Certain Services—Requirements—

(i) In solicitations that include the provision at 52.222-52; and

(ii) In resulting contracts in which the contracting officer has determined, in accordance with 22.1002-1(e)(3), that the Service Contract Labor Standards statute does not apply.

(f) Insert the clause at 52.222-49, Service Contract Labor Standards—Place of Performance Unknown, if using the procedures prescribed in 22.1002-3(a)(2).

22.1002-3 Wage determinations.

The contracting officer must obtain wage determinations for each new solicitation and contract in excess of $2,500.

(a) *Wage determinations based on prevailing rates.* Contractors performing on contracts to which no predecessor contractor's collective bargaining agreement applies must pay their employees at least the wages and fringe benefits found by the Department of Labor to prevail in the locality or, in the absence of a wage determination, the minimum wage set forth in the Fair Labor Standards Act. If the Wage Determinations at the SAM.gov database do not contain the applicable prevailing wage determination for a contract action, the contracting officer must use the e98 process to request a wage determination from the Department of Labor.

(1) If the place of performance is unknown, the contracting officer must obtain a wage determination for each locality where services may be performed.

(2) If the contracting officer believes that there may be offerors interested in performing in unidentified places or areas, the contracting officer may use the following procedures:

(i) Complete the fill-in of the clause at 52.222-49, Service Contract Labor Standards-Place of Performance Unknown (see 22.1002-2(f)).

(ii) The procedures in 14.304 must apply to late receipt of offerors' requests for wage determinations for additional places of performance. However, late receipt of an offeror's request for a wage determination for additional places of performance does not preclude the offeror's competing for the proposed acquisition.

(iii) If the contracting officer receives any timely requests for wage determinations for additional places of performance the contracting officer must—

(A) Obtain wage determinations for the additional places of performance; and

(B) Amend the solicitation to include all wage determinations and, if necessary, extend the time for submission of final offers.

(iv) If the successful offeror did not make a timely request for a wage determination and will perform in a place of performance for which the contracting officer therefore did not request a wage determination, the contracting officer must—

(A) Award the contract;

(B) Obtain a wage determination; and

(C) Incorporate the wage determination in the contract, retroactive to the date of contract award and with no adjustment in contract price, pursuant to the clause at 52.222-49, Service Contract Labor Standards-Place of Performance Unknown.

(3) If the contracting officer subsequently learns of any potential offerors in previously unidentified places before the closing date for submission of offers, the contracting officer must obtain wage determinations for the additional places of performance and amend the solicitation to include all wage determinations. If necessary, the contracting officer must extend the time for submission of final offers.

(b) *Wage determinations based on collective bargaining agreements*.

(1) Early in the acquisition cycle, the contracting officer must determine whether 41 U.S.C. 6707(c) affects the new acquisition. The contracting officer must determine whether there is a predecessor contract covered by the Service Contract Labor Standards statute and, if so, whether the incumbent prime contractor or its subcontractors and any of their employees have a collective bargaining agreement.

(2) 41 U.S.C. 6707(c) provides that a successor contractor must pay wages and fringe benefits (including accrued wages and benefits and prospective increases) to service employees at least equal to those agreed upon by a predecessor contractor under the following conditions-

(i) The services to be furnished under the proposed contract will be substantially the same as services being furnished by an incumbent contractor whose contract the proposed contract will succeed;

(ii) The services will be performed in the same locality; and

(iii) The incumbent prime contractor or subcontractor is furnishing such services through the use of service employees whose wages and fringe benefits are the subject of one or more collective bargaining agreements.

(3) The application of 41 U.S.C. 6707(c) is subject to the following limitations:

(i) 41 U.S.C. 6707(c) will not apply if the incumbent contractor enters into a collective bargaining agreement for the first time and the agreement does not become effective until after the expiration of the incumbent's contract.

(ii) If the incumbent contractor enters into a new or revised collective bargaining agreement during the period of the incumbent's performance on the current contract, the terms of the new or revised agreement must not be effective for the purposes of 41 U.S.C. 6707(c) under the following conditions:

(A)

(1) In sealed bidding, the contracting agency receives notice of the terms of the collective bargaining agreement less than 10 days before bid opening and finds that there is not reasonable time still available to notify bidders (see 22.1003(b)(1)); or

(2) For contractual actions other than sealed bidding, the contracting agency receives notice of the terms of the collective bargaining agreement after award, provided that the start of performance is within 30 days of award (see 22.1003(b)(2)); and

(B) The contracting officer has given both the incumbent contractor and its employees' collective bargaining agent timely written notification of the applicable acquisition dates (see 22.1004-6).

(4) If 41 U.S.C. 6707(c) applies, the contracting officer must obtain a copy of any collective bargaining agreement between an incumbent contractor or subcontractor and its employees. Obtaining a copy of an incumbent contractor's collective bargaining agreement may involve coordination with the administrative contracting officer responsible for administering the predecessor contract. (Paragraph (m) of the clause at 52.222-41, Service Contract Labor Standards, requires the incumbent prime contractor to furnish the contracting officer a copy of each collective bargaining agreement.)

(5) 41 U.S.C. 6707(c) will not apply if the Secretary of Labor determines—

(i) After a hearing, that the wages and fringe benefits in the predecessor contractor's collective bargaining agreement are substantially at variance with those which prevail for services of a similar character in the locality; or

(ii) That the wages and fringe benefits in the predecessor contractor's collective bargaining agreement are not the result of arm's length negotiations. The Department of Labor (DOL) has concluded that contingent collective bargaining agreement provisions that attempt to limit a contractor's obligations by means such as requiring issuance of a wage determination by the DOL, requiring inclusion of the wage determination in the contract, or requiring the Government to adequately reimburse the contractor, generally reflect a lack of arm's length negotiations.

(6) If the contracting officer's review of the incumbent's collective bargaining agreement indicates that its monetary provisions may be substantially at variance or may not have been reached as a result of arm's length bargaining, the contracting officer must immediately contact the agency labor advisor to consider if further action is warranted.

(7) If the services are being furnished at more than one location and the collectively bargained wage rates and fringe benefits are different at different locations or do not apply to one or more locations, the contracting officer must identify the locations to which the agreements apply.

(8) If the collective bargaining agreement does not apply to all service employees under the contract, the contracting officer must access Wage Determinations at *SAM.gov* to obtain the prevailing wage determination for those service employee classifications that are not covered by the collective bargaining agreement. The contracting officer must separately list in the solicitation and contract the service employee classifications—

(i) Subject to the collective bargaining agreement, and

(ii) Not subject to any collective bargaining agreement.

(9) If the contracting officer has submitted an e98 to Department of Labor requesting a wage determination based on a collective bargaining agreement and the Department of Labor is unable to provide the wage determination by the latest date needed to maintain the acquisition schedule, the contracting officer must incorporate the collective bargaining agreement itself in a solicitation and include a wage determination referencing that collective bargaining agreement created by use of the Wage Determinations at *SAM.gov* website.

(c) *Requests for hearing*.

(1) A contracting agency or other interested party may request a hearing on an issue presented in paragraph (b)(5)(i) of this subsection. To obtain a hearing for the contracting agency, the contracting officer must submit a written request through appropriate channels (ordinarily the agency labor advisor) to: Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210.

(2) A request for a substantial variance hearing must include sufficient data to show that the rates at issue vary substantially from those prevailing for similar services in the locality. The request must also include—

(i) The number of the wage determinations at issue;

(ii) The name of the contracting agency whose contract is involved;

(iii) A brief description of the services to be performed under the contract;

(iv) The status of the procurement and any estimated procurement dates, such as bid opening, contract award, and commencement date of the contract or its follow-up option period;

(v) A statement of the applicant's case, setting forth in detail the reasons why the applicant believes that a substantial variance exists with respect to some or all of the wages and/or fringe benefits;

(vi) Names and addresses (to the extent known) of interested parties; and

(vii) Any other data required by the Administrator.

(3) A request for an arm's length hearing must include—

(i) A statement of the applicant's case setting forth in detail the reasons why the applicant believes that the wages and fringe benefits contained in the collective bargaining agreement were not reached as a result of arm's length negotiations;

(ii) A statement regarding the status of the procurement and any estimated procurement dates, such as bid opening, contract award, and commencement date of the contract or its follow-up option period; and

(iii) Names and addresses (to the extent known) of interested parties.

(4) Unless the Administrator determines that extraordinary circumstances exist, the Administrator will not consider requests for a hearing unless received as follows:

(i) For sealed bid contracts, more than 10 days before the award of the contract; or

(ii) For negotiated contracts and for contracts with provisions exceeding the initial term by option, before the commencement date of the contract or the follow-up option period.

22.1002-4 Executive Orders 13658 and 14026.

Executive Order (E.O.) 13658 established minimum wages for certain workers at $10.10 per hour. The E.O. 13658 rate has increased each year since 2015, rising to $11.25 on January 1, 2022. As of January 30, 2022, E.O. 13658 is superseded by E.O. 14026 to the extent that it is inconsistent with E.O. 14026; the minimum wage rate for certain workers is increased to $15.00 per hour. The wage rate is subject to annual increases by an amount determined by the Secretary of Labor. See subpart 22.19. The clause at 52.222-55, Minimum Wages for Contractor Workers under Executive Order 14026, requires the E.O. 14026 minimum wage rate to be paid if it is higher than other minimum wage rates, such as the subpart 22.10 statutory wage determination amount.

22.1003 Evaluation and award.

(a) *Periodic revisions to wage determinations by DOL*.

(1) The Wage and Hour Administrator may issue revisions to prevailing wage determinations periodically. The need for inclusion of a revised prevailing wage determination in a solicitation is determined by the date of receipt of the revised prevailing wage determination by the contracting agency. (Note the distinction between receipt by the agency and receipt by the contracting officer which may occur later.)

(i) For purposes of using Wage Determinations at *SAM.gov*, the time of receipt by the contracting agency must be the first day of publication of the revised prevailing wage determination on the website.

(ii) For purposes of using the e98 process, the time of receipt by the contracting agency must be the date the agency receives actual notice of a new or revised prevailing wage determination from the Department of Labor as an e98 response.

(2) In selecting a prevailing wage determination from the Wage Determinations at *SAM.gov* website for use in a solicitation or other contract action, the contracting officer must monitor the Wage Determinations at *SAM.gov* website to determine whether the applicable wage determination has been revised. Revisions published on the Wage Determinations at *SAM.gov* website or otherwise communicated to the contracting officer within the timeframes prescribed at paragraphs (a)(3) and (4) of this section are effective and must be included in the resulting contract. Monitoring can be accomplished by use of the Wage Determinations at *SAM.gov* website's “Alert Service”.

(3) The following must apply when contracting by sealed bidding: a revised prevailing wage determination shall not be effective if it is received by the contracting agency less than 10 days before the opening of bids, and the contracting officer finds that there is not reasonable time to incorporate the revision in the solicitation.

(4) For contractual actions other than sealed bidding, a revised prevailing wage determination received by the contracting agency after award of a new contract or a modification as specified in 22.1004-1(c) shall not be effective provided that the start of performance is within 30 days of the award or the specified modification. If the contract does not specify a start of performance date which is within 30 days of the award or the specified modification, and if contract performance does not commence within 30 days of the award or the specified modification, any revision received by the contracting agency not less than 10 days before commencement of the work shall be effective.

(5) If the contracting officer has submitted an e98 to the Department of Labor requesting a prevailing wage determination and has not received a response within 10 days, the contracting officer must contact the Wage and Hour Division by telephone to determine when the wage determination can be expected. (The telephone number is provided on the e98 website.)

(b) *Wage determinations based on collective bargaining agreements*.

(1) In sealed bidding, a new or changed collective bargaining agreement shall not be effective under 41 U.S.C. 6707(c) if the contracting agency has received notice of the terms of the new or changed collective bargaining agreement less than 10 days before bid opening and the contracting officer determines that there is not reasonable time to incorporate the new or changed terms of the collective bargaining agreement in the solicitation.

(2) For contractual actions other than sealed bidding, a new or changed collective bargaining agreement shall not be effective under 41 U.S.C. 6707(c) if notice of the terms of the new or changed collective bargaining agreement is received by the contracting agency after award of a successor contract or a modification as specified in 22.1004-1(c), provided that the contract start of performance is within 30 days of the award of the contract or of the specified modification. If the contract does not specify a start of performance date which is within 30 days of the award of the contract or of the specified modification, or if contract performance does not commence within 30 days of the award of the contract or of the specified modification, any notice of the terms of a new or changed collective bargaining agreement received by the agency not less than 10 days before commencement of the work must be effective for purposes of the successor contract under 41 U.S.C. 6707(c).

(3) The limitations in paragraphs (b)(1) and (2) of this section must apply only if timely notification required in 22.1004-6 has been given.

(4) If the contracting officer has submitted an e98 to Department of Labor requesting a wage determination based on a collective bargaining agreement and has not received a response from the Department of Labor within 10 days, the contracting officer must contact the Wage and Hour Division by telephone to determine when the wage determination can be expected. (The telephone number is provided on the e98 website.) If the Department of Labor is unable to provide the wage determination by the latest date needed to maintain the acquisition schedule, the contracting officer must incorporate the collective bargaining agreement itself in a solicitation or other contract action (*e.g.*, exercise of option) and include a wage determination referencing that collective bargaining agreement created by use of the Wage Determinations at *SAM.gov* website.

(c) *Delays*. If a wage determination was obtained through the e98 process, and bid opening has been delayed, for whatever reason, more than 60 days from the date indicated on the previously submitted e98, the contracting officer must submit a new e98. Any revision of a wage determination received by the contracting agency as a result of that communication must supersede the earlier response as the wage determination applicable to the particular acquisition subject to the time frames in 22.1003(a)(3) and (4).

(d) *Notification to contractors and employees*. The contracting officer must take the following steps to ensure that service employees are notified of minimum wages and fringe benefits.

(1) At the time of award, furnish the contractor Department of Labor Publication WH-1313, Notice to Employees Working on Government Contracts, for posting at a prominent and accessible place at the worksite before contract performance begins. The publication advises employees of the compensation (wages and fringe benefits) required to be paid or furnished under the Service Contract Labor Standards statute and satisfies the notice requirements in paragraph (g) of the clause at 52.222-41, Service Contract Labor Standards.

(2) Attach any applicable wage determination to Publication WH-1313.

22.1004 Postaward.

22.1004-1 Revisions to wage determinations.

(a) The Wage and Hour Administrator may issue revisions to prevailing wage determinations periodically. The need for inclusion of a revised prevailing wage determination in a contract is determined by the date of receipt of the revised prevailing wage determination by the contracting agency.

(b) If a wage determination was obtained through the e98 process, and commencement of work under a negotiated contract has been delayed, for whatever reason, more than 60 days from the date indicated on the previously submitted e98, the contracting officer must submit a new e98. Any revision of a wage determination received by the contracting agency as a result of that communication must supersede the earlier response as the wage determination applicable to the particular acquisition subject to the time frames in 22.1003(a)(3) and (4).

(c) The contracting officer must obtain wage determinations for each contract modification which brings the contract above $2,500 and—

(1) Extends the existing contract pursuant to an option clause or otherwise; or

(2) Changes the scope of the contract whereby labor requirements are affected significantly.

(d) The contracting officer must obtain wage determinations for each multiple year contract in excess of $2,500 upon the—

(1) Annual anniversary date if the contract is subject to annual appropriations; or

(2) Biennial anniversary date if the contract is not subject to annual appropriations and its proposed term exceeds 2 years—unless otherwise advised by the Wage and Hour Division.

(e) If the contracting officer has submitted an e98 to Department of Labor requesting a wage determination based on a collective bargaining agreement and the Department of Labor is unable to provide the wage determination by the latest date needed to maintain the acquisition schedule, the contracting officer must incorporate the collective bargaining agreement itself in a contract action (*e.g.*, exercise of option) and include a wage determination referencing that collective bargaining agreement created by use of the Wage Determinations at *SAM.gov* website.

(f) If the Department of Labor discovers and determines, whether before or after a contract award, that a contracting officer made an erroneous determination that the Service Contract Labor Standards statute did not apply to a particular acquisition or failed to include an appropriate wage determination in a covered contract, the contracting officer, within 30 days of notification by the Department of Labor, must include in the contract the clause at 52.222-41 and any applicable wage determination issued by the Administrator. If the contract is subject to 41 U.S.C. 6707(f), the Administrator may require retroactive application of that wage determination. The contracting officer must equitably adjust the contract price to reflect any changed cost of performance resulting from incorporating a wage determination or revision.

22.1004-2 Additional classes of service employees.

(a) If the contracting officer is aware that contract performance involves classes of service employees not included in the wage determination, the contracting officer must require the contractor to classify the unlisted classes so as to provide a reasonable relationship (i.e., appropriate level of skill comparison) between the unlisted classifications and the classifications listed in the determination (see paragraph (c) of the clause at 52.222-41, Service Contract Labor Standards). The contractor must initiate the conforming procedure before unlisted classes of employees perform contract work. The contractor must submit Standard Form (SF) 1444, Request For Authorization of Additional Classification and Rate. The contracting officer must review the proposed classification and rate and promptly submit the completed SF 1444 (which must include information regarding the agreement or disagreement of the employees' representative or the employees themselves together with the agency recommendation) and all other pertinent information to the Wage and Hour Division. Within 30 days of receipt of the request, the Wage and Hour Division will (1) approve, modify, or disapprove the request when the parties are in agreement or (2) render a final determination in the event of disagreement among the parties. If the Wage and Hour Division will require more than 30 days to take action, it will notify the contracting officer within 30 days of receipt of the request that additional time is necessary.

(b) Some wage determinations will list a series of classes within a job classification family, for example, Computer Operators, level I, II, and III, or Electronic Technicians, level I, II, and III, or Clerk Typist, level I and II. Generally, level I is the lowest level. It is the entry level, and establishment of a lower level through conformance is not permissible. Further, trainee classifications may not be conformed. Helpers in skilled maintenance trades (for example, electricians, machinists, and automobile mechanics) whose duties constitute, in fact, separate and distinct jobs may also be used if listed on the wage determination, but may not be conformed. Conformance may not be used to artificially split or subdivide classifications listed in the wage determination. However, conforming procedures may be used if the work which an employee performs under the contract is not within the scope of any classification listed on the wage determination, regardless of job title. (See 29 CFR 4.152.)

(c) Subminimum rates for apprentices, student learners, and disabled workers are permissible in accordance with paragraph (q) of the clause at 52.222-41, Service Contract Labor Standards.

22.1004-3 Withholding of contract payments.

(a) Any violations of the clause at 52.222-41, Service Contract Labor Standards, as amended, renders the responsible contractor liable for the amount of any deductions, rebates, refunds, or underpayments (which includes nonpayment) of compensation due employees performing the contract.

(b) The contracting officer may withhold—or, upon written request of the Department of Labor from a level no lower than that of Deputy Regional Administrator, Wage and Hour Division, Department of Labor, must withhold—the amount needed to pay such underpaid employees from accrued payments due the contractor on the contract, or on any other prime contract (whether subject to the Service Contract Labor Standards statute or not) with the contractor.

(c) The agency must place the amount withheld in a deposit fund. Such withheld funds must be transferred to the Department of Labor for disbursement to the underpaid employees on order of the Secretary (or authorized representatives), an Administrative Law Judge, or the Administrative Review Board. In addition, the Department of Labor has given blanket approval to forward withheld funds pending completion of an investigation or other administrative proceeding when disposition of withheld funds remains the final action necessary to close out a contract.

22.1004-4 Termination for default.

As provided by the Service Contract Labor Standards statute, any contractor failure to comply with the requirements of the contract clauses related to the Service Contract Labor Standards statute may be grounds for termination for default (see paragraph (k) of the clause at 52.222-41, Service Contract Labor Standards).

22.1004-5 Enforcement.

(a) Persons or firms found to be in violation of the Service Contract Labor Standards statute will have an active exclusion record contained in the System for Award Management (see part 9). No Government contract may be awarded to any violator so listed because of a violation of the Service Contract Labor Standards statute, or to any firm, corporation, partnership, or association in which the violator has a substantial interest, without the approval of the Secretary of Labor. This prohibition against award to an ineligible contractor applies to both prime and subcontracts.

(b) The contracting officer must cooperate with Department of Labor representatives in the examination of records, interviews with service employees, and all other aspects of investigations undertaken by the Department. When asked, agencies must furnish the Wage and Hour Administrator or a designee, any available information on contractors, subcontractors, their contracts, and the nature of the contract services. The contracting officer must promptly refer, in writing to the appropriate regional office of the Department, apparent violations and complaints received. Employee complaints must not be disclosed to the employer.

(c) Disputes concerning labor standards requirements of the contract are handled under paragraph (t) of the contract clause at 52.222-41, Service Contract Labor Standards, and not under the clause at 52.233-1, Disputes.

22.1004-6 Notification to interested parties under collective bargaining agreements.

(a) The contracting officer should determine whether the incumbent prime contractor's or its subcontractors' service employees performing on the current contract are represented by a collective bargaining agent. If there is a collective bargaining agent, the contracting officer must give both the incumbent contractor and its employees' collective bargaining agent written notification of—

(1) The forthcoming successor contract and the applicable acquisition dates (issuance of solicitation, opening of bids, commencement of negotiations, award of contract, or start of performance, as the case may be); or

(2) The forthcoming contract modification and applicable acquisition dates (exercise of option, extension of contract, change in scope, or start of performance, as the case may be); or

(3) The forthcoming multiple year contract anniversary date (annual anniversary date or biennial date, as the case may be).

(b) This written notification must be given at least 30 days in advance of the earliest applicable acquisition date or the applicable annual or biennial anniversary date in order for the time-of-receipt limitations in 22.1003(b)(1) and (2) to apply. The contracting officer must retain a copy of the notification in the contract file.

22.1004-7 Seniority lists.

If a contract is performed at a Federal facility where employees may be hired/retained by a succeeding contractor, the incumbent prime contractor is required to furnish a certified list of all service employees on the contractor's or subcontractor's payroll during the last month of the contract, together with anniversary dates of employment, to the contracting officer no later than 10 days before contract completion. (See paragraph (n) of the clause at 52.222-41, Service Contract Labor Standards.) At the commencement of the succeeding contract, the contracting officer must provide a copy of the list to the successor contractor for determining employee eligibility for vacation or other fringe benefits which are based upon length of service, including service with predecessor contractors if such benefit is required by an applicable wage determination.

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Subpart 22.11 – [Reserved]

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Subpart 22.12 - [Reserved]

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Subpart 22.13 - Equal Opportunity for Veterans

22.1300 Scope.

This subpart prescribes policies and procedures for implementing the following:

(a) The Vietnam Era Veterans' Readjustment Assistance Act of 1972, as amended (38 U.S.C. 4211 and 4212) (the Act).

(b) The Veterans Employment Opportunities Act of 1998, Public Law 105-339.

(c) Executive Order 11701, January 24, 1973 (3 CFR, 1971-1975 Comp., p. 752).

(d) The regulations of the Secretary of Labor (41 CFR parts 60-300 and 61-300).

22.1301 Definitions.

As used In this subpart --

Active duty wartime or campaign badge veteran means a veteran who served on active duty in the U.S. military, ground, naval, or air service, during a war or in a campaign or expedition for which a campaign badge has been authorized under the laws administered by the Department of Defense.

Armed Forces service medal veteran means any veteran who, while serving on active duty in the U.S. military, ground, naval, or air service, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order 12985 (61 FR 1209).

Disabled veteran means—

(1) A veteran of the U.S. military, ground, naval, or air service, who is entitled to compensation (or who, but for the receipt of military retired pay, would be entitled to compensation) under laws administered by the Secretary of Veterans Affairs; or

(2) A person who was discharged or released from active duty because of a service-connected disability.

Protected veteran means a veteran who is protected under the non-discrimination and affirmative action provisions of 38 U.S.C. 4212; specifically, a veteran who may be classified as a “disabled veteran,” “recently separated veteran,” “active duty wartime or campaign badge veteran,” or an “Armed Forces service medal veteran,” as defined by this section.

Qualified disabled veteran means a disabled veteran who has the ability to perform the essential functions of the employment positions with or without reasonable accommodation.

Recently separated veteran means any veteran during the three-year period beginning on the date of such veteran's discharge or release from active duty in the U.S. military, ground, naval, or air service.

United States means the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island.

22.1302 Presolicitation.

22.1302-1 Requirements.

(a) (1) Contractors and subcontractors, when entering into contracts and subcontracts subject to the Act, are required to—

(i) List all employment openings, with the appropriate employment service delivery system where the opening occurs, except for—

(A) Executive and senior management positions;

(B) Positions to be filled from within the contractor's organization; and

(C) Positions lasting three days or less;

(ii) Take affirmative action to employ, advance in employment, and otherwise treat qualified individuals, including qualified disabled veterans, without discrimination based upon their status as a protected veteran, in all employment practices;

(iii) Undertake appropriate outreach and positive recruitment activities that are reasonably designed to effectively recruit protected veterans; and

(iv) Establish a hiring benchmark and apply it to hiring of protected veterans in each establishment, on an annual basis, in the manner prescribed in the regulations of the Secretary of Labor.

(2) The Act applies to all contracts and subcontracts for personal property and nonpersonal services (including construction) of $200,000 or more except—

(i) As waived by the Secretary of Labor; or

(ii) In any contract with a State or local government (or any agency, instrumentality, or subdivision), the Act does not apply to any agency, instrumentality, or subdivision of that government that does not participate in work on or under the contract.

(b) The Act requires submission of the annual VETS-4212, Federal Contractor Veterans' Employment Report (VETS-4212 Report) in all cases where the contractor or subcontractor has received an award of $200,000 or more, except for awards to State and local governments, and foreign organizations where the workers are recruited outside of the United States.

22.1302-2 Solicitation provision and contract clauses.

(a)

(1) Insert the clause at 52.222-35, Equal Opportunity for Veterans, in solicitations and contracts if the expected value is $200,000 or more, except when—

(i) Work is performed outside the United States by employees recruited outside the United States; or

(ii) The Director, Office of Federal Contract Compliance Programs of the U.S. Department of Labor, has waived, in accordance with 22.1302-3(a) or the head of the agency has waived, in accordance with 22.1302-3(b), all of the terms of the clause.

(2) If the Director, Office of Federal Contract Compliance Programs of the U.S. Department of Labor, or the head of the agency waives one or more (but not all) of the terms of the clause, use the basic clause with its Alternate I.

(b) Insert the clause at 52.222-37, Employment Reports on Veterans, in solicitations and contracts containing the clause at 52.222-35, Equal Opportunity for Veterans.

22.1302-3 Waivers.

(a) The Director, Office of Federal Contract Compliance Programs, Department of Labor, may waive any or all of the terms of the clause at 52.222-35, Equal Opportunity for Veterans, for—

(1) Any contract if a waiver is in the national interest; or

(2) Groups or categories of contracts if a waiver is in the national interest and it is—

(i) Impracticable to act on each request individually; and

(ii) Determined that the waiver will substantially contribute to convenience in administering the Act.

(b) The head of the agency may waive any requirement in this subpart when it is determined that the contract is essential to the national security, and that its award without complying with such requirements is necessary to the national security. Upon making such a determination, the head of the agency must notify the Deputy Assistant Secretary of Labor in writing within 30 days.

(c) The contracting officer must submit requests for waivers in accordance with agency procedures.

(d) The Deputy Assistant Secretary of Labor may withdraw an approved waiver for a specific contract or group of contracts to be awarded, when in the Deputy's judgment such action is necessary to achieve the purposes of the Act. The withdrawal does not apply to awarded contracts. For procurements entered into by sealed bidding, such withdrawal does not apply unless the withdrawal is made more than 10 calendar days before the date set for the opening of bids.

22.1303 Evaluation and award.

(a) Except for contracts for commercial products or commercial services, or contracts that do not exceed the simplified acquisition threshold, contracting officers must not obligate or expend funds appropriated for the agency for a fiscal year to enter into a contract for the procurement of personal property and nonpersonal services (including construction) with a contractor that has not submitted the required annual VETS-4212, with respect to the preceding fiscal year if the contractor was subject to the reporting requirements of 38 U.S.C. 4212(d) for that fiscal year.

(b) To verify if a proposed contractor is current with its submission of the VETS-4212 Report, the contracting officer must query the Department of Labor's VETS-4212 Database via the Internet at *http://www.dol.gov/vets/vets4212.htm* under “Filing Verification”.

22.1304 Postaward.

(a) The contracting officer must furnish to the contractor appropriate notices for posting when they are prescribed by the Deputy Assistant Secretary of Labor (see *http://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm.*

(b) If performance under the clause at 52.222-35, Equal Opportunity for Veterans, may necessitate a revision of a collective bargaining agreement, the contracting officer must advise the affected labor unions that the Department of Labor will give them appropriate opportunity to present their views. However, neither the contracting officer nor any representative

of the contracting officer may discuss with the contractor or any labor representative any aspect of the collective bargaining agreement.

(c) The Director, Office of Federal Contract Compliance Programs, is responsible for investigating complaints.

(d) The contracting officer must take necessary action as soon as possible upon notification by the appropriate agency official to implement any sanctions imposed on a contractor by the Department of Labor for violations of the clause at 52.222-35, Equal Opportunity for Veterans. These sanctions (see 41 CFR 60-300.66) may include—

(1) Withholding progress payments;

(2) Termination or suspension of the contract; or

(3) Debarment of the contractor.

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Subpart 22.14 - Employment of Workers with Disabilities

22.1400 Scope.

(a) This subpart prescribes policies and procedures for implementing section 503 of the Rehabilitation Act of l973, as amended (29 U.S.C. 793) (the Act); Executive Order 11758, January 15, 1974; and the regulations of the Secretary of Labor (41 CFR part 60-741).

(b) Section 503 of the Act applies to all Government contracts in excess of $20,000 for supplies and services (including construction) except as waived by the Secretary of Labor under 22.1401-3.

(c) In this subpart, the terms *contract* and *contractor* include *subcontract* and *subcontractor.*

22.1401 Presolicitation.

22.1401-1 Requirements.

Contractors and subcontractors, when entering into contracts and subcontracts subject to the Act, are required to—

(a) Take affirmative action to employ, and advance in employment, qualified individuals with disabilities, and to otherwise treat qualified individuals without discrimination based on their physical or mental disability;

(b) Undertake appropriate outreach and positive recruitment activities that are reasonably designed to effectively recruit qualified individuals with disabilities; and

(c) Compare the utilization of individuals with disabilities in their workforces to the utilization goal, as prescribed in the regulations of the Secretary of Labor, on an annual basis.

22.1401-2 Contract clause.

(a) (1) Insert the clause at 52.222-36, Equal Opportunity for Workers with Disabilities, in solicitations and contracts that exceed or are expected to exceed $20,000, except when—

(i) Both the performance of the work and the recruitment of workers will occur outside the United States, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island; or

(ii) The Director of OFCCP or agency head has waived, in accordance with 22.1401-3(a) or (b) all the terms of the clause.

(2) If the Director of OFCCP or agency head waives one or more (but not all) of the terms of the clause in accordance with 22.1401-3(a) or (b), use the basic clause with its *Alternate I.*

(b) The requirements of the clause at 52.222-36 in any contract with a State or local government (or any agency, instrumentality, or subdivision) must not apply to any agency, instrumentality, or subdivision of that government that does not participate in work on or under the contract.

22.1401-3 Waivers.

(a) The Director of the Office of Federal Contract Compliance Programs of the U.S. Department of Labor (Director of OFCCP), may waive the application of any or all of the terms of the clause at 52.222-36 for—

(1) Any contract if a waiver is deemed to be in the national interest; or

(2) Groups or categories of contracts if a waiver is in the national interest and it is—

(i) Impracticable to act on each request individually; and

(ii) Determined that the waiver will substantially contribute to convenience in administering the Act.

(b) The head of an agency may waive any requirement in this subpart when it is determined that the contract is essential to the national security, and that its award without complying with such requirements is necessary to the national security. Upon making such a determination, the head of the agency must notify the Director of OFCCP in writing within 30 days.

(c) The contracting officer must submit requests for waivers in accordance with agency procedures.

(d) A waiver granted for a particular class of contracts may be withdrawn for any contract within that class whenever considered necessary by the Director of OFCCP to achieve the purposes of the Act. The withdrawal shall not apply to contracts awarded before the withdrawal. The withdrawal shall not apply to solicitations under any means of formal sealed bidding unless it is made more than 10 days before the date set for bid opening.

22.1402 Postaward.

(a) The contracting officer must furnish to the contractor appropriate notices that state the contractor's obligations and the rights of individuals with disabilities. The contracting officer may obtain these notices from the Office of Federal Contract Compliance Programs (OFCCP) regional office.

(b) If performance under the clause at 52.222-36, Equal Opportunity for Workers with Disabilities, may necessitate a revision of a collective bargaining agreement, the contracting officer must advise the affected labor unions that the Department of Labor will give them appropriate opportunity to present their views. However, neither the contracting officer nor any representative of the contracting officer shall discuss with the contractor or any labor representative any aspect of the collective bargaining agreement.

(c) (1) Following agency procedures, the contracting office must forward any complaints received about the administration of section 503 of the Rehabilitation Act of l973, as amended (29 U.S.C. 793) to—

(i) Director, Office of Federal Contract Compliance Programs, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; or

(ii) Any OFCCP regional or area office.

(2) The OFCCP must institute investigation of each complaint and must be responsible for developing a complete case record.

(d) The contracting officer must take necessary action, as soon as possible upon notification by the appropriate agency official, to implement any sanctions imposed on a contractor by the Department of Labor for violations of the clause at 52.222-36, Equal Opportunity for Workers with Disabilities. These sanctions (see 41 CFR 60-741.66) may include—

(1) Withholding from payments otherwise due;

(2) Termination or suspension of the contract; or

(3) Debarment of the contractor.

Subpart 22.15 - Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor

22.1501 Definitions.

As used in this subpart—

Forced or indentured child labor means all work or service—

(1) Exacted from any person under the age of 18 under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily; or

(2) Performed by any person under the age of 18 pursuant to a contract the enforcement of which can be accomplished by process or penalties.

List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor means the list published by the Department of Labor in accordance with Executive Order 13126 of June 12, 1999, Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor. The list identifies products, by their country of origin, that the Departments of Labor, Treasury, and State have a reasonable basis to believe might have been mined, produced, or manufactured by forced or indentured child labor.

22.1502 Presolicitation.

22.1502-1 Policy.

Agencies must take appropriate action to enforce the laws prohibiting the manufacture or importation of products that have been mined, produced, or manufactured wholly or in part by forced or indentured child labor, consistent with 19 U.S.C. 1307, 29 U.S.C. 201, et seq., and 41 U.S.C. chapter 65. Agencies should make every effort to avoid acquiring such products.

22.1502-2 Solicitation provision and contract clause.

(a) (1) Except as provided in paragraph (c) of this subsection, insert the provision at 52.222-18, Certification Regarding Knowledge of Child Labor for Listed End Products, in all solicitations that are expected to exceed the micro-purchase threshold and are for the acquisition of end products (regardless of country of origin) of a type identified by country of origin on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor. The contracting officer must identify in paragraph (b) of the provision at 52.222-18, Certification Regarding Knowledge of Child Labor for Listed End Products any applicable end products and countries of origin from the List. For solicitations estimated to equal or exceed $50,000, the contracting officer must exclude from the List in the solicitation end products from any countries identified in paragraph (c) of this subsection, in accordance with the specified thresholds.

(2) Insert the clause at 52.222-19, Child Labor—Cooperation with Authorities and Remedies, in all solicitations and contracts for the acquisition of supplies that are expected to exceed the micro-purchase threshold.

(b) When issuing a solicitation for supplies expected to exceed the micro-purchase threshold, the contracting officer must check the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor (the List) (www.dol.gov/ilab/) (see 22.1502-2(a)(1). Appearance of a product on the List is not a bar to purchase of any such product mined, produced, or manufactured in the identified country, but rather is an alert that there is a reasonable basis to believe that such product may have been mined, produced, or manufactured by forced or indentured child labor.

(c) The requirements of this subpart that result from the appearance of any end product on the List do not apply to a solicitation or contract if the identified country of origin on the List is—

(1) Israel, and the anticipated value of the acquisition is $50,000 or more (see part 25 for the Israeli Trade Act);

(2) Mexico, and the anticipated value of the acquisition is $105,767 or more (see part 25 for trade agreements); or

(3) Armenia, Aruba, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Italy, Japan, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, New Zealand, North Macedonia, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan, Ukraine, or the United Kingdom and the anticipated value of the acquisition is $174,000 or more (see part 25 for trade agreements).

22.1503 Evaluation and award.

(a) Except as provided in paragraph (c) of 22.1502-2, before the contracting officer may make an award for an end product (regardless of country of origin) of a type identified by country of origin on the List the offeror must certify that—

(1) It will not supply any end product on the List that was mined, produced, or manufactured in a country identified on the List for that product, as specified in the solicitation by the contracting officer in the Certification Regarding Knowledge of Child Labor for Listed End Products; or

(2) (i) It has made a good faith effort to determine whether forced or indentured child labor was used to mine, produce, or manufacture any end product to be furnished under the contract that is on the List and was mined, produced, or manufactured in a country identified on the List for that product; and

(ii) On the basis of those efforts, the offeror is unaware of any such use of child labor.

(b) Absent any actual knowledge that the certification is false, the contracting officer must rely on the offerors' certifications in making award decisions.

(c) Proper certification will not prevent the head of an agency from imposing remedies in accordance with 22.1504 if it is later discovered that the contractor has furnished an end product or component that has in fact been mined, produced, or manufactured, wholly or in part, using forced or indentured child labor.

22.1504 Postaward.

(a) Whenever a 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 22.1502-2(a)(1) and 22.1503(a), the contracting officer must refer the matter for investigation by the agency's Inspector General, the Attorney General, or the Secretary of the Treasury, whichever is determined appropriate in accordance with agency procedures, except to the extent that the end product is from the country listed 22.1502-2(c), under a contract exceeding the applicable threshold.

(b) The Government may impose remedies set forth in paragraph (c) of this section for the following violations (note that the violations in paragraphs (b)(3) and (b)(4) of this section go beyond violations of the requirements relating to certification of end products):

(1) The contractor has submitted a false certification regarding knowledge of the use of forced or indentured child labor.

(2) The contractor has failed to cooperate as required in accordance with the clause at 52.222-19, Child Labor Cooperation with Authorities and Remedies, with an investigation of the use of forced or indentured child labor by an Inspector General, the Attorney General, or the Secretary of the Treasury.

(3) The contractor uses forced or indentured child labor in its mining, production, or manufacturing processes.

(4) The contractor has furnished an end product or component mined, produced, or manufactured, wholly or in part, by forced or indentured child labor. Remedies in paragraphs (b)(2) and (b)(3) of this section are inappropriate unless the contractor knew of the violation.

(c) The Government may impose the following remedies for violations:

(1) The contracting officer may terminate the contract.

(2) The suspending and debarring official may suspend the contractor in accordance with the procedures in subpart 9.4.

(3) The suspending and debarring official may debar the contractor for a period not to exceed 3 years in accordance with the procedures in subpart 9.4.

Subpart 22.16 - Notification of Employee Rights Under the National Labor Relations Act.

22.1601 Definitions.

United States, as used in this subpart, means the 50 States, the District of Columbia, Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island.

22.1602 Presolicitation.

22.1602-1 Policy.

(a) This subpart prescribes policies and procedures to implement Executive Order 13496, dated January 30, 2009 (74 FR 6107, February 4, 2009). Executive Order 13496 requires contractors to post a notice informing employees of their rights under Federal labor laws.

(b) The Secretary has determined that the notice must contain employee rights under the National Labor Relations Act (Act), 29 U.S.C. 151 et seq. The Act encourages collective bargaining, and protects the exercise by employees of their freedom to associate, to self-organize, and to designate representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

(c) The requirements of this subpart do not apply to—

(1) Contracts under the simplified acquisition threshold;

(2) Subcontracts of $10,000 or less; and

(3) Contracts or subcontracts for work performed exclusively outside the United States.

(d) (1) If the Secretary finds that the requirements of the Executive Order impair the ability of the Government to procure goods and services on an economical and efficient basis or if special circumstances require an exemption in order to serve the national interest, the Secretary may exempt a contracting department or agency, or groups of departments or agencies, from the requirements of any or all of the provisions of this Executive Order with respect to a particular contract or subcontract, or any class of contracts or subcontracts, including the requirement to include the clause at 52.222-40, or parts of that clause, in contracts.

(2) Requests for exemptions may be submitted in accordance with Department of Labor regulations at 29 CFR 471.3.

22.1602-2 Contract clause.

(a) Insert the clause at 52.222-40, Notification of Employee Rights under the National Labor Relations Act, in all solicitations and contracts, including acquisitions for commercial products, commercial services, and commercially available off-the-shelf items, except acquisitions—

(1) Under the simplified acquisition threshold. For indefinite-quantity contracts, include the clause only if the value of orders in any calendar year of the contract is expected to exceed the simplified acquisition threshold;

(2) For work performed exclusively outside the United States; or

(3) Covered (in their entirety) by an exemption granted by the Secretary.

(b) A contracting agency may modify the clause at 52.222-40, if necessary, to reflect an exemption granted by the Secretary (see 22.1602-1(d)).

22.1603 Postaward.

(a) The Secretary may conduct compliance evaluations or investigate complaints of any contractor or subcontractor to determine if any of the requirements of the clause at 52.222-40, Notification of Employee Rights under the National Labor Relations Act, have been violated.

(b) Contracting departments and agencies must cooperate with the Secretary and provide such information and assistance as the Secretary may require in the performance of the Secretary's functions.

(c) If the Secretary determines that there has been a violation, the Secretary may take such actions as set forth in 29 CFR 471.14.

(d) The Secretary may not terminate or suspend a contract or suspend or debar a contractor if the agency head has provided written objections, which must include a statement of reasons for the objection and a finding that the contractor's performance is essential to the agency's mission, and continues to object to the imposition of such sanctions and penalties. Procedures for enforcement by the Secretary are set out in 29 CFR 471.10 through 29 CFR 471.16.

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Subpart 22.17 - Combating Trafficking in Persons.

22.1700 Scope.

This subpart prescribes policy for implementing 22 U.S.C. chapter 78 and Executive Order 13627, Strengthening Protections Against Trafficking in Persons in Federal Contracts, dated September 25, 2012.

22.1701 Applicability.

(a) This subpart applies to all acquisitions.

(b) The requirement at 22.1703-1(b) for a certification and compliance plan applies only to any portion of a contract or subcontract that—

(1) Is for supplies, other than commercially available off-the-shelf (COTS) items, to be acquired outside the United States, or services to be performed outside the United States; and

(2) Has an estimated value that exceeds $700,000.

22.1702 Definitions.

As used in this subpart --

Agent means any individual, including a director, an officer, an employee, or an independent contractor, authorized to act on behalf of the organization.

Coercion means—

(1) Threats of serious harm to or physical restraint against any person;

(2) Any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(3) The abuse or threatened abuse of the legal process.

Commercial sex act means any sex act on account of which anything of value is given to or received by any person.

Debt bondage means the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

Employee means an employee of the Contractor directly engaged in the performance of work under the contract who has other than a minimal impact or involvement in contract performance.

Forced labor means knowingly providing or obtaining the labor or services of a person—

(1) By threats of serious harm to, or physical restraint against, that person or another person;

(2) By means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or

(3) By means of the abuse or threatened abuse of law or the legal process.

Involuntary servitude includes a condition of servitude induced by means of—

(1) Any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such conditions, that person or another person would suffer serious harm or physical restraint; or

(2) The abuse or threatened abuse of the legal process.

Recruitment fees means fees of any type, including charges, costs, assessments, or other financial obligations, that are associated with the recruiting process, regardless of the time, manner, or location of imposition or collection of the fee.

(1) Recruitment fees include, but are not limited to, the following fees (when they are associated with the recruiting process) for—

(i) Soliciting, identifying, considering, interviewing, referring, retaining, transferring, selecting, training, providing orientation to, skills testing, recommending, or placing employees or potential employees;

(ii) Advertising;

(iii) Obtaining permanent or temporary labor certification, including any associated fees;

(iv) Processing applications and petitions;

(v) Acquiring visas, including any associated fees;

(vi) Acquiring photographs and identity or immigration documents, such as passports, including any associated fees;

(vii) Accessing the job opportunity, including required medical examinations and immunizations; background, reference, and security clearance checks and examinations; and additional certifications;

(viii) An employer's recruiters, agents or attorneys, or other notary or legal fees;

(ix) Language interpretation or translation, arranging for or accompanying on travel, or providing other advice to employees or potential employees;

(x) Government-mandated fees, such as border crossing fees, levies, or worker welfare funds;

(xi) Transportation and subsistence costs—

(A) While in transit, including, but not limited to, airfare or costs of other modes of transportation, terminal fees, and travel taxes associated with travel from the country of origin to the country of performance and the return journey upon the end of employment; and

(B) From the airport or disembarkation point to the worksite;

(xii) Security deposits, bonds, and insurance; and

(xiii) Equipment charges.

(2) A recruitment fee, as described in the introductory text of this definition, is a recruitment fee, regardless of whether the payment is—

(i) Paid in property or money;

(ii) Deducted from wages;

(iii) Paid back in wage or benefit concessions;

(iv) Paid back as a kickback, bribe, in-kind payment, free labor, tip, or tribute; or

(v) Collected by an employer or a third party, whether licensed or unlicensed, including, but not limited to—

(A) Agents;

(B) Labor brokers;

(C) Recruiters;

(D) Staffing firms (including private employment and placement firms);

(E) Subsidiaries/affiliates of the employer;

(F) Any agent or employee of such entities; and

(G) Subcontractors at all tiers.

Severe forms of trafficking in persons means—

(1) Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

(2) The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

Sex trafficking means the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act.

Subcontractor means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

United States means the 50 States, the District of Columbia, and outlying areas.

22.1703 Presolicitation.

22.1703-1 Requirements.

(a) The United States Government has adopted a policy prohibiting trafficking in persons, including certain trafficking-related activities. Additional information about trafficking in persons may be found at the website for the Department of State's Office to Monitor and Combat Trafficking in Persons at http://www.state.gov/j/tip/ . Government solicitations and contracts must—

(1) Prohibit contractors, contractor employees, subcontractors, subcontractor employees, and their agents from the trafficking-related activities listed in paragraph (b) of the clause at 52.222-50, Combating Trafficking in Persons.

(2) Require contractors and subcontractors to notify employees of the prohibited activities referenced in paragraph (a)(1) of this subsection and the actions that may be taken against them for violations.

(3) Require the contractor and subcontractors to—

(i) Disclose to the contracting officer and the agency Inspector General information sufficient to identify the nature and extent of an offense and the individuals responsible for the conduct;

(ii) Provide timely and complete responses to Government auditors' and investigators' requests for documents;

(iii) Cooperate fully in providing reasonable access to their facilities and staff (both inside and outside the U.S.) to allow contracting agencies and other responsible Federal agencies to conduct audits, investigations, or other actions to ascertain compliance with the Trafficking Victims Protection Act (22 U.S.C. chapter 78), Executive Order 13627, or any

other applicable law or regulation establishing restrictions on trafficking in persons, the procurement of commercial sex acts, or the use of forced labor; and

(4) Provide suitable remedies, including termination, to be imposed on contractors that fail to comply with the requirements of paragraphs (a)(1) through (3) and (b) of this subsection.

(b) With regard to certification and a compliance plan, Government solicitations and contracts must—

(1) (i) Require the apparent successful offeror to provide, before contract award, a certification (see 52.222-56) that the offeror has a compliance plan if any portion of the contract or subcontract—

(A) Is for supplies, other than COTS items (see 2.101), to be acquired outside the United States, or services to be performed outside the United States; and

(B) The estimated value exceeds $700,000.

(ii) The certification must state that—

(A) The offeror has implemented the plan and has implemented procedures to prevent any prohibited activities and to monitor, detect, and terminate the contract with a subcontractor or agent engaging in prohibited activities; and

(B) After having conducted due diligence, either—

(1) To the best of the offeror's knowledge and belief, neither it nor any of its agents, proposed subcontractors, or their agents, has engaged in any such activities; or

(2) If abuses relating to any of the prohibited activities identified in 52.222-50(b) have been found, the offeror or proposed subcontractor has taken the appropriate remedial and referral actions;

(2) Require annual certifications (see 52.222-50(h)(5)) during performance of the contract, when a compliance plan was required at award;

(3) (i) Require the contractor to obtain a certification from each subcontractor, prior to award of a subcontract, if any portion of the subcontract—

(A) Is for supplies, other than COTS items (see 2.101), to be acquired outside the United States, or services to be performed outside the United States; and

(B) The estimated value exceeds $700,000.

(ii) The certification must state that—

(A) The subcontractor has implemented a compliance plan; and

(B) After having conducted due diligence, either—

(1) To the best of the subcontractor's knowledge and belief, neither it nor any of its agents, subcontractors, or their agents, has engaged in any such activities; or

(2) If abuses relating to any of the prohibited activities identified in 52.222-50(b) have been found, the subcontractor has taken the appropriate remedial and referral actions;

(4) Require the contractor to obtain annual certifications from subcontractors during performance of the contract, when a compliance plan was required at the time of subcontract award; and

(5) Require that any compliance plan or procedures must be appropriate to the size and complexity of the contract and the nature and scope of its activities, including the number of non-U.S. citizens expected to be employed and the risk that the contract or subcontract will involve services or supplies susceptible to trafficking in persons. The minimum elements of the plan are specified at 52.222-50(h).

22.1703-2 Solicitation provisions and contract clauses.

(a) (1) Insert the clause at 52.222-50, Combating Trafficking in Persons, in all solicitations and contracts.

(2) Use the clause with its Alternate I when the contract will be performed outside the United States and the contracting officer has been notified of specific U.S. directives or notices regarding combating trafficking in persons (such as general orders or military listings of "off-limits" local establishments) that apply to contractor employees at the contract place of performance.

(b) Insert the provision at 52.222-56, Certification Regarding Trafficking in Persons Compliance Plan, in solicitations if—

(1) It is possible that at least $700,000 of the value of the contract may be performed outside the United States; and

(2) The acquisition is not entirely for commercially available off-the-shelf items.

22.1704 Postaward.

(a) *Violations.* It is a violation of the Trafficking Victims Protection Act of 2000, as amended, (22 U.S.C. chapter 78), E.O. 13627, or the policies of this subpart if the contractor, contractor employee, subcontractor, subcontractor employee, or agent fails to comply with the requirements of the clause at 52.222-50, Combating Trafficking in Persons.

(b) *Credible information.* Upon receipt of credible information regarding a violation listed in paragraph (a) of this section, the contracting officer must promptly notify, in accordance with agency procedures, the agency Inspector General, the agency debarring and suspending official, and if appropriate, law enforcement officials with jurisdiction over the alleged offense; and may direct the contractor to take specific steps to abate the alleged violation or enforce the requirements of its compliance plan.

(c) *Receipt of agency Inspector General report.*

(1) The head of an executive agency must ensure that the contracting officer is provided a copy of the agency Inspector General report of an investigation of a violation of the trafficking in persons prohibitions in 52.222-50(b).

(2)

(i) Upon receipt of a report from the agency Inspector General that provides support for the allegations, the head of the executive agency must—

(A) Refer the matter to the agency suspending and debarring official; and

(B) In accordance with agency procedures, delegate to an authorized agency official, who may also be the agency suspending or debarring official, the responsibility to—

(1) Expeditiously conduct an administrative proceeding, allowing the contractor the opportunity to respond to the report;

(2) Make a final determination as to whether the allegations are substantiated; and

(3) Notify the contracting officer of the determination.

(ii) Whether or not the official authorized to conduct the administrative proceeding described in paragraph (c)(2)(i)(B) of this section is the suspending and debarring official, the suspending and debarring official has the authority, at any time before or after the final determination as to whether the allegations are substantiated, to use the suspension and debarment procedures in subpart 9.4 to suspend, propose for debarment, or debar the contractor, if appropriate, also considering the factors in paragraph (d)(2) of this section.

(d) *Remedies.* After a final determination in accordance with paragraph (c)(2)(ii) of this section that the allegations of a trafficking in persons violation are substantiated, the contracting officer must—

(1) Enter the violation in FAPIIS (see part 42); and

(2) Consider taking any of the remedies specified in paragraph (e) of the clause at 52.222-50, Combating Trafficking in Persons. These remedies are in addition to any other remedies available to the United States Government.

Subpart 22.18 - Employment Eligibility Verification

22.1801 Definitions.

As used in this subpart—

Commercially available off-the-shelf (COTS) item —

(1) Means any item of supply that is—

(i) A commercial product (as defined in paragraph (1) of the definition of "commercial product" at 2.101);

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

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

(2) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products. Per 46 CFR 525.1(c)(2), "bulk cargo" means cargo that is loaded and carried in bulk onboard ship without mark or count, in a loose unpackaged form, having homogenous characteristics. Bulk cargo loaded into intermodal equipment, except LASH or Seabee barges, is subject to mark and count and, therefore, ceases to be bulk cargo.

Employee assigned to the contract means an employee who was hired after November 6, 1986 (after November 27, 2009, in the Commonwealth of the Northern Mariana Islands), who is directly performing work, in the United States, under a contract that is required to include the clause prescribed at 22.1802-2. An employee is not considered to be directly performing work under a contract if the employee—

(1) Normally performs support work, such as indirect or overhead functions; and

(2) Does not perform any substantial duties applicable to the contract.

Subcontract means any contract, as defined in 2.101, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

Subcontractor means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

United States means the 50 States, the District of Columbia, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands and the U.S. Virgin Islands, as defined in 8 U.S.C. 1101(a)(38).

22.1802 Presolicitation.

22.1802-1 Policy.

(a) This subpart prescribes policies and procedures requiring contractors to utilize the Department of Homeland Security (DHS), United States Citizenship and Immigration Service's employment eligibility verification program (E-Verify) as the means for verifying employment eligibility of certain employees.

(b) Statutes and Executive orders require employers to abide by the immigration laws of the United States and to employ in the United States only individuals who are eligible to work in the United States. The E-Verify program provides an Internet-based means of verifying employment eligibility of workers employed in the United States, but is not a substitute for any other employment eligibility verification requirements.

(c) Contracting officers must include in solicitations and contracts, as prescribed in 22.1802-2, requirements that Federal contractors must—

(1) Enroll as Federal contractors in E-Verify;

(2) Use E-Verify to verify employment eligibility of all new hires working in the United States, except that the contractor may choose to verify only new hires assigned to the contract if the contractor is—

(i) An institution of higher education (as defined at 20 U.S.C. 1001(a));

(ii) A State or local government or the government of a Federally recognized Indian tribe; or

(iii) A surety performing under a takeover agreement entered into with a Federal agency pursuant to a performance bond;

(3) Use E-Verify to verify employment eligibility of all employees assigned to the contract; and

(4) Include these requirements, as required by the clause at 52.222-54, in subcontracts for—

(i) Services, except for commercial services that are part of the purchase of a COTS item (or an item that would be a COTS item, but for minor modifications), performed by the COTS provider, and are normally provided for that COTS item; and

(ii) Construction.

(d) Contractors may elect to verify employment eligibility of all existing employees working in the United States who were hired after November 6, 1986 (after November 27, 2009, in the Commonwealth of the Northern Mariana Islands), instead of just those employees assigned to the contract. The contractor is not required to verify employment eligibility of—

(1) Employees who hold an active security clearance of confidential, secret, or top secret; or

(2) Employees for whom background investigations have been completed and credentials issued pursuant to Homeland Security Presidential Directive (HSPD)-12.

(e) In exceptional cases, the head of the contracting activity may waive the E-Verify requirement for a contract or subcontract or a class of contracts or subcontracts, either temporarily or for the period of performance. This waiver authority may not be delegated.

(f) DHS and the Social Security Administration (SSA) may terminate a contractor's memorandum of understanding (MOU) and deny access to the E-Verify system in accordance with the terms of the MOU. If DHS or SSA terminates a contractor's MOU, the terminating agency must refer the contractor to a suspending and debarring official for possible suspension or debarment action. During the period between termination of the MOU and a decision by the suspending and debarring official whether to suspend or debar, the contractor is excused from its obligations under paragraph (b) of the clause at 52.222-54. If the contractor is suspended, debarred, or subject to a voluntary exclusion as a result of the MOU termination, the contractor is not eligible to participate in E-Verify during the period of its suspension, debarment, or voluntary exclusion. If the contractor is not suspended, debarred, or subject to a voluntary exclusion, then the contractor must reenroll in E-Verify.

22.1802-2 Contract clause.

Insert the clause at 52.222-54, Employment Eligibility Verification, in all solicitations and contracts that exceed $150,000, except those that—

(a) Are only for work that will be performed outside the United States;

(b) Are for a period of performance of less than 120 days; or

(c) Are only for—

(1) Commercially available off-the-shelf items;

(2) Items that would be COTS items, but for minor modifications (as defined at paragraph (3)(ii) of definition of “commercial product” at 2.101;

(3) Items that would be COTS items if they were not bulk cargo; or

(4) Commercial services that are—

(i) Part of the purchase of a COTS item (or an item that would be a COTS item, but for minor modifications);

(ii) Performed by the COTS provider; and

(iii) Are normally provided for that COTS item.

Subpart 22.19 - Increasing the Minimum Wage for Contractors.

22.1900 Scope of subpart.

This subpart prescribes policies and procedures to implement Executive Order (E.O.) 14026, Increasing the Minimum Wage for Federal Contractors, which requires minimum wages for certain workers; Department of Labor (DOL) implementing regulations are found at 29 CFR part 23. This E.O. superseded E.O. 13658; DOL implementing regulations for E.O. 13658 are found at 29 CFR part 10.

22.1901 Definitions.

As used in this subpart—

United States means the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, Johnston Island, Wake Island, and the outer Continental Shelf as defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331, *et seq.*).

Worker (in accordance with 29 CFR 23.20)—

(1) (i) Means any person engaged in performing work on, or in connection with, a contract covered by Executive Order 14026, and

(A) Whose wages under such contract are governed by the Fair Labor Standards Act (29 U.S.C. chapter 8), the Service Contract Labor Standards statute (41 U.S.C. chapter 67), or the Wage Rate Requirements (Construction) statute (40 U.S.C. chapter 31, subchapter IV),

(B) Other than individuals employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541,

(C) Regardless of the contractual relationship alleged to exist between the individual and the employer.

(ii) Includes workers performing on, or in connection with, the contract whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c).

(iii) Also includes any person working on, or in connection with, the contract and individually registered in a bona fide apprenticeship or training program registered with the Department of Labor's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship.

(2) (i) A worker performs *on* a contract if the worker directly performs the specific services called for by the contract; and

(ii) A worker performs *in connection with* a contract if the worker's work activities are necessary to the performance of a contract but are not the specific services called for by the contract.

22.1902 Policy.

(a) Pursuant to Executive Order 14026, the minimum hourly wage rate required to be paid to workers performing on, or in connection with, contracts and subcontracts subject to this subpart is—

(1) At least $15.00 per hour beginning January 30, 2022; and

(2) Beginning January 1, 2023, and annually thereafter, an amount determined by the Secretary of Labor. The Administrator of the Wage and Hour Division (the Administrator) will notify the public of the new E.O. minimum wage rate at least 90 days before it is to take effect. (See 22.1904.)

(b) *Relationship with other wage rates.*

(1) Nothing in this subpart shall excuse noncompliance with any applicable Federal or State prevailing wage law or any applicable law or municipal ordinance or any applicable contract establishing a minimum wage higher than the E.O. minimum wage. However, wage increases under such other laws or municipal ordinances are not subject to price adjustment under this subpart.

(2) The E.O. minimum wage rate applies whenever it is higher than any applicable collective bargaining agreement(s) wage rate.

(c) *Application to tipped workers.* Policies and procedures in DOL regulations at 29 CFR 23.240(b) and 23.280 address the relationship between the E.O. minimum wage and wages of workers engaged in an occupation in which they customarily and regularly receive more than $30 a month in tips.

22.1903 Applicability.

(a) This subpart applies to contracts covered by the Service Contract Labor Standards statute (41 U.S.C. chapter 67, formerly known as the Service Contract Act, subpart 22.10), or the Wage Rate Requirements (Construction) statute (40

U.S.C. chapter 31, Subchapter IV, formerly known as the Davis Bacon Act, subpart 22.4), that require performance in whole or in part within the United States (the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, Johnston Island, Wake Island, and the outer Continental Shelf as defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331, *et seq.*)). When performance is in part within and in part outside the United States, this subpart applies to the part of the contract that is performed within the United States.

(b) (1) This subpart applies to workers as defined at 22.1901. As provided in that definition—

(i) Workers are covered regardless of the contractual relationship alleged to exist between the contractor or subcontractor and the worker;

(ii) Workers with disabilities whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c) are covered; and

(iii) Workers who are registered in a bona fide apprenticeship program or training program registered with the Department of Labor's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship, are covered.

(2) This subpart does not apply to—

(i) Fair Labor Standards Act (FLSA)-covered individuals performing in connection with contracts covered by the E.O., *i.e.,* those individuals who perform duties necessary to the performance of the contract, but who are not directly engaged in performing the specific work called for by the contract, and who spend less than 20 percent of their hours worked in a particular workweek performing in connection with such contracts;

(ii) Individuals exempted from the minimum wage requirements of the FLSA under 29 U.S.C. 213(a) and 214(a) and (b), unless otherwise covered by the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute. These individuals include but are not limited to—

(A) Learners, apprentices, or messengers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(a);

(B) Students whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(b); and

(C) Those employed in a bona fide executive, administrative, or professional capacity (29 U.S.C. 213(a)(1) and 29 CFR part 541).

(c) Agency Labor Advisors, as defined at 22.001, are listed at *https://www.sam.gov* and are available to provide guidance and assistance with the application of this subpart.

22.1904 Annual Executive Order Minimum Wage Rate.

(a) For the E.O. minimum wage rate that becomes effective on January 30, 2022, and annually thereafter, the Administrator will—

(1) Notify the public of the new E.O. minimum wage rate at least 90 days before it becomes effective by publishing a notice in the Federal Register;

(2) Publish and maintain on Wage Determinations at *SAM.gov, https://www.sam.gov* or any successor site, the E.O. minimum wage rate; and

(3) Include a general notice on wage determinations which are issued under the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute. The notice will provide information on the E.O. minimum wage and how to obtain annual updates.

(b) (1) The contractor may request a price adjustment only after the effective date of a new annual E.O. minimum wage determination published pursuant to paragraph (a). Prices will be adjusted only for increased labor costs (including subcontractor labor costs) as a result of the annual E.O. minimum wage, and for associated labor costs (including those for subcontractors). Associated labor costs must include increases or decreases that result from changes in social security and unemployment taxes and workers' compensation insurance, but will not otherwise include any amount for general and administrative costs, overhead, or profit.

(2) The wage rate price adjustment under this clause is the lowest amount calculated by subtracting from the new E.O. wage rate the following: The current E.O. minimum wage rate; the current service or construction wage determination rate under the contract (if the wage rate is applicable to that worker); or the actual wage currently paid the worker. If the amount is zero or below, there will be no increase paid for this worker.

(i) Example 1—New E.O. wage rate is $16.10.

Previous E.O. wage rate is $15.70. The current service or construction wage determination rate applicable to this worker under the contract is $15.75.	Analysis: The calculation is $16.10−$15.80 = $.30. The price adjustment for this worker is $.30.
The actual wage currently paid to the worker is $15.80.	
(ii) Example 2—New E.O. wage rate is $15.50.	
Previous E.O. wage rate is $15.10. The current service or construction wage determination rate applicable to this worker under the contract is $15.75.	Analysis: The calculation is $15.50−$15.80 = −$.30. There is no price adjustment for this worker.
The actual wage currently paid to the worker is $15.80.	

(3) The contracting officer must not adjust the contract price for any costs other than those identified in paragraph (b)(1) of this section, and must not provide duplicate price adjustments with any price adjustment under clauses implementing the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute.

22.1905 Enforcement of Executive Order Minimum Wage Requirements.

(a) *Authority.*

(1) Section 5 of the E.O. grants the authority for investigating potential violations of, and obtaining compliance with, the E.O. to the Secretary of Labor. The Secretary of Labor, in promulgating the implementing regulations required by Section 4 of the E.O., has assigned this authority to the Administrator. Contracting agencies do not have authority to conduct compliance investigations under 29 CFR part 10 or part 23 as implemented in this subpart. This does not limit the contracting officer's authority to otherwise enforce the terms and conditions of the contract.

(2) Contracting officers must withhold payment at the direction of the Administrator.

(3) The contracting officer must withhold payment, without a request from the Administrator, if the contractor fails to comply with the requirements in paragraph (e)(2) of 52.222-55, Minimum Wages for Contractor Workers Under Executive Order 14026 to furnish payroll records, until such time as the noncompliance is corrected.

(b) *Complaints.*

(1) Complaints may be filed with the contracting officer or the Administrator by any person, entity, or organization that believes a violation of this subpart has occurred.

(2) The identity of any individual who makes a written or oral statement as a complaint or in the course of an investigation, as well as portions of the statement which would reveal the individual's identity, must not be disclosed in any manner to anyone other than Federal officials without the prior consent of the individual, unless otherwise authorized by law.

(3) Upon receipt of a complaint, or if notified that the Administrator has received a complaint, the contracting officer must report the following information, within 14 days, if available without conducting an investigation, to the Department of Labor, Wage and Hour Division, Office of Government Contracts, 200 Constitution Avenue NW., Room S3006, Washington, DC 20210.

(i) The complaint or description of the alleged violation;

(ii) Available statements by the worker, contractor, or any other person regarding the alleged violation;

(iii) Evidence that clause 52.222-55, Minimum Wages for Contractor Workers Under Executive Order 14026, (or its predecessor for complaints under 29 CFR part 10) was included in the contract;

(iv) Information concerning known settlement negotiations between the parties, if applicable; and

(v) Any other relevant facts known to the contracting officer or other information requested by the Wage and Hour Division.

(c) *Investigations.* Complaints will be investigated by the Administrator, if warranted, in accordance with the procedures in 29 CFR part 23.430.

(d) *Remedies and sanctions —*

(1) *Unpaid wages.* When the Administrator's investigation reveals that a contractor has failed to pay the applicable E.O. minimum wage, the Administrator will notify the contractor and the contracting agency of the unpaid wage violation, and request that the contractor remedy the violation. If the contractor does not remedy the violation, the Administrator may direct

withholding of payments due on the contract or any other contract between the contractor and the Federal Government. Upon final decision and direction of the Administrator, the contracting agency must transfer the withheld funds to the Department of Labor for disbursement in accordance with the procedures at 22.404-2.

(2) *Antiretaliation.* When a contractor has been found to have violated paragraph (i) of clause 52.222-55, Minimum Wages for Contractor Workers Under Executive Order 14026, the Administrator may provide for relief to the worker in accordance with 29 CFR 23.440.

(3) *Debarment.*

(i) The Department of Labor may initiate debarment proceedings under 29 CFR 23.520 whenever a contractor is found to have disregarded its obligations under 29 CFR part 23.

(ii) Contracting officers must consider notifying the agency suspending and debarring official in accordance with agency procedures when a contractor commits significant violations of contract terms and conditions related to this subpart.

(4) *Retroactive inclusion of contract clause.* If a contracting agency fails to include the contract clause in a contract to which E.O. 14026 applies, the contracting agency, on its own initiative or within 15 calendar days of notification by an authorized representative of the Department of Labor, must incorporate the contract clause in the contract retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation and termination).

22.1906 Contract clause.

Insert the clause at 52.222-55, Minimum Wages for Contractor Workers Under Executive Order 14026, in solicitations and contracts that include the clause at 52.222-6, Construction Wage Rate Requirements, or 52.222-41, Service Contract Labor Standards, where work is to be performed, in whole or in part, in the United States.

Subpart 22.20 - [Reserved]

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Subpart 22.21 - Establishing Paid Sick Leave for Federal Contractors.

22.2101 Definitions.

As used in this subpart—

Accrual year means the 12-month period during which a contractor may limit an employee's accrual of paid sick leave to no less than 56 hours (see 29 CFR 13.5(b)(1)).

Certification issued by a health care provider has the meaning given in 29 CFR 13.2.

Employee—

(1) (i) Means any person engaged in performing work on or in connection with a contract covered by E.O. 13706; and

(A) Whose wages under such contract are governed by the Service Contract Labor Standards statute (41 U.S.C. chapter 67), the Wage Rate Requirements (Construction) statute (40 U.S.C. chapter 31, subchapter IV), or the Fair Labor Standards Act (29 U.S.C. chapter 8);

(B) Including employees who qualify for an exemption from the Fair Labor Standards Act's minimum wage and overtime provisions; and

(C) Regardless of the contractual relationship alleged to exist between the individual and the employer; and

(ii) Includes any person performing work on or in connection with the contract and individually registered in a bona fide apprenticeship or training program registered with the Department of Labor's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship.

(2) (i) An employee performs on a contract if the employee directly performs the specific services called for by the contract; and

(ii) An employee performs in connection with a contract if the employee's work activities are necessary to the performance of a contract but are not the specific services called for by the contract.

Health care provider has the meaning given in 29 CFR 13.2.

Multiemployer plan means a plan to which more than one employer is required to contribute and which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer.

Paid sick leave means compensated absence from employment that is required by E.O. 13706 and 29 CFR part 13.

22.2102 Presolicitation.

22.2102-1 General.

(a) This subpart prescribes policies and procedures to implement E.O. 13706, Establishing Paid Sick Leave for Federal Contractors, dated September 7, 2015, and Department of Labor implementing regulations at 29 CFR part 13.

(b) This subpart applies to—

(1) Contracts that—

(i) Are covered by the Service Contract Labor Standards statute (41 U.S.C. chapter 67, formerly known as the Service Contract Act, subpart 22.10), or the Wage Rate Requirements (Construction) statute (40 U.S.C. chapter 31, Subchapter IV, formerly known as the Davis-Bacon Act, 22.402-3); and

(ii) Require performance in whole or in part within the United States. When performance is in part within and in part outside the United States, this subpart applies to the part of the contract that is performed within the United States; and

(2) Employees performing on or in connection with such contracts whose wages are governed by the Service Contract Labor Standards statute, the Wage Rate Requirements (Construction) statute, or the Fair Labor Standards Act, including employees who qualify for an exemption from the Fair Labor Standards Act's minimum wage and overtime provisions.

(c) The following are excluded from coverage under this subpart:

(1) Employees performing in connection with contracts covered by the E.O. for less than 20 percent of their work hours in a given workweek. This exclusion is inapplicable to employees performing on contracts covered by the E.O., *i.e.,* those employees directly engaged in performing the specific work called for by the contract, at any point during the workweek (see 29 CFR 13.4(e)).

(2) Until the earlier of the date the agreement terminates or January 1, 2020, employees whose covered work is governed by a collective bargaining agreement ratified before September 30, 2016, that—

(i) Already provides 56 hours (or 7 days, if the agreement refers to days rather than hours) of paid sick time (or paid time off that may be used for reasons related to sickness or health care) each year; or

(ii) Provides less than 56 hours (or 7 days, if the agreement refers to days rather than hours) of paid sick time (or paid time off that may be used for reasons related to sickness or health care) each year, provided that each year the contractor provides covered employees with the difference between 56 hours (or 7 days) and the amount provided under the existing agreement in accordance with 29 CFR 13.4(f).

(3) The Government's unilateral exercise of a pre-negotiated option to renew an existing contract that does not contain the clause at 52.222-62 will not automatically trigger the application of that clause. (See definition of "new contract" at 29 CFR 13.2).

(d) Nothing in E.O. 13706 or 29 CFR part 13 shall excuse noncompliance with or supersede any applicable Federal or State law, any applicable law or municipal ordinance, or a collective bargaining agreement requiring greater paid sick leave or leave rights than those established under E.O. 13706 and 29 CFR part 13. For additional details regarding interaction with the Service Contract Labor Standards statute, the Wage Rate Requirements (Construction) statute, the Family and Medical Leave Act, and State and local paid sick time laws, see 29 CFR 13.5(f)(2) through (4).

22.2102-2 Policy.

(a) The Government must require contractors to allow employees performing work on or in connection with a contract covered by E.O. 13706 to accrue and use paid sick leave in accordance with the E.O. and 29 CFR part 13.

(b) In accordance with 29 CFR 13.5(f)(5)(i), the paid sick leave requirements of E.O. 13706 and 29 CFR part 13 may be satisfied by a contractor's voluntary paid time off policy, whether provided pursuant to a collective bargaining agreement or otherwise, where the voluntary paid time off policy meets or exceeds the requirements. For additional details regarding paid time off policies, see 29 CFR 13.5(f)(5)(ii) and (iii).

(c) Employees cannot waive, nor may contractors induce employees to waive, their rights under E.O. 13706 or 29 CFR part 13 (see 29 CFR 13.7).

(d) Contractors may fulfill their obligations under E.O. 13706 and 29 CFR part 13 jointly with other contractors through a multiemployer plan, or may fulfill their obligations through an individual fund, plan, or program (see 29 CFR 13.8).

(e) Unless otherwise provided in this subpart, compliance is the responsibility of the contractor, and enforcement is the responsibility of the Department of Labor.

22.2102-3 Requirements.

In accordance with 29 CFR 13.5, and by operation of the clause at 52.222-62, Paid Sick Leave Under Executive Order 13706, the following contractor requirements apply:

(a) *Accrual.*

(1) Contractors are required to permit an employee to accrue not less than 1 hour of paid sick leave for every 30 hours worked on or in connection with a contract covered by the E.O. (see 29 CFR 13.5(a)(1)).

(2) Contractors are required to inform each employee, in writing, of the amount of paid sick leave the employee has accrued but not used no less than once each pay period or each month, whichever interval is shorter, as well as upon a separation from employment and upon reinstatement of paid sick leave, pursuant to 29 CFR 13.5(b)(4) (see 29 CFR 13.5(a)(2)).

(3) Contractors may choose to provide employees with at least 56 hours of paid sick leave at the beginning of each accrual year rather than allowing the employee to accrue such leave based on hours worked over time (see 29 CFR 13.5(a)(3)).

(b) *Maximum accrual, carryover, reinstatement, and payment for unused leave.*

(1) Contractors may limit the amount of paid sick leave employees are permitted to accrue to not less than 56 hours in each accrual year (see 29 CFR 13.5(b)(1)).

(2) Paid sick leave must carry over from one accrual year to the next. Paid sick leave carried over from the previous accrual year must not count toward any limit the contractor sets on annual accrual (see 29 CFR 13.5(b)(2)).

(3) Contractors may limit the amount of paid sick leave an employee is permitted to have available for use at any point to not less than 56 hours (see 29 CFR 13.5(b)(3)).

(4) Contractors are required to reinstate paid sick leave for employees only when rehired by the same contractor within 12 months after a job separation (see 29 CFR 13.5(b)(4)).

(5) Nothing in E.O. 13706 or 29 CFR part 13 requires contractors to make a financial payment to an employee for accrued paid sick leave that has not been used upon a separation from employment. If a contractor nevertheless makes such a payment in an amount equal to or greater than the value of the pay and benefits the employee would have received pursuant to 29 CFR 13.5(c)(3) had the employee used the paid sick leave, the contractor is relieved of the obligation to reinstate an

employee's accrued paid sick leave upon rehiring the employee within 12 months of the separation pursuant to 29 CFR 13.5(b)(4) (see 29 CFR 13.5(b)(5)).

(c) *Use.* Contractors are required to permit an employee to use paid sick leave in accordance with 29 CFR 13.5(c).

(d) *Request for paid sick leave.* Contractors are required to permit an employee to use any or all of the employee's available paid sick leave upon the oral or written request of an employee that includes information sufficient to inform the contractor that the employee is seeking to be absent from work for a purpose described in 29 CFR 13.5(c) and, to the extent reasonably feasible, the anticipated duration of the leave (see 29 CFR 13.5(d)).

(e) *Certification or documentation for leave of 3 or more consecutive full workdays.* Contractors may require certification issued by a health care provider to verify the need for paid sick leave used for a purpose described in 29 CFR 13.5(c)(1)(i), (ii), or (iii), or documentation from an appropriate individual or organization to verify the need for paid sick leave used for a purpose described in 29 CFR 13.5(c)(1)(iv), only if the employee is absent for 3 or more consecutive full workdays (see 29 CFR 13.5(e)).

22.2102-4 Prohibited acts.

In accordance with 29 CFR 13.6, and by operation of the clause at 52.222-62, Paid Sick Leave Under Executive Order 13706, a contractor may not—

(a) Interfere with an employee's accrual or use of paid sick leave as required by E.O. 13706 or 29 CFR part 13 (see 29 CFR 13.6(a));

(b) Discharge or in any other manner discriminate against any employee for—

(1) Using, or attempting to use, paid sick leave as provided for under E.O. 13706 and 29 CFR part 13;

(2) Filing any complaint, initiating any proceeding, or otherwise asserting any right or claim under E.O. 13706 or 29 CFR part 13;

(3) Cooperating in any investigation or testifying in any proceeding under E.O. 13706 or 29 CFR part 13; or

(4) Informing any other person about his or her rights under E.O. 13706 or 29 CFR part 13 (see 29 CFR 13.6(b)); or

(c) Fail to make and maintain or to make available to authorized representatives of the Wage and Hour Division records for inspection, copying, and transcription as required by 29 CFR 13.25, or otherwise fail to comply with the requirements of 29 CFR 13.25 (see 29 CFR 13.6(c)).

22.2102-5 Contract clause.

Insert the clause at 52.222-62, Paid Sick Leave Under Executive Order 13706, in solicitations and contracts that include the clause at 52.222-6, Construction Wage Rate Requirements, or 52.222-41, Service Contract Labor Standards, where work is to be performed, in whole or in part, in the United States (the 50 States and the District of Columbia).

22.2103 Postaward.

(a) *Authority.* Section 4 of Executive Order (E.O.) 13706 grants to the Secretary the authority for investigating potential violations of, and obtaining compliance with, the E.O. The Secretary of Labor, in promulgating the implementing regulations required by section 3 of the E.O., has assigned this authority to the Administrator of the Wage and Hour Division. Contracting agencies do not have authority to conduct compliance investigations under 29 CFR part 13 as implemented in this subpart. This does not limit the contracting officer's authority to otherwise enforce the terms and conditions of the contract.

(b) *Complaints.*

(1) Complaints are filed with the Administrator of the Wage and Hour Division and may be brought by any person (including the employee), entity, or organization that believes a violation of this subpart has occurred.

(2) The identity of any individual who makes a written or oral statement as a complaint or in the course of an investigation, as well as portions of the statement which would reveal the individual's identity, must not be disclosed in any manner to anyone other than Federal officials without the prior consent of the individual, unless otherwise authorized by law.

(3) If the contracting agency receives a complaint or is notified that the Administrator of the Wage and Hour Division has received a complaint, the contracting officer must report, within 14 days, to the Department of Labor, Wage and Hour Division, Office of Government Contracts, 200 Constitution Avenue NW., Room S3006, Washington, DC 20210, all of the following information that is available without conducting an investigation:

(i) The complaint or description of the alleged violation.

(ii) Available statements by the employee, contractor, or any other person regarding the alleged violation.

(iii) Evidence that clause 52.222-62, Paid Sick Leave Under Executive Order 13706, was included in the contract.

(iv) Information concerning known settlement negotiations between the parties, if applicable.

(v) Any other relevant facts known to the contracting officer or other information requested by the Wage and Hour Division.

(c) *Investigations.* Complaints will be investigated by the Administrator of the Wage and Hour Division, if warranted, in accordance with the procedures in 29 CFR 13.43.

(d) *Remedies and sanctions —*

(1) *Withholding or suspending payment.* The contracting officer must, upon his or her own action or upon written request of the Administrator of the Wage and Hour Division—

(i)

(A) Withhold or cause to be withheld from the contractor under the contract covered by the E.O. or any other Federal contract with the same contractor, so much of the accrued payments or advances as may be considered necessary to pay employees the full amount owed to compensate for any violation of E.O. 13706 or 29 CFR part 13; and

(B) In the event of any such violation, the contracting agency may, after authorization or by direction of the Administrator of the Wage and Hour Division and written notification to the contractor, take action to cause suspension of any further payment, advance, or guarantee of funds until such violations have ceased; or

(ii) Take action to cause suspension of any further payment, advance, or guarantee of funds to a contractor that has failed to make available for inspection, copying, and transcription any of the records identified in 29 CFR 13.25.

(2) *Civil actions to recover greater underpayments than those withheld.*

(i) If the payments withheld under 29 CFR 13.11(c) are insufficient to reimburse all monetary relief due, or if there are no payments to withhold, the Department of Labor, following a final order of the Secretary of Labor, may bring an action against the contractor in any court of competent jurisdiction to recover the remaining amount.

(ii) The Department of Labor must, to the extent possible, pay any sums it recovers in this manner directly to the employees who suffered the violation(s) of 29 CFR 13.6(a) or (b).

(iii) Any sum not paid to an employee because of inability to do so within 3 years must be transferred into the Treasury of the United States as miscellaneous receipts.

(3) *Termination.* Contracting officers may consider the failure of a contractor to comply with the requirements of E.O. 13706 or 29 CFR part 13 as grounds for termination for default or cause.

(4) *Debarment.*

(i) The Department of Labor may initiate debarment proceedings under 29 CFR 13.44(d) and 29 CFR 13.52 whenever a contractor is found to have disregarded its obligations under E.O. 13706 or 29 CFR part 13.

(ii) Contracting officers must consider notifying the agency suspending and debarring official in accordance with agency procedures when a contractor commits significant violations of contract terms and conditions related to this subpart (see subpart 9.4).

(5) *Remedies for interference.*

(i) When the Administrator of the Wage and Hour Division determines that a contractor has interfered with an employee's accrual or use of paid sick leave in violation of 29 CFR 13.6(a), the Administrator of the Wage and Hour Division will notify the contractor and the relevant contracting agency of the interference and request that the contractor remedy the violation.

(ii) If the contractor does not remedy the violation, the Administrator of the Wage and Hour Division must direct the contractor to provide any appropriate relief to the affected employee(s) in the investigative findings letter issued pursuant to 29 CFR 13.51. Such relief may include—

(A) Any pay and/or benefits denied or lost by reason of the violation;

(B) Other actual monetary losses sustained as a direct result of the violation; or

(C) Appropriate equitable or other relief.

(iii) Payment of liquidated damages in an amount equaling any monetary relief may also be directed unless such amount is reduced by the Administrator of the Wage and Hour Division because the violation was in good faith and the contractor had reasonable grounds for believing it had not violated the E.O. or 29 CFR part 13.

(iv) The Administrator of the Wage and Hour Division may additionally direct that payments due on the contract or any other contract between the contractor and the Federal Government be withheld as may be necessary to provide any appropriate monetary relief. Upon the final order of the Secretary of Labor that monetary relief is due, the Administrator of the Wage and Hour Division may direct the relevant contracting agency to transfer the withheld funds to the Department of Labor for disbursement.

(6) *Remedies for discrimination.*

(i) When the Administrator of the Wage and Hour Division determines that a contractor has discriminated against an employee in violation of 29 CFR 13.6(b), the Administrator of the Wage and Hour Division will notify the contractor and the relevant contracting agency of the discrimination and request that the contractor remedy the violation.

(ii) If the contractor does not remedy the violation, the Administrator of the Wage and Hour Division must direct the contractor to provide appropriate relief to the affected employee(s) in the investigative findings letter issued pursuant to 29 CFR 13.51. Such relief may include, but is not limited to—

(A) Employment;

(B) Reinstatement;

(C) Promotion; and

(D) Restoration of leave, or lost pay and/or benefits.

(iii) Payment of liquidated damages in an amount equaling any monetary relief may also be directed unless such amount is reduced by the Administrator of the Wage and Hour Division because the violation was in good faith and the contractor had reasonable grounds for believing the contractor had not violated the E.O. or 29 CFR part 13.

(iv) The Administrator of the Wage and Hour Division may additionally direct that payments due on the contract or any other contract between the contractor and the Federal Government be withheld as may be necessary to provide any appropriate monetary relief. Upon the final order of the Secretary of Labor that monetary relief is due, the Administrator of the Wage and Hour Division may direct the relevant contracting agency to transfer the withheld funds to the Department of Labor for disbursement.

(7) *Recordkeeping.* When a contractor fails to make, maintain, or protect records; or produce records when requested by authorized representatives of the Administrator of the Wage and Hour Division, or otherwise comply with the requirements of 29 CFR 13.25 in violation of 29 CFR 13.6(c), the Administrator of the Wage and Hour Division will request that the contractor remedy the violation. If the contractor fails to produce required records upon request, the contracting officer must, upon his or her own action or upon direction of an authorized representative of the Department of Labor, take such action as may be necessary to cause suspension of any further payment, advance, or guarantee of funds on the contract until such time as the violations are discontinued.

(e) *Inclusion of contract clause.* If a contracting agency fails to include the clause at FAR 52.222-62 in a contract to which the E.O. applies, the contracting officer, on his or her own initiative or within 15 days of notification by an authorized representative of the Department of Labor, must incorporate the contract clause in the contract retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation, and termination).

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Subpart 22.22 - Addressing DEI Discrimination by Federal Contractors

22.2200 Scope of subpart.

This subpart prescribes policies and procedures to implement Executive Order (E.O.) 14398, Addressing DEI Discrimination by Federal Contractors, (91 FR 16147, March 31, 2026).

22.2201 Definitions.

As used in this subpart—

Program participation means membership or participation in, or access or admission to: training, mentoring, or leadership development programs; educational opportunities; clubs; associations; or similar opportunities that are sponsored or established by the contractor or subcontractor.

Racially discriminatory DEI activities means disparate treatment based on race or ethnicity in the recruitment, employment (e.g., hiring, promotions), contracting (*e.g.*, vendor agreements), program participation, or allocation or deployment of an entity's resources.

22.2202 Policy.

Executive Order 14398 requires measures to prevent contractors from engaging in any racially discriminatory DEI activities.

22.2203 Contract clause.

Insert the clause at 52.222-90, Addressing DEI Discrimination by Federal Contractors, in solicitations and contracts, including those for commercial products and commercial services, except those that result in contracts for which the place of delivery or performance is outside the United States.

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PART 23 - SUSTAINABLE ACQUISITION, MATERIAL SAFETY, AND POLLUTION PREVENTION

Sec.

23.000 Scope of part.

Subpart 23.1 - Sustainable Products

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23.000 Scope of part.

This part prescribes acquisition policies and procedures for sustainable acquisition, ensuring proper handling and notification of hazardous materials, and preventing pollution.

Subpart 23.1 - Sustainable Products

23.100 Scope of subpart.

This subpart provides policies and procedures for procuring sustainable products.

23.101 Definitions.

As used in this subpart—

Energy-efficient product means a product that—

(1) Meets Department of Energy (DOE) and Environmental Protection Agency (EPA) criteria for use of the ENERGY STAR® trademark label (see https://www.energy.gov/eere/femp/search-energy-efficient-products); or

(2) Is in the upper 25 percent of efficiency for all similar products as designated by the DOE Federal Energy Management Program (FEMP) (see https://www.energy.gov/eere/femp/search-energy-efficient-products).

EPA-designated item means a product that is listed by EPA in a procurement guideline because it can be made with recovered material and for which EPA has provided recommended recovered material content levels (see https://www.epa.gov/smm/comprehensive-procurement-guideline-cpg-program#products).

Low standby power device means a product that—

(1) Uses an external standby power device or contains an internal standby power function; and

(2) Uses no more than one watt of electricity in its standby power consuming mode or meets recommended low standby levels as designated by DOE FEMP (see https://www.energy.gov/femp/low-standby-power-product-list).

Ozone-depleting substance means any substance the EPA designates in 40 CFR part 82 as—

(1) Class I, including, but not limited to, chlorofluorocarbons, halons, carbon tetrachloride, and methyl chloroform; or

(2) Class II, including, but not limited to, hydrochlorofluorocarbons.

Sustainable product means—

(1) A product that contains recovered material designated by the EPA under the Comprehensive Procurement Guidelines (42 U.S.C. 6962) (40 CFR part 247) (https://www.epa.gov/smm/comprehensive-procurement-guideline-cpg-program#products).

(2) An energy-efficient product or low standby power device (42 U.S.C. 8259b) (10 CFR part 436, subpart C) (https://www.energy.gov/eere/femp/search-energy-efficient-products, https://www.energystar.gov/products?s=mega, and https://www.energy.gov/femp/low-standby-power-product-list).

(3) A biobased product that meets the content requirements of the U.S. Department of Agriculture (USDA) under the BioPreferred® program 7 U.S.C. 8102) (7 CFR Part 4270) (https://www.biopreferred.gov/).

(4) A substance identified in the EPA's Significant New Alternatives Policy (SNAP) program as a safe alternative to an ozone-depleting substance (42 U.S.C. 76711) (40 CFR part 82, subpart G) (https://www.epa.gov/snap/unacceptable-and-acceptable-substitutes-tables).

USDA-designated product category means a generic grouping of biobased products that are listed by USDA in a procurement guideline and for which USDA has provided minimum biobased content standards (https://www.biopreferred.gov/resources/categories.html).

23.102 Policy.

(a) Agencies must procure sustainable products to the maximum extent practicable. Procuring a sustainable product is considered practicable, unless the agency cannot acquire the sustainable product—

(1) Competitively within a reasonable performance schedule;

(2) That meets reasonable performance requirements; or

(3) At a reasonable price.

(b) When considering whether the price of a sustainable product is reasonable, agencies should consider whether the product is cost-effective over the life of the product.

23.103 Procedures.

(a) Work with the requiring activity to identify sustainable products that apply to the acquisition.

(b) When it is not practicable to procure a sustainable product (see 23.102(a)), include a justification explaining the circumstances in the contract file.

(c) Ensure the solicitation and contract identify sustainable products that are required to be provided during performance of the contract and those that are covered by a justification described in paragraph (b).

23.104 Priorities.

(a) When both an EPA-designated item containing recovered material and a biobased product in a USDA-designated product category could be used for the same purposes, procure the EPA-designated item.

(b) Treat products from designated countries, as defined in part 25, as eligible for the preference for biobased products provided that those products—

(1) Meet the criteria for the definition of biobased product, except that the products need not meet the requirement that renewable agricultural materials or forestry materials in such product must be domestic; and

(2) Otherwise meet all requirements for participation in the preference program.

23.105 Exceptions.

(a) Contracts performed or supplies delivered outside of the United States are not required to include sustainable products, unless the agency head determines that such application is in the interest of the United States.

(b) Contracts for weapon systems are not required to include sustainable products; however, compliance with applicable agency programs is required for recovered materials (see 23.107(a)1)) (42 U.S.C. 6962) and for alternatives for ozone depleting substances (42 U.S.C. 7671l), unless a written justification exists.

(c) Energy-consuming products or systems designed or procured for combat or combat-related missions are not required to be energy-efficient products (42 U.S.C. 8259b).

(d) Biobased products to be used in military equipment (products or systems designed or procured for combat or combat-related missions), spacecraft systems, or launch support equipment are not required to meet the content requirements of the USDA under the BioPreferred® program (7 U.S.C 8102).

(e) Substitution is not required for class II substances identified as safe alternatives under 42 U.S.C. 7671k, or for products made with or containing such substances, and such substances may be used as substitutes for other class I or class II substances.

23.106 Restrictions.

(a) Do not purchase class II substances, or products containing class II substances, for the purpose of any use prohibited under 42 U.S.C. 7671d(c) (40 CFR 82.84(a)(2)).

(b) Do not purchase products whose sale is prohibited under 42 U.S.C. 7671h, except when the products will be used by persons certified to service vehicles (40 CFR 82.84(a)(4)).

(c) Do not purchase nonessential products as defined under 42 U.S.C. 7671i (40 CFR 82.84(a)(4)).

23.107 Agency programs.

(a) Each agency must implement the following:

(1) A program to promote the procurement of EPA-designated items that contain recovered material. This program applies to an item if the agency procures $10,000 or more worth of the item in a fiscal year. The program must meet the minimum requirements at 40 CFR 247.6.

(2) A program to promote the procurement of biobased products in the USDA BioPreferred® Program. This program applies to a product if the agency procures $10,000 or more worth of the product in a fiscal year. The program must meet the minimum requirements at 7 CFR 4270.5(b).

(b) Agencies may use their own specifications or commercial product descriptions; however, the solicitation and contract should specify that—

(1) EPA-designated items be composed of the highest percentage of recovered materials practicable or meet the EPA's minimum recovered material content standards.

(2) Biobased products in the BioPreferred® Program be composed of the highest percentage of biobased material practicable or meet the USDA's minimum biobased content standards.

23.108 Solicitation provisions and contract clauses.

(a) *General*. Insert the clause at 52.223-23, Sustainable Products, in solicitations and contracts unless a written justification or exception (see 23.103(b) and 23.105, respectively) covers the entire acquisition.

(b) *Products containing recovered material.* Except for the acquisition of COTS items—

(1) Insert the provision at 52.223-4, Recovered Material Certification, in solicitations that require the delivery or specify the use of EPA-designated items; and

(2) Insert the clause at 52.223-9, Estimate of Percentage of Recovered Material Content for EPA-designated Items, in solicitations and contracts exceeding $200,000 that are for, or specify the use of, EPA-designated items containing recovered materials. If technical personnel advise that estimates can be verified, use the clause with its Alternate I.

(c) *Biobased products*.

(1) Insert the provision at 52.223-1, Biobased Product Certification, in solicitations, other than for acquisitions described at 23.105(d), that—

(i) Require the delivery or specify the use of biobased products in USDA-designated product categories; or

(ii) (Include the clause at 52.223-2.

(2) Insert the clause at 52.223-2, Reporting of Biobased Products Under Service and Construction Contracts, in service and construction solicitations and contracts, unless the contract will not involve the use of biobased products in USDA-designated product categories.

(d) *Products containing ozone-depleting substances*. Except for contracts for supplies that will be delivered outside the United States and its outlying areas, or contracts for services that will be performed outside the United States and its outlying areas, insert the following clauses:

(1) 52.223-11, Ozone-Depleting Substances, in solicitations and contracts that may include products that may contain or be manufactured with ozone-depleting substances.

(2) 52.223-12, Maintenance, Service, Repair, or Disposal of Refrigeration Equipment and Air Conditioners, in solicitations and contracts that include the maintenance, service, repair, or disposal of refrigeration equipment or air conditioners.

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Subpart 23.2 - Energy Savings Performance Contracts

23.200 Scope of subpart.

This subpart prescribes policies and procedures for using an energy savings performance contract. This subpart applies to acquisitions in the United States and its outlying areas. Agencies conducting acquisitions outside of these areas should use their best efforts to comply with this subpart.

23.201 Definition.

As used in this subpart—

Energy savings performance contract, pursuant to 42 U.S.C. 8287 and 10 CFR 436.31, means a contract that requires the contractor to—

(1) Perform services for the design, acquisition, financing, installation, testing, operation, and where appropriate, maintenance and repair, of an identified energy conservation measure or series of measures at one or more locations;

(2) Incur the costs of implementing the energy savings measures, including at least the cost (if any) incurred in making energy audits, acquiring and installing equipment, and training personnel in exchange for a predetermined share of the value of the energy savings directly resulting from implementation of such measures during the term of the contract; and

(3) Guarantee future energy and cost savings to the Government.

23.202 Policy.

(a) Agencies should make maximum use of the authority provided in the National Energy Conservation Policy Act (42 U.S.C. 8287) to use an energy savings performance contract (ESPC) when life-cycle, cost-effective to reduce energy use and cost in the agency's facilities and operations.

(b) To solicit and award an ESPC, use the procedures, selection method, and terms and conditions provided in 10 CFR part 436, subpart B.

(c) For more information see *https://energy.gov/eere/femp/energy-savings-performance-contracts-federal-agencies* .

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Subpart 23.3 - Material Safety

23.300 Scope of subpart.

This subpart prescribes policies and procedures for the following:

(a) Acquiring deliverable items, other than ammunition and explosives, that require the furnishing of data involving hazardous materials.

(b) Providing notification of radioactive materials prior to delivery.

23.301 Definition.

Hazardous material is defined in the latest version of Federal Standard No. 313, Material Safety Data, Transportation Data, and Disposal Data for Hazardous Materials Furnished to Government Activities.

23.302 Hazardous material identification and safety data.

(a) Offerors and contractors are required to submit hazardous materials data whenever the supplies being acquired are identified as hazardous materials. The latest version of Federal Standard No. 313 includes criteria for identification of hazardous materials.

(b) Safety Data Sheets (SDS's) are required—

(1) As specified in the latest version of Federal Standard No. 313, including revisions adopted during the term of the contract;

(2) For any other material designated by a Government technical representative as potentially hazardous and requiring safety controls.

(c) (c) SDS's must be submitted—

(1) By the apparent successful offeror prior to contract award if hazardous materials are expected to be used during contract performance.

(2) For agencies other than the Department of Defense, again by the contractor with the supplies at the time of delivery.

(d) The contracting officer must provide a copy of all SDS's received to the safety officer or other designated individual.

23.303 Notice of radioactive materials.

(a) The clause at 52.223-7, Notice of Radioactive Materials, requires the contractor to notify the contracting officer prior to delivery of radioactive material.

(b) Upon receipt of the notice, the contracting officer must notify receiving activities so that appropriate safeguards can be taken.

(c) The clause permits the contracting officer to waive the notification if the contractor states that the notification on prior deliveries is still current. The contracting officer may waive the notice only after consultation with cognizant technical representatives.

(d) The contracting officer must specify in the clause at 52.223-7, the number of days in advance of delivery that the contractor will provide notification. The determination of the number of days should be done in coordination with the installation/facility radiation protection officer (RPO). The RPO is responsible for ensuring the proper license, authorization, or permit is obtained prior to receiving radioactive material.

23.304 Contract clauses.

(a) (1) Insert the clause at 52.223-3, Hazardous Material Identification and Safety Data, in solicitations and contracts if the contract will require the delivery of hazardous materials as defined in 23.301.

(2) If the contract is awarded by an agency other than the Department of Defense, the contracting officer shall use the clause at 52.223-3 with its Alternate I..

(b) Insert the clause at 52.223-7, Notice of Radioactive Materials, in solicitations and contracts for supplies that are or that contain—

(1) Radioactive material requiring specific licensing under regulations issued pursuant to the Atomic Energy Act of 1954; or

(2) Radioactive material not requiring specific licensing in which the specific activity is greater than 0.002 microcuries per gram or the activity per item equals or exceeds 0.01 microcuries. Such supplies include, but are not limited to, aircraft, ammunition, missiles, vehicles, electronic tubes, instrument panel gauges, compasses, and identification markers.

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Subpart 23.4 - Pollution Prevention

23.400 Scope of subpart.

This subpart prescribes policies and procedures for obtaining information needed for Government compliance with the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. 11001-11050 (EPCRA) and Pollution Prevention Act of 1990, 42 U.S.C. 13101-13109 (PPA).

23.401 Definitions.

As used in this subpart—

Federal facility means a facility owned or operated by a Federal agency in the customs territory of the United States.

Pollution prevention means any practice that—

(1) Reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment (including fugitive emissions) prior to recycling, treatment, or disposal; and

(2) Reduces the hazards to public health and the environment associated with the release of such substances, pollutants, and contaminants. (42 U.S.C. 13102(5))

Toxic chemical means a chemical or chemical category listed in 40 CFR 372.65.

23.402 Emergency planning and toxic chemical release reporting.

Contracts that require performance on a Federal facility must require the contractor to provide information necessary for the agency to comply with the emergency planning and toxic chemical release reporting requirements in EPCRA and PPA.

23.403 Contract clauses.

Insert the clause at 52.223-5, Pollution Prevention and Right-to-Know Information, in solicitations and contracts that provide for performance, in whole or in part, on a Federal facility.

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PART 24 - PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

Sec.

24.000 Scope of part.

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Subpart 24.2 - Freedom of Information Act

24.201 Authority.
24.202 Prohibitions.
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Subpart 24.3 - Privacy Training

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24.000 Scope of part.

This part explains how the Privacy Act of 1974 (5 U.S.C. 552a) and OMB Circular No. A-130 (December 12, 1985) apply to Government contracts. It also references the Freedom of Information Act (5 U.S.C. 552).

Subpart 24.1 - Protection of Individual Privacy

24.101 Definitions.

As used in this subpart-

Agency means any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

Individual means a citizen of the United States or an alien lawfully admitted for permanent residence.

Maintain means maintain, collect, use, or disseminate.

Operation of a system of records means performance of any of the activities associated with maintaining the system of records, including the collection, use, and dissemination of records.

Personally identifiable information means information that can be used to distinguish or trace an individual's identity, either alone or when combined with other information that is linked or linkable to a specific individual. (See Office of Management and Budget (OMB) Circular No. A-130, Managing Federal Information as a Strategic Resource).

Record means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, education, financial transactions, medical history, and criminal or employment history, and that contains the individual's name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a fingerprint or voiceprint or a photograph.

System of records on individuals 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.

24.102 General.

(a) When an agency hires a contractor to design, develop, or operate a system of records on individuals, the agency must apply the Privacy Act requirements to the contractor and its employees working on the contract.

(b) Both agency staff and contractor employees may face criminal penalties for violating the Privacy Act. When contractors operate a system of records on individuals to accomplish an agency function, the law treats these contractors as agency employees for purposes of the criminal penalties.

(c) When a contract specifically calls for designing, developing, or operating a system of records on individuals to accomplish an agency function, the agency must apply Privacy Act requirements to the contractor and its employees working on the contract. The system of records operated under the contract is officially considered to be maintained by the agency for the purposes of the Act.

(d) Agencies that, within the limits of their authorities, fail to require contractors to operate systems of records according to the Privacy Act may be civilly liable. If an individual suffers harm due to the contractor’s violation of the Act, the agency may be liable.

24.103 Procedures.

(a) The contracting officer must review requirements to determine if they include designing, developing, or operating a system of records on individuals to accomplish an agency function.

(b) If the contract requires such work, the contracting officer must—

(1) Clearly identify in the contract work statement both the specific system of records and the design, development, or operation work required; and

(2) Provide the contractor with the agency's rules and regulations that implement the Privacy Act.

24.104 Contract clauses.

When a contract requires designing, developing, or operating a system of records on individuals to accomplish an agency function, the contracting officer must include the following clauses in solicitations and contracts:

(a) The clause at 52.224-1, Privacy Act Notification.

(b) The clause at 52.224-2, Privacy Act.

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Subpart 24.2 - Freedom of Information Act

24.201 Authority.

The Freedom of Information Act (5 U.S.C. 552) requires that information be made available to the public through three methods:

(a) Publication in the *Federal Register*;

(b) Access to read and copy records at convenient locations; or

(c) Providing a copy of a reasonably described record upon request.

24.202 Prohibitions.

(a) An agency must not disclose under the Freedom of Information Act any proposal submitted in response to solicitation for competitive proposals. This prohibition does not apply to a proposal, or any part of a proposal, that is included or incorporated by reference in a contract between the Government and the contractor that submitted the proposal. (See 10 U.S.C. 3309 and 41 U.S.C. 4702.)

(b) An agency must not disclose outside the Government any information obtained under part 15 that is exempt from disclosure under the Freedom of Information Act. (See 10 U.S.C. 3705(c)(3) and 41 U.S.C. 3505(b)(3).)

(c) A dispute resolution communication between a neutral person and a party to alternative dispute resolution proceedings that is protected under 5 U.S.C.574(j) is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552(b)(3)).

24.203 Policy.

(a) The Freedom of Information Act specifies how agencies must make their records available upon public request, sets strict time standards for agency responses, and exempts certain records from public disclosure. Each agency's implementation of these requirements appears in its respective title of the Code of Federal Regulations and is referenced in subpart 24.2 of its implementing acquisition regulations.

(b) Contracting officers may receive requests for records that may be exempt from mandatory public disclosure. The most common exemptions are for trade secrets and confidential commercial or financial information (5 U.S.C. 552(b)(4)). Other exemptions include certain interagency or intra-agency memoranda, classified information, internal personnel rules, personal and medical information about individuals, and law enforcement.

(c) Since these requests often involve complex issues requiring in-depth knowledge of court rulings and policy guidance, contracting officers must comply with their agency's implementing regulations. Contracting officers should obtain necessary guidance from agency officials responsible for Freedom of Information Act compliance. For additional assistance, authorized agency officials may contact the Department of Justice, Office of Information and Privacy. A Freedom of Information Act guide and other resources are available at the Department of Justice website under FOIA reference materials: http://www.usdoj.gov/oip.

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Subpart 24.3 - Privacy Training

24.301 [Reserved]

24.302 Contract clause.

(a) The contracting officer must insert the clause at FAR 52.224-3, Privacy Training, in solicitations and contracts when, on behalf of the agency, contractor employees will—

(1) Have access to a system of records;

(2) Create, collect, use, process, store, maintain, disseminate, disclose, dispose, or otherwise handle personally identifiable information; or

(3) Design, develop, maintain, or operate a system of records.

(b) When an agency specifies that only its agency-provided training is acceptable, use the clause with its Alternate I.

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PART 25 - FOREIGN ACQUISITION

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25.001 General.

(a) 41 U.S.C. chapter 83, Buy American—

(1) Restricts the purchase of supplies, that are not domestic end products, for use within the United States. A foreign end product may be purchased if the contracting officer determines that the price of the lowest domestic offer is unreasonable or if another exception applies (see subpart 25.1); and

(2) Requires, with some exceptions, the use of only domestic construction materials in contracts for construction in the United States (see subpart 25.2).

(b) The restrictions in the Buy American statute are not applicable in acquisitions subject to certain trade agreements (see subpart 25.4). In these acquisitions, end products and construction materials from certain countries receive nondiscriminatory treatment in evaluation with domestic offers. Generally, the dollar value of the acquisition determines which of the trade agreements applies. Exceptions to the applicability of the trade agreements are described in subpart 25.4.

(c) The test to determine the country of origin for an end product under the Buy American statute (see the "domestic end product" definition in 25.003) is different from the test to determine the country of origin for an end product under the trade agreements (see the various country "end product" definitions in 25.003), or the criteria for the representation on end products manufactured outside the United States (see 52.225-18).

(1) The Buy American statute uses a two-part test to define a "domestic end product" or "domestic construction material" (manufactured in the United States and a domestic content test). The domestic content test has been waived for acquisition of commercially available off-the-shelf (COTS) items, except a product that consists wholly or predominantly of iron or steel or a combination of both (excluding COTS fasteners) (see 25.101(a) and 25.201(b)).

(2) Under the trade agreements, the test to determine country of origin is "substantial transformation" (*i.e.*, transforming an article into a new and different article of commerce, with a name, character, or use distinct from the original article).

(3) For the representation at 52.225-18, the only criterion is whether the place of manufacture of an end product is in the United States or outside the United States, without regard to the origin of the components.

25.002 [Reserved]

25.003 Definitions.

As used in this part—

Caribbean Basin country means any of the following countries: Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, or Trinidad and Tobago.

Caribbean Basin country end product —

(1) Means an article that—

(i)

(A) Is wholly the growth, product, or manufacture of a Caribbean Basin country; or

(B) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed; and

(ii) Is not excluded from duty-free treatment for Caribbean countries under 19 U.S.C. 2703(b).

(A) For this reason, the following articles are not Caribbean Basin country end products:

(1) Tuna, prepared or preserved in any manner in airtight containers.

(2) Petroleum, or any product derived from petroleum.

(3) Watches and watch parts (including cases, bracelets, and straps) of whatever type including, but not limited to, mechanical, quartz digital, or quartz analog, if such watches or watch parts contain any material that is the product of any country to which the Harmonized Tariff Schedule of the United States (HTSUS) column 2 rates of duty apply (*i.e.,* Afghanistan, Cuba, Laos, North Korea, and Vietnam).

(4) Certain of the following: textiles and apparel articles; footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel; or handloomed, handmade, and folklore articles.

(B) Access to the HTSUS to determine duty-free status of articles of the types listed in paragraph (1)(ii)(A)(*4*) of this definition is available via the Internet at *https://usitc.gov/tata/hts/index.htm.* In particular, see the following:

(1) General Note 3(c), Products Eligible for Special Tariff treatment.

(2) General Note 17, Products of Countries Designated as Beneficiary Countries under the United States-Caribbean Basin Trade Partnership Act of 2000.

(3) Section XXII, Chapter 98, Subchapter II, Articles Exported and Returned, Advanced or Improved Abroad, U.S. Note 7(b).

(4) Section XXII, Chapter 98, Subchapter XX, Goods Eligible for Special Tariff Benefits under the United States-Caribbean Basin Trade Partnership Act; and

(2) Refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the acquisition, includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

Civil aircraft and related articles means—

(1) All aircraft other than aircraft to be purchased for use by the Department of Defense or the U.S. Coast Guard;

(2) The engines (and parts and components for incorporation into the engines) of these aircraft;

(3) Any other parts, components, and subassemblies for incorporation into the aircraft; and

(4) Any ground flight simulators, and parts and components of these simulators, for use with respect to the aircraft, whether to be used as original or replacement equipment in the manufacture, repair, maintenance, rebuilding, modification, or conversion of the aircraft and without regard to whether the aircraft or articles receive duty-free treatment under section 601(a)(2) of the Trade Agreements Act.

Component means an article, material, or supply incorporated directly into an end product or construction material.

Construction material means an article, material, or supply brought to the construction site by a contractor or subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

Cost of components means—

(1) For components purchased by the contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product or construction material (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(2) For components manufactured by the contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

Critical component means a component that is mined, produced, or manufactured in the United States and deemed critical to the U.S. supply chain. The list of critical components is at 25.105.

Critical item means a domestic construction material or domestic end product that is deemed critical to the U.S. supply chain. The list of critical items is at 25.105.

Designated country means any of the following countries:

(1) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Armenia, Aruba, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, New Zealand, North Macedonia, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan (known in the World Trade Organization as "the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu" (Chinese Taipei)), Ukraine, or United Kingdom);

(2) A Free Trade Agreement (FTA) country (Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Oman, Panama, Peru, or Singapore);

(3) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Tanzania, Timor-Leste, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(4) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, or Trinidad and Tobago).

Designated country end product means a WTO GPA country end product, an FTA country end product, a least developed country end product, or a Caribbean Basin country end product.

Domestic construction material means—

(1) For construction material that does not consist wholly or predominantly of iron or steel or a combination of both—

(i) An unmanufactured construction material mined or produced in the United States; or

(ii) A construction material manufactured in the United States, if—

(A) The cost of the components mined, produced, or manufactured in the United States exceeds 60 percent of the cost of all its components, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029 (unless an alternate percentage is established for a contract in accordance with FAR 25.201(c)). Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic. Components of unknown origin are treated as foreign; or

(B) The construction material is a commercially available off-the-shelf (COTS) item; or

(2) For construction material that consists wholly or predominantly of iron or steel or a combination of both, a construction material manufactured in the United States if the cost of foreign iron and steel constitutes less than 5 percent of the cost of all the components used in such construction material. The cost of foreign iron and steel includes but is not limited to the cost of foreign iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the construction material and a good faith estimate of the cost of all foreign iron or steel components excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the construction material contains multiple components, the cost of all the materials used in such construction material is calculated in accordance with the definition of "cost of components" in this section.

Domestic end product means—

(1) For an end product that does not consist wholly or predominantly of iron or steel or a combination of both—

(i) An unmanufactured end product mined or produced in the United States;

(ii) An end product manufactured in the United States, if—

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 60 percent of the cost of all its components, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029 (unless an alternate percentage is established for a contract in accordance with FAR 25.101(d)). Components of foreign origin of the same class or kind as those that the agency determines are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities of a satisfactory quality are treated as domestic. Components of unknown origin are treated as foreign. Scrap generated, collected, and prepared for processing in the United States is considered domestic; or

(B) The end product is a COTS item; or

(2) For an end product that consists wholly or predominantly of iron or steel or a combination of both, an end product manufactured in the United States, if the cost of foreign iron and steel constitutes less than 5 percent of the cost of all the components used in the end product. The cost of foreign iron and steel includes but is not limited to the cost of foreign iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the end product and a good faith estimate of the cost of all foreign iron or steel components excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the end product contains multiple components, the cost of all the materials used in such end product is calculated in accordance with the definition of "cost of components" in this section.

Domestic offer means an offer of a domestic end product. When the solicitation specifies that award will be made on a group of line items, a domestic offer means an offer where the proposed price of the domestic end products exceeds 50 percent of the total proposed price of the group.

Eligible offer means an offer of an eligible product. When the solicitation specifies that award will be made on a group of line items, an eligible offer means a foreign offer where the combined proposed price of the eligible products and the domestic end products exceeds 50 percent of the total proposed price of the group.

Eligible product means a foreign end product, construction material, or service that, due to applicability of a trade agreement to a particular acquisition, is not subject to discriminatory treatment.

End product means those articles, materials, and supplies to be acquired for public use.

Fastener means a hardware device that mechanically joins or affixes two or more objects together. Examples of fasteners are nuts, bolts, pins, rivets, nails, clips, and screws.

Foreign construction material means a construction material other than a domestic construction material.

Foreign contractor means a contractor or subcontractor organized or existing under the laws of a country other than the United States.

Foreign end product means an end product other than a domestic end product.

Foreign iron and steel means iron or steel products not produced in the United States. Produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, from the initial melting stage through the application of coatings, except metallurgical processes involving refinement of steel additives. The origin of the elements of the iron or steel is not relevant to the determination of whether it is domestic or foreign.

Foreign offer means any offer other than a domestic offer.

Free Trade Agreement country means Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Oman, Panama, Peru, or Singapore.

Free Trade Agreement country end product means an article that—

(1) Is wholly the growth, product, or manufacture of a Free Trade Agreement (FTA) country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in an FTA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product, includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

Israeli end product means an article that—

(1) Is wholly the growth, product, or manufacture of Israel; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Israel into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

Least developed country means any of the following countries: Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Tanzania, Timor-Leste, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia.

Least developed country end product means an article that—

(1) Is wholly the growth, product, or manufacture of a least developed country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a least developed country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product, includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

Noneligible offer means an offer of a noneligible product.

Noneligible product means a foreign end product that is not an eligible product.

Predominantly of iron or steel or a combination of both means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

Steel means an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.

United States means the 50 States, the District of Columbia, and outlying areas.

U.S.-made end product means an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

World Trade Organization Government Procurement Agreement (WTO GPA) country means any of the following countries: Armenia, Aruba, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, New Zealand, North Macedonia, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan, Ukraine, or United Kingdom.

WTO GPA country end product means an article that—

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

Subpart 25.1 —Buy American—Supplies

25.100 Scope of subpart.

This subpart—

(a) Implements—

(1) 41 U.S.C. chapter 83, Buy American;

(2) Executive Order 10582, December 17, 1954;

(3) Executive Order 13881, July 15, 2019;

(4) Executive Order 14005, January 25, 2021; and

(5) Waiver of the domestic content test of the Buy American statute for acquisition of commercially available off-the-shelf (COTS) items in accordance with 41 U.S.C. 1907, but see 25.101(a)(2)(ii).

(b) Applies to supplies acquired for use in the United States, including supplies acquired under contracts set aside for small business concerns, if—

(1) The supply contract exceeds the micro-purchase threshold; or

(2) The supply portion of a contract for services that involves the furnishing of supplies (e.g., lease) exceeds the micro-purchase threshold.

25.101 General.

(a) The Buy American statute restricts the purchase of supplies that are not domestic end products. For manufactured end products, the Buy American statute, E.O. 13881, and E.O. 14005 use a two-part test to define a domestic end product.

(1) The article must be manufactured in the United States; and

(2)

(i) Except for an end product that consists wholly or predominantly of iron or steel or a combination of both, the cost of domestic components must exceed 60 percent of the cost of all the components, except that the percentage is 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029. But see paragraph (d) of this section. In accordance with 41 U.S.C. 1907, this domestic content test of the Buy American statute has been waived for acquisitions of COTS items (but see paragraph (a)(2)(ii) of this section).

(ii) For an end product that consists wholly or predominantly of iron or steel or a combination of both, the cost of foreign iron and steel must constitute less than 5 percent of the cost of all the components used in the end product (see the definition of "foreign iron and steel" at 25.003). The cost of foreign iron and steel includes but is not limited to the cost of foreign iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the end product and a good faith estimate of the cost of all foreign iron or steel components excluding COTS fasteners. This domestic content test of the Buy American statute has not been waived for acquisitions of COTS items in this category, except for COTS fasteners.

(b) The Buy American statute applies to small business set-asides. A manufactured product of a small business concern is a U.S.-made end product, but is not a domestic end product unless it meets the domestic content test in paragraph (a)(2) of this section.

(c) Exceptions that allow the purchase of a foreign end product are listed at 25.103. The unreasonable cost exception is implemented through the use of an evaluation factor applied to low foreign offers that are not eligible offers. The evaluation factor is not used to provide a preference for one foreign offer over another.

(d)

(1) A contract with a period of performance that spans the schedule of domestic content threshold increases specified in paragraph (a)(2)(i) of this section must comply with each increased threshold for the items in the year of delivery, unless the senior procurement executive of the contracting agency allows for application of an alternate domestic content test for that contract under which the domestic content threshold in effect at time of contract award will apply to the entire period of

performance for the contract. This authority is not delegable. The senior procurement executive must consult the Office of Management and Budget's Made in America Office (MIAO) before allowing the use of the alternate domestic content test.

(2) When a senior procurement executive allows for application of an alternate domestic content test for a contract—

(i) See 25.601(a)(1)(ii) or 25.601(b)(1)(v) for use of the appropriate Alternate clause to reflect the domestic content threshold that will apply to the entire period of performance for that contract; and

(ii) Use the fill-in at 52.213-4(b)(1)(xviii)(B) instead of including 52.225-1 Alternate I when using 52.213-4, Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services).

25.102 Policy.

Except as provided in 25.103, acquire only domestic end products for public use inside the United States.

25.103 Exceptions.

When one of the following exceptions applies, the contracting officer may acquire a foreign end product without regard to the restrictions of the Buy American statute:

(a) *Public interest.* The head of the agency may make a determination that domestic preference would be inconsistent with the public interest. This exception applies when an agency has an agreement with a foreign government that provides a blanket exception to the Buy American statute.

(b) *Nonavailability.* The Buy American statute does not apply with respect to articles, materials, or supplies if articles, materials, or supplies of the class or kind to be acquired, either as end items or components, are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

(1) *Class nonavailability determinations.*

(i) A nonavailability determination has been made for the articles listed in 25.104. This determination does not necessarily mean that there is no domestic source for the listed items, but that domestic sources can only meet 50 percent or less of total U.S. Government and nongovernment demand.

(ii) Before acquisition of an article on the list, the procuring agency is responsible to conduct market research appropriate to the circumstances, including seeking of domestic sources. This applies to acquisition of an article as—

(A) An end product; or

(B) A significant component (valued at more than 50 percent of the value of all the components).

(iii) The determination in paragraph (b)(1)(i) of this section does not apply if the contracting officer learns at any time before the time designated for receipt of bids in sealed bidding or final offers in negotiation that an article on the list is available domestically in sufficient and reasonably available commercial quantities of a satisfactory quality to meet the requirements of the solicitation. The contracting officer must—

(A) Ensure that the appropriate Buy American statute provision and clause are included in the solicitation (see 25.601(a), 25.601(b), or 25.602);

(B) Specify in the solicitation that the article is available domestically and that offerors and contractors may not treat foreign components of the same class or kind as domestic components; and

(C) Submit a copy of supporting documentation to your agency representative at the FAR Council, in accordance with agency procedures, for possible removal of the article from the list.

(2) *Individual nonavailability determinations.*

(i) The head of the contracting activity must first make a determination that an article, material, or supply is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality (i.e., individual nonavailability waiver determinations) in accordance with agency procedures. Prior to award, the agency must comply with the procedures in paragraph (b)(2)(iii) of this section. A determination is not required before January 1, 2030, if there is an offer for a foreign end product that exceeds 55 percent domestic content (see 25.106(b)(2) and 25.106(c)(2)).

(ii) If the contracting officer considers that the nonavailability of an article is likely to affect future acquisitions, the contracting officer may submit a copy of the determination and supporting documentation to its agency representative at the FAR Council, in accordance with agency procedures, for possible addition to the list in 25.104.

(iii) Contracting officers must submit a proposed individual nonavailability waiver for review and posting to MadeinAmerica.gov using the digital waiver portal by the MIAO, unless an exception applies. The contracting officer must not make an award until the contracting officer has received confirmation that the MIAO has completed its review of the proposed nonavailability waiver determination; MIAO has waived the requirement for a review; or an exception to

posting the proposed nonavailability waiver determination applies. Agencies will issue final waivers only after completing coordination with the Office of Management and Budget (OMB).

(A) Contracting officers must post a proposed individual nonavailability waiver determination to MadeinAmerica.gov by inputting the required information into a digital waiver. The digital waiver requires the standardized nonavailability waiver determination information listed in the OMB guidance, and additional information, such as the proposed duration of the nonavailability waiver determination and whether the waiver determination is for an indefinite-delivery type contract (i.e., a "multi-procurement waiver" in the digital form) or for a contract that is not an indefinite-delivery type contract (i.e., an "individual waiver" in the digital form).

(B) Unless waived, all proposed nonavailability waiver determination information posted using the digital waiver will be reviewed by MIAO. Certain information from the nonavailability waiver determination will be available to the public at MadeinAmerica.gov immediately upon posting the proposed waiver and prior to review by MIAO. The digital waiver identifies for the contracting officer those fields that will be made public and those fields that are not public because they are for government use only. Contracting officers must not enter source selection information (see 2.101 and 3.104) in any field. Contracting officers must not enter in the public fields any information that cannot be made public.

(C) MIAO plans to complete the majority of nonavailability waiver determination reviews within 15 business days from submission to OMB. Waivers involving certain small dollar transactions (e.g., over the micro-purchase threshold but less than $25,000), will generally be reviewed by MIAO rapidly but waivers for larger and more complex acquisitions, or waivers implicating critical supply chains, may take the full 15 business days. Contracting officers should consider the timeframes above for acquisition planning.

(D) Contracting officers are not required to post proposed individual nonavailability waiver determinations to MadeinAmerica.gov prior to waiver determination issuance when−

(1) The acquisition is conducted under reduced competition due to urgency (see FAR 6.103-2 and 13.101(b)) or where the agency is obligated by law to act more quickly than the review procedures established in this section allow. In these instances, contracting officers must file an urgent requirement report for such waivers using information found in the digital waiver portal within 30 days of award. MIAO will make relevant information available to the public on MadeinAmerica.gov but will not make a determination on such waivers; or

(2) The acquisition is for products that have been determined to be nonavailable on a class basis and are listed in 25.104.

(c) *Unreasonable cost.* The contracting officer may determine that the cost of a domestic end product would be unreasonable, in accordance with 25.106 and subpart 25.5.

(d) *Resale.* The contracting officer may purchase foreign end products specifically for commissary resale.

(e) *Information technology that is a commercial product.* The restriction on purchasing foreign end products does not apply to the acquisition of information technology that is a commercial product, when using fiscal year 2004 or subsequent fiscal year funds (section 535(a) of Division F, Title V, Consolidated Appropriations Act, 2004, and similar sections in subsequent appropriations acts).

25.104 Nonavailable articles.

(a) The following articles have been determined to be nonavailable in accordance with 25.103(b)(1)(i):

(1) Antimony, as metal or oxide.

(2) Bamboo shoots.

(3) Bananas.

(4) Bismuth.

(5) Books, trade, text, technical, or scientific; newspapers; pamphlets; magazines; periodicals; printed briefs and films; not printed in the United States and for which domestic editions are not available.

(6) Brazil nuts, unroasted.

(7) Capers.

(8) Cashew nuts.

(9) Chestnuts.

(10) Chrome ore or chromite.

(11) Cocoa beans.

(12) Coconut and coconut meat, unsweetened, in shredded, desiccated, or similarly prepared form.

(13) Coffee, raw or green bean.

(14) Cork, wood or bark and waste.

(15) Cover glass, microscope slide.
(16) Fair linen, altar.
(17) Fibers of the following types: abaca, abace, agave, coir, flax, jute, jute burlaps, palmyra, and sisal.
(18) Grapefruit sections, canned.
(19) Hemp yarn.
(20) Hog bristles for brushes.
(21) Hyoscine, bulk.
(22) Modacrylic fiber.
(23) Nitroguanidine (also known as picrite).
(24) Oranges, mandarin, canned.
(25) Pineapple, canned.
(26) Quartz crystals.
(27) Rubber, crude and latex (natural).
(28) Rutile.
(29) Silk, raw and unmanufactured.
(30) Spare and replacement parts for equipment of foreign manufacture, and for which domestic parts are not available.
(31) Spices and herbs, in bulk.
(32) Swords and scabbards.
(33) Tapioca flour and cassava.
(34) Tartar, crude; tartaric acid and cream of tartar in bulk.
(35) Tea in bulk.
(36) Tin in bars, blocks, and pigs.
(37) Vanilla beans.
(38) Venom, cobra.
(39) Water chestnuts.

(b) This list will be published in the Federal Register for public comment no less frequently than once every five years.

25.105 Critical components and critical items.

(a) The following is a list of articles that have been determined to be a critical component or critical item and their respective preference factor(s).

(1) -(2) [Reserved]

(b) The list of articles and preference factors in paragraph (a) of this section will be published in the Federal Register for public comment no less frequently than once every 4 years.

(c) For determining reasonableness of cost for domestic end products that contain critical components or are critical items (*see* 25.106(c)).

25.106 Determining reasonableness of cost.

(a) The contracting officer—

(1) Must use the evaluation factors in paragraphs (b) and (c) of this section unless the head of the agency makes a written determination that the use of higher factors is more appropriate. If the determination applies to all agency acquisitions, the agency evaluation factors must be published in agency regulations; and

(2) Must not apply evaluation factors to offers of eligible products if the acquisition is subject to a trade agreement under subpart 25.4.

(b) *For end products that are not critical items and do not contain critical components.*

(1)

(i) If there is a domestic offer that is not the low offer, and the restrictions of the Buy American statute apply to the low offer, the contracting officer must determine the reasonableness of the cost of the domestic offer by adding to the price of the low offer, inclusive of duty—

(A) 20 percent, if the lowest domestic offer is from a large business concern; or

(B) 30 percent, if the lowest domestic offer is from a small business concern. The contracting officer must use this factor, or another factor established in agency regulations, in small business set-asides if the low offer is from a small business concern offering the product of a small business concern that is not a domestic end product (see part 19).

(ii) The price of the domestic offer is reasonable if it does not exceed the evaluated price of the low offer after addition of the appropriate evaluation factor in accordance with paragraph (a) or (b)(1)(i) of this section. See evaluation procedures at subpart 25.5.

(2)

(i) For end products that are not COTS items and do not consist wholly or predominantly of iron or steel or a combination of both, if the procedures in paragraph (b)(1)(i) of this section result in an unreasonable cost determination for the domestic offer or there is no domestic offer received, and the low offer is for a foreign end product that does not exceed 55 percent domestic content, the contracting officer must —

(A) Treat the lowest offer of a foreign end product that is manufactured in the United States and exceeds 55 percent domestic content as a domestic offer; and

(B) Determine the reasonableness of the cost of this offer by applying the evaluation factors listed in paragraph (b)(1)(i) of this section to the low offer.

(ii) The price of the lowest offer of a foreign end product that exceeds 55 percent domestic content is reasonable if it does not exceed the evaluated price of the low offer after addition of the appropriate evaluation factor in accordance with paragraph (a) or (b)(1)(i) of this section. See evaluation procedures at subpart 25.5.

(iii) The procedures in this paragraph (b)(2) will no longer apply as of January 1, 2030.

(c) *For end products that are critical items or contain critical components.*

(1)

(i) If there is a domestic offer that is not the low offer, and the restrictions of the Buy American statute apply to the low offer, the contracting officer must determine the reasonableness of the cost of the domestic offer by adding to the price of the low offer, inclusive of duty—

(A) 20 percent, plus the additional preference factor identified for the critical item or end product containing critical components listed at section 25.105, if the lowest domestic offer is from a large business concern; or

(B) 30 percent, plus the additional preference factor identified for the critical item or end product containing critical components listed at section 25.105, if the lowest domestic offer is from a small business concern. The contracting officer must use this factor, or another factor established in agency regulations, in small business set-asides if the low offer is from a small business concern offering the product of a small business concern that is not a domestic end product (see part 19).

(ii) The price of the domestic offer is reasonable if it does not exceed the evaluated price of the low offer after addition of the appropriate evaluation factor in accordance with paragraph (a) or (b) of this section. See evaluation procedures at subpart 25.5.

(2)

(i) For end products that are not COTS items and do not consist wholly or predominantly of iron or steel or a combination of both, if the procedures in paragraph (c)(1)(ii) of this section result in an unreasonable cost determination for the domestic offer or there is no domestic offer received, and the low offer is for a foreign end product that does not exceed 55 percent domestic content, the contracting officer must —

(A) Treat the lowest offer of a foreign end product that is manufactured in the United States and exceeds 55 percent domestic content as a domestic offer; and

(B) Determine the reasonableness of the cost of this offer by applying the evaluation factors listed in paragraph (c)(1) of this section to the low offer.

(ii) The price of the lowest offer of a foreign end product that exceeds 55 percent domestic content is reasonable if it does not exceed the evaluated price of the low offer after addition of the appropriate evaluation factor in accordance with paragraph (a) or (b) of this section. See evaluation procedures at subpart 25.5.

(iii) The procedures in this paragraph (c)(2) will no longer apply as of January 1, 2030.

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Subpart 25.2 —Buy American—Construction Materials

25.200 Scope of subpart.

(a) This subpart implements—

(1) 41 U.S.C. chapter 83, Buy American;

(2) Executive Order 10582, December 17, 1954;

(3) Executive Order 13881, July 15, 2019;

(4) Executive Order 14005, January 25, 2021; and

(5) Waiver of the domestic content test of the Buy American statute for acquisitions of commercially available off-the-shelf (COTS) items in accordance with 41 U.S.C. 1907, but see 25.201(b)(2)(ii).

(b) It applies to contracts for the construction, alteration, or repair of any public building or public work in the United States.

25.201 Policy.

(a) Except as provided in 25.202, use only domestic construction materials in construction contracts performed in the United States.

(b) The Buy American statute restricts the purchase of construction materials that are not domestic construction materials. For manufactured construction materials, the Buy American statute, E.O. 13881, and E.O. 14005 use a two-part test to define domestic construction materials.

(1) The article must be manufactured in the United States; and

(2)

(i) Except for construction material that consists wholly or predominantly of iron or steel or a combination of both, the cost of domestic components must exceed 60 percent of the cost of all the components, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029, but see paragraph (c) of this section. In accordance with 41 U.S.C. 1907, this domestic content test of the Buy American statute has been waived for acquisitions of COTS items (see part 12).

(ii) For construction material that consists wholly or predominantly of iron or steel or a combination of both, the cost of foreign iron and steel must constitute less than 5 percent of the cost of all the components used in such construction material (see the definition of “foreign iron and steel” at 25.003). The cost of foreign iron and steel includes but is not limited to the cost of foreign iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the construction material and a good faith estimate of the cost of all foreign iron or steel components excluding COTS fasteners. This domestic content test of the Buy American statute has not been waived for acquisitions of COTS items in this category, except for COTS fasteners.

(c)

(1) A contract with a period of performance that spans the schedule of domestic content threshold increases specified in paragraph (b)(2)(i) of this section must comply with each increased threshold for the items in the year of delivery, unless the senior procurement executive of the contracting agency allows for application of an alternate domestic content test for that contract under which the domestic content threshold in effect at time of contract award will apply to the entire period of performance for the contract. This authority is not delegable. The senior procurement executive must consult the Office of Management and Budget's Made in America Office before allowing the use of the alternate domestic content test.

(2) When a senior procurement executive allows for application of an alternate domestic content test for a contract, see 25.602(a)(3) or (c)(4) for use of the appropriate Alternate clause to reflect the domestic content threshold that will apply to the entire period of performance for that contract.

25.202 Exceptions.

(a) When one of the following exceptions applies, the contracting officer may allow the contractor to acquire foreign construction materials without regard to the restrictions of the Buy American statute:

(1) *Impracticable or inconsistent with public interest.* The head of the agency may determine that application of the restrictions of the Buy American statute to a particular construction material would be impracticable or would be inconsistent with the public interest. The public interest exception applies when an agency has an agreement with a foreign government that provides a blanket exception to the Buy American statute.

(2) *Nonavailability.* The head of the contracting activity may determine that a particular construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities

of a satisfactory quality. The nonavailability waiver determinations of the articles listed at 25.104(a) and the procedures at 25.103(b)(1) also apply if any of those articles are acquired as construction materials. A determination is not required before January 1, 2030, if there is an offer for a foreign construction material that exceeds 55 percent domestic content (see 25.204(a)(1)(ii) and 25.204(a)(2)(ii)).

(3) *Unreasonable cost.* The contracting officer concludes that the cost of domestic construction material is unreasonable in accordance with 25.204.

(4) *Information technology that is a commercial product.* The restriction on purchasing foreign construction material does not apply to the acquisition of information technology that is a commercial product, when using Fiscal Year 2004 or subsequent fiscal year funds in accordance with section 535(a) of Division F, Title V, Consolidated Appropriations Act, 2004, and similar sections in subsequent appropriations acts.

(b) *Determination and findings.* When a determination is made for any of the reasons stated in this section that certain foreign construction materials may be used, the contracting officer must list the excepted materials in the contract. The agency must make the findings justifying the exception available for public inspection.

(c) *Acquisitions under trade agreements.* For construction contracts with an estimated acquisition value of $6,683,000 or more, see subpart 25.4.

25.203 Preaward determinations.

(a) For any acquisition, an offeror may request from the contracting officer a determination concerning the inapplicability of the Buy American statute for specifically identified construction materials.

(b) Before award, the contracting officer must evaluate all requests based on the information provided and may supplement this information with other readily available information.

25.204 Evaluating offers of foreign construction material.

(a)

(1) *For construction material that is not a critical item and does not contain critical components.*

(i) Unless the head of the agency specifies a higher percentage, the contracting officer must add to the offered price 20 percent of the cost of any foreign construction material proposed for exception from the requirements of the Buy American statute based on the unreasonable cost of domestic construction materials. In the case of a tie, the contracting officer must give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.

(ii) For construction material that is not a COTS item and does not consist wholly or predominantly of iron or steel or a combination of both, if the procedures in paragraph (a)(1)(i) of this section result in an unreasonable cost determination for the domestic construction material offer or there is no domestic construction material offer received, and the low offer is for foreign construction material that does not exceed 55 percent domestic content, the contracting officer must —

(A) Treat the lowest offer of foreign construction material that is manufactured in the United States and exceeds 55 percent domestic content as a domestic offer; and

(B) Determine the reasonableness of the cost of this offer by applying the evaluation factor listed in paragraph (a)(1)(i) to the low offer.

(iii) The procedures in paragraph (a)(1)(ii) of this section will no longer apply as of January 1, 2030.

(2) *For construction material that is a critical item or contains critical components.*

(i) The contracting officer must add to the offered price 20 percent, plus the additional preference factor identified for the critical item or construction material containing critical components listed at section 25.105, of the cost of any foreign construction material proposed for exception from the requirements of the Buy American statute based on the unreasonable cost of domestic construction materials. In the case of a tie, the contracting officer must give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost. See 25.105 for the list of critical components and critical items.

(ii) For construction material that is not a COTS item and does not consist wholly or predominantly of iron or steel or a combination of both, if the procedures in paragraph (a)(2)(i) of this section result in an unreasonable cost determination for the domestic construction material offer or there is no domestic construction material offer received, and the low offer is for foreign construction material that does not exceed 55 percent domestic content, the contracting officer must —

(A) Treat the lowest offer of foreign construction material that is manufactured in the United States and exceeds 55 percent domestic content as a domestic offer; and

(B) Determine the reasonableness of the cost of this offer by applying the evaluation factors listed in this paragraph (a)(2) to the low offer.

(iii) The procedures in paragraph (a)(2)(ii) of this section will no longer apply as of January 1, 2030.

(b) If the contracting officer awards a contract to an offeror that proposed foreign construction material not listed in the applicable clause in the solicitation (paragraph (b)(2) of 52.225-9, or paragraph (b)(3) of 52.225-11), the contracting officer must add the excepted materials to the list in the contract clause.

25.205 Postaward determinations.

(a) If a contractor requests a determination regarding the inapplicability of the Buy American statute after contract award, the contractor must explain why it could not request the determination before contract award or why the need for such determination otherwise was not reasonably foreseeable. If the contracting officer concludes that the contractor should have made the request before contract award, the contracting officer may deny the request.

(b) The contracting officer must base evaluation of any request for a determination regarding the inapplicability of the Buy American statute made after contract award on information required by paragraphs (c) and (d) of the applicable clause at 52.225-9 or 52.225-11 and/or other readily available information.

(c) If a determination, under 25.202(a), is made after contract award that an exception to the Buy American statute applies, the contracting officer must negotiate adequate consideration and modify the contract to allow use of the foreign construction material. When the basis for the exception is the unreasonable price of a domestic construction material, adequate consideration is at least the differential established in 25.202(a) or in accordance with agency procedures.

25.206 Noncompliance.

The contracting officer must—

(a) Review allegations of Buy American statute violations;

(b) Unless fraud is suspected, notify the contractor of the apparent unauthorized use of foreign construction material and request a reply, to include proposed corrective action; and

(c) If the review reveals that a contractor or subcontractor has used foreign construction material without authorization, take appropriate action, including one or more of the following:

(1) Process a determination concerning the inapplicability of the Buy American statute in accordance with 25.205.

(2) Consider requiring the removal and replacement of the unauthorized foreign construction material.

(3) If removal and replacement of foreign construction material incorporated in a building or work would be impracticable, cause undue delay, or otherwise be detrimental to the interests of the Government, the contracting officer may determine in writing that the foreign construction material need not be removed and replaced. A determination to retain foreign construction material does not constitute a determination that an exception to the Buy American statute applies, and this should be stated in the determination. Further, a determination to retain foreign construction material does not affect the Government's right to suspend or debar a contractor, subcontractor, or supplier for violation of the Buy American statute, or to exercise other contractual rights and remedies, such as reducing the contract price or terminating the contract for default.

(4) If the noncompliance is sufficiently serious, consider exercising appropriate contractual remedies, such as terminating the contract for default. Also consider preparing and forwarding a report to the agency suspending and debarring official in accordance with subpart 9.4. If the noncompliance appears to be fraudulent, refer the matter to other appropriate agency officials, such as the officer responsible for criminal investigation.

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Subpart 25.3 [Reserved]

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Subpart 25.4 —Trade Agreements

25.400 Scope of subpart.

(a) This subpart provides policies and procedures applicable to acquisitions that are covered by—

(1) The World Trade Organization Government Procurement Agreement (WTO GPA), as approved by Congress in the Uruguay Round Agreements Act (Pub. L. 103-465);

(2) Free Trade Agreements (FTA), consisting of—

(i) USMCA (United States-Mexico-Canada Agreement, as approved by Congress in the United States-Mexico-Canada Agreement Implementation Act (Government Procurement Agreement applicable only to the United States and Mexico) (Pub. L. 116-113) (19 U.S.C. chapter 29 (sections 4501-4732));

(ii) Chile FTA (the United States-Chile Free Trade Agreement, as approved by Congress in the United States-Chile Free Trade Agreement Implementation Act (Pub. L. 108-77) (19 U.S.C. 3805 note));

(iii) Singapore FTA (the United States-Singapore Free Trade Agreement, as approved by Congress in the United States-Singapore Free Trade Agreement Implementation Act (Pub. L. 108-78) (19 U.S.C. 3805 note));

(iv) Australia FTA (the United States-Australia Free Trade Agreement, as approved by Congress in the United States-Australia Free Trade Agreement Implementation Act (Pub. L. 108-286) (19 U.S.C. 3805 note));

(v) Morocco FTA (The United States—Morocco Free Trade Agreement, as approved by Congress in the United States—Morocco Free Trade Agreement Implementation Act (Pub. L. 108-302) (19 U.S.C. 3805 note));

(vi) CAFTA-DR (The Dominican Republic-Central America-United States Free Trade Agreement, as approved by Congress in the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (Pub. L. 109-53) (19 U.S.C. 4001 note));

(vii) Bahrain FTA (the United States-Bahrain Free Trade Agreement, as approved by Congress in the United States-Bahrain Free Trade Agreement Implementation Act (Pub. L. 109-169) (19 U.S.C. 3805 note));

(viii) Oman FTA (the United States-Oman Free Trade Agreement, as approved by Congress in the United States-Oman Free Trade Agreement Implementation Act (Pub. L. 109-283) (19 U.S.C. 3805 note));

(ix) Peru FTA (the United States-Peru Trade Promotion Agreement, as approved by Congress in the United States-Peru Trade Promotion Agreement Implementation Act (Pub. L. 110-138) (19 U.S.C. 3805 note));

(x) Korea FTA (the United States-Korea Free Trade Agreement Implementation Act (Pub. L. 112-41) (19 U.S.C 3805 note));

(xi) Colombia FTA (the United States-Colombia Trade Promotion Agreement Implementation Act (Pub. L. 112-42) (19 U.S.C. 3805 note)); and

(xii) Panama FTA (the United States-Panama Trade Promotion Agreement Implementation Act (Pub. L. 112-43) (19 U.S.C. 3805 note));

(3) The least developed country designation made by the U.S. Trade Representative, pursuant to the Trade Agreements Act (19 U.S.C. 2511(b)(4)), in acquisitions covered by the WTO GPA;

(4) The Caribbean Basin Trade Initiative (CBTI) (determination of the U.S. Trade Representative that end products or construction material granted duty-free entry from countries designated as beneficiaries under the Caribbean Basin Economic Recovery Act (19 U.S.C. 2701, *et seq.*), with the exception of Panama, must be treated as eligible products in acquisitions covered by the WTO GPA);

(5) The Israeli Trade Act (the U.S.-Israel Free Trade Area Agreement, as approved by Congress in the United States-Israel Free Trade Area Implementation Act of 1985 (19 U.S.C. 2112 note)); or

(6) The Agreement on Trade in Civil Aircraft (U.S. Trade Representative waiver of the Buy American statute for signatories of the Agreement on Trade in Civil Aircraft, as implemented in the Trade Agreements Act of 1979 (19 U.S.C. 2513)).

(b) For application of the trade agreements that are unique to individual agencies, see agency regulations.

25.401 Exceptions.

(a) This subpart does not apply to—

(1) Acquisitions set aside for small businesses;

(2) Acquisitions of arms, ammunition, or war materials, or purchases indispensable for national security or for national defense purposes;

(3) Acquisitions of end products for resale;

(4) Acquisitions under subpart 8.2, Acquisition From AbilityOne Participating Nonprofit Agencies, and acquisitions from Federal Prison Industries, Inc., under subpart 8.3;

(5) Other acquisitions not using full and open competition, if authorized by 6.102 or 6.103, when the limitation of competition would preclude use of the procedures of this subpart; or sole source acquisitions justified in accordance with 12.102; and

(6) Goods and services specifically excluded under individual trade agreements, such as exceptions negotiated by the U.S. Trade Representative for particular agencies. See the agency supplementary regulations.

(b) In the World Trade Organization Government Procurement Agreement (WTO GPA) and each FTA, there is a U.S. schedule that lists services that are excluded from that agreement in acquisitions by the United States. Acquisitions of the following services are excluded from coverage by the U.S. schedule of the WTO GPA or an FTA as indicated in this table:

The service(Federal Service Codes from the Federal Procurement Data System Product/Service Code Manual are indicated in parentheses for some services.)	**WTO GPA AND KOREA FTA**	**Bahrain FTA, CAFTA-DR, Chile FTA, Columbia FTA, USMCA, Oman FTA, Panama FTA, and Peru FTA**	**Singapore FTA**	**Australia and Morocco FTA**
(1) All services purchased in support of military services overseas.	X	X	X	X
(2)(i) Automatic data processing (ADP) telecommunications and transmission services (D304), except enhanced (*i.e.*, value-added) telecommunications services.	X	X		
(ii) ADP teleprocessing and timesharing services (D305), telecommunications network management services (D316), automated news services, data services or other information services (D317), and other ADP and telecommunications services (D399)	X	X		
(iii) Basic telecommunications network services (*i.e.*, voice telephone services, packet-switched data transmission services, circuit-switched data transmission services, telex services, facsimile services, and private leased circuit services, but not information services, as defined in 47 U.S.C. 153(24))	*	*	X	X
(3) Dredging	X	X	X	X
(4)(i) Operation and management contracts of certain Government or privately owned facilities used for Government purposes, including Federally Funded Research and Development Centers	X		X	

The service(Federal Service Codes from the Federal Procurement Data System Product/Service Code Manual are indicated in parentheses for some services.)	WTO GPA AND KOREA FTA	Bahrain FTA, CAFTA-DR, Chile FTA, Columbia FTA, USMCA, Oman FTA, Panama FTA, and Peru FTA	Singapore FTA	Australia and Morocco FTA
(ii) Operation of all Department of Defense, Department of Energy, or the National Aeronautics and Space Administration facilities; and all Government-owned research and development facilities or Government-owned environmental laboratories	* *	X	* *	X
(5) Research and development	X	X	X	X
(6) Transportation services (including launching services, but not including travel agent services)	X	X	X	X
(7) Utility services	X	X	X	X
(8) Maintenance, repair, modification, rebuilding and installation of equipment related to ships (J019)		X		X
(9) Nonnuclear ship repair (J998)		X		X

***Note 1**. Acquisitions of the services listed at (2)(iii) of this table are a subset of the excluded services at (2)(i) and (ii), and are therefore not covered under the WTO GPA.

****Note 2**. Acquisitions of the services listed at (4)(ii) of this table are a subset of the excluded services at (4)(i), and are therefore not covered under the WTO GPA.

25.402 General.

(a)

(1) The Trade Agreements Act (19 U.S.C. 2501, *et seq.*) provides the authority for the President to waive the Buy American statute and other discriminatory provisions for eligible products from countries that have signed an international trade agreement with the United States, or that meet certain other criteria, such as being a least developed country. The President has delegated this waiver authority to the U.S. Trade Representative. In acquisitions covered by the WTO GPA, Free Trade Agreements, or the Israeli Trade Act, the U.S. Trade Representative has waived the Buy American statute and other discriminatory provisions for eligible products. Offers of eligible products receive equal consideration with domestic offers.

(2) The contracting officer must determine the origin of services by the country in which the firm providing the services is established. See subpart 25.5 for evaluation procedures for supply contracts covered by trade agreements.

(b) The value of the acquisition is a determining factor in the applicability of trade agreements. Most of these dollar thresholds are subject to revision by the U.S. Trade Representative approximately every 2 years. The various thresholds are summarized as follows:

Trade agreement	Supply contract (equal to or exceeding)	Service contract (equal to or exceeding)	Construction contract (equal to or exceeding)
WTO GPA	$174,000	$174,000	$6,683,000
FTAs:			
Australia FTA	105,767	105,767	6,683,000
Bahrain FTA	174,000	174,000	13,749,689
CAFTA-DR (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua)	105,767	105,767	6,683,000
Chile FTA	105,767	105,767	6,683,000
Colombia FTA	105,767	105,767	6,683,000
Korea FTA	100,000	100,000	6,683,000
Morocco FTA	174,000	174,000	6,683,000
USMCA:			
—Mexico	105,767	105,767	13,749,689
Oman FTA	174,000	174,000	13,749,689
Panama FTA	174,000	174,000	6,683,000
Peru FTA	174,000	174,000	6,683,000
Singapore FTA	105,767	105,767	6,683,000
Israeli Trade Act	50,000		

25.403 World Trade Organization Government Procurement Agreement and Free Trade Agreements.

(a) Eligible products from WTO GPA and FTA countries are entitled to the nondiscriminatory treatment specified in 25.402(a)(1). The WTO GPA and FTAs specify procurement procedures designed to ensure fairness (see 25.408).

(b) *Thresholds.*

(1) To determine whether the acquisition of products by lease, rental, or lease-purchase contract (including lease-to-ownership, or lease-with-option-to purchase) is covered by the WTO GPA or an FTA, calculate the estimated acquisition value as follows:

(i) If a fixed-term contract of 12 months or less is contemplated, use the total estimated value of the acquisition.

(ii) If a fixed-term contract of more than 12 months is contemplated, use the total estimated value of the acquisition plus the estimated residual value of the leased equipment at the conclusion of the contemplated term of the contract.

(iii) If an indefinite-term contract is contemplated, use the estimated monthly payment multiplied by the total number of months that ordering would be possible under the proposed contract, *i.e.,* the initial ordering period plus any optional ordering periods.

(iv) If there is any doubt as to the contemplated term of the contract, use the estimated monthly payment multiplied by 48.

(2) The estimated value includes the value of all options.

(3) If, in any 12-month period, recurring or multiple awards for the same type of product or products are anticipated, use the total estimated value of these projected awards to determine whether the WTO GPA or an FTA applies. Do not divide any acquisition with the intent of reducing the estimated value of the acquisition below the dollar threshold of the WTO GPA or an FTA.

(c) *Purchase restriction.* Under the Trade Agreements Act (19 U.S.C. 2512), in acquisitions covered by the WTO GPA, acquire only U.S.-made or designated country end products or U.S. or designated country services, unless offers for such end products or services are either not received or are insufficient to fulfill the requirements. This purchase restriction does not apply below the WTO GPA threshold for supplies and services, even if the acquisition is covered by an FTA.

25.404 Least developed countries.

For acquisitions covered by the WTO GPA, least developed country end products, construction material, and services must be treated as eligible products.

25.405 Caribbean Basin Trade Initiative.

Under the Caribbean Basin Trade Initiative, the United States Trade Representative has determined that, for acquisitions covered by the WTO GPA, Caribbean Basin country end products, construction material, and services must be treated as eligible products. In accordance with Section 201 (a)(3) of the Dominican Republic—Central America—United States Free Trade Implementation Act (Pub. L. 109-53) (19 U.S.C. 4031), when the CAFTA-DR agreement enters into force with respect to a country, that country is no longer designated as a beneficiary country for purposes of the Caribbean Basin Economic Recovery Act, and is therefore no longer included in the definition of "Caribbean Basin country" for purposes of the Caribbean Basin Trade Initiative.

25.406 Israeli Trade Act.

Acquisitions of supplies by most agencies are covered by the Israeli Trade Act, if the estimated value of the acquisition is $50,000 or more but does not exceed the WTO GPA threshold for supplies (see 25.402(b)). Agencies other than the Department of Defense, the Department of Energy, the Department of Transportation, the Bureau of Reclamation of the Department of the Interior, the Federal Housing Finance Board, and the Office of Thrift Supervision must evaluate offers of Israeli end products without regard to the restrictions of the Buy American statute. The Israeli Trade Act does not prohibit the purchase of other foreign end products. In accordance with Section 201 (a)(3) of the Dominican Republic—Central America—United States Free Trade Implementation Act (Pub. L. 109-53), when the CAFTA-DR agreement enters into force with respect to a country, that country is no longer designated as a beneficiary country for purposes of the Caribbean Basin Economic Recovery Act, and is therefore no longer included in the definition of "Caribbean Basin country" for purposes of the Caribbean Basin Trade Initiative.

25.407 Agreement on Trade in Civil Aircraft.

Under the authority of Section 303 of the Trade Agreements Act, the U.S. Trade Representative has waived the Buy American statute for civil aircraft and related articles that meet the substantial transformation test of the Trade Agreements Act, from countries that are parties to the Agreement on Trade in Civil Aircraft. Those countries are Albania, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Macao China, Malta, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Taiwan (Chinese Taipei), and the United Kingdom.

25.408 Procedures.

(a) If the WTO GPA or an FTA applies (see 25.401), the contracting officer must—

(1) Comply with the requirements of 5.201, Solicitation notice;

(2) Comply with the requirements of 5.301, General;

(3) Not include technical requirements in solicitations solely to preclude the acquisition of eligible products; and

(4) Specify in solicitations that offerors must submit offers in the English language and in U.S. dollars (see 52.214-34, Submission of Offers in the English Language, and 52.214-35, Submission of Offers in U.S. Currency, or paragraph (c)(5) of 52.215-1, Instruction to Offerors—Competitive Acquisition).

(b) See subpart 25.5 for evaluation procedures.

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Subpart 25.5 —Evaluating Foreign Offers—Supply Contracts

25.501 General.

The contracting officer—

(a) Must apply the evaluation procedures of this subpart to each line item of an offer unless either the offer or the solicitation specifies evaluation on a group basis (see 25.503);

(b) May rely on the offeror's certification of end product origin when evaluating a foreign offer; and

(c) When trade agreements are involved, must not use the Buy American statute evaluation factors prescribed in this subpart to provide a preference for one foreign offer over another foreign offer.

25.502 Application.

(a) Unless otherwise specified in agency regulations, perform the following steps in the order presented:

(1) Eliminate all offers or offerors that are unacceptable for reasons other than price; *e.g.,* nonresponsive, debarred or suspended, or a prohibited source (see part 40).

(2) Rank the remaining offers by price.

(3) If the solicitation specifies award on the basis of factors in addition to cost or price, apply the evaluation factors as specified in this section and use the evaluated cost or price in determining the offer that represents the best value to the Government.

(b) For acquisitions covered by the WTO GPA (see subpart 25.4)—

(1) Consider only offers of U.S.-made or designated country end products, unless no offers of such end products were received;

(2) If the agency gives the same consideration given eligible offers to offers of U.S.-made end products that are not domestic end products, award on the low offer. Otherwise, evaluate in accordance with agency procedures; and

(3) If there were no offers of U.S.-made or designated country end products, make a nonavailability waiver determination and award on the low offer (see 25.403(c)).

(c) For acquisitions not covered by the WTO GPA, but subject to the Buy American statute (an FTA or the Israeli Trade Act also may apply), the following applies:

(1) If the low offer is a domestic offer or an eligible offer under an FTA or the Israeli Trade Act, award on that offer.

(2) If the low offer is a noneligible offer and there were no domestic offers (see 25.103(b)(3)), award on the low offer. The procedures at 25.106(b)(2) and 25.106(c)(2) do not apply.

(3) If the low offer is a noneligible offer and there is an eligible offer that is lower than the lowest domestic offer, award on the low offer. The procedures at 25.106(b)(2) and 25.106(c)(2) do not apply.

(4) Otherwise, apply the appropriate evaluation factor provided in 25.106 to the low offer. The procedures at 25.106(b)(2) and 25.106(c)(2) do not apply.

(i) If the evaluated price of the low offer remains less than the lowest domestic offer, award on the low offer.

(ii) If the price of the lowest domestic offer is less than the evaluated price of the low offer, award on the lowest domestic offer.

(d) *Ties*.

(1) If application of an evaluation factor results in a tie between a domestic offer and a foreign offer, award on the domestic offer.

(2) If no evaluation preference was applied (*i.e.,* offers afforded nondiscriminatory treatment under the Buy American statute), resolve ties between domestic and foreign offers by a witnessed drawing of lots by an impartial individual.

(3) Resolve ties between foreign offers from small business concerns (under the Buy American statute, a small business offering a manufactured article that does not meet the definition of “domestic end product” is a foreign offer) or foreign offers from a small business concern and a large business concern in accordance with 14.308(a).

25.503 Group offers.

(a) If the solicitation specifies that award will be made only on a group of line items or on all line items contained in the solicitation, or an offer restricts award to a group of line items or to all line items contained in the offer, reject the offer—

(1) If any part of the award would consist of prohibited end products (see part 40); or

(2) If the acquisition is covered by the WTO GPA and any part of the offer consists of items restricted in accordance with 25.403(c).

(b) If an offer restricts award to a group of line items or to all line items contained in the offer, determine for each line item whether to apply an evaluation factor.

(1) First, evaluate offers that do not specify an award restriction on a line item basis in accordance with 25.502, determining a tentative award pattern by selecting for each line item the offer with the lowest evaluated price.

(2) Evaluate an offer that specifies an award restriction against the offered prices of the tentative award pattern, applying the appropriate evaluation factor on a line item basis.

(3) Compute the total evaluated price for the tentative award pattern and the offer that specified an award restriction.

(4) Unless the total evaluated price of the offer that specified an award restriction is less than the total evaluated price of the tentative award pattern, award based on the tentative award pattern.

(c) For acquisitions not covered by the WTO GPA, if the solicitation specifies that award will be made only on a group of line items or all line items contained in the solicitation, determine the category of end products on the basis of each line item, but determine whether to apply an evaluation factor on the basis of the group of items.

(1) If the proposed price of domestic end products exceeds 50 percent of the total proposed price of the group, evaluate the entire group as a domestic offer. Evaluate all other groups as foreign offers.

(2) For foreign offers, if the proposed price of domestic end products and eligible products exceeds 50 percent of the total proposed price of the group, evaluate the entire group as an eligible offer.

(3) Apply the evaluation factor to the entire group in accordance with 25.502.

(d) If no trade agreement applies to a solicitation and the solicitation specifies that award will be made only on a group of line items or all line items contained in the solicitation, determine the category of end products (*i.e.,* domestic or foreign) on the basis of each line item, but determine whether to apply an evaluation factor on the basis of the group of items.

(1) If the proposed price of domestic end products exceeds 50 percent of the total proposed price of the group, evaluate the entire group as a domestic offer. Evaluate all other groups as foreign offers.

(2) Apply the evaluation factor to the entire group in accordance with 25.502, except where 25.502(c)(4) applies and the evaluated price of the low offer remains less than the lowest domestic offer. Where the evaluated price of the low offer remains less than the lowest domestic offer, treat as a domestic offer any group where the proposed price of end products with a domestic content of at least 55 percent exceeds 50 percent of the total proposed price of the group.

(3) Apply the evaluation factor to the entire group in accordance with 25.502(c)(4).

Subpart 25.6 —Solicitation Provisions and Contract Clauses

25.601 Acquisition of supplies.

The following provisions and clauses apply to the acquisition of supplies and the acquisition of services involving the furnishing of supplies.

(a) (1) (i) Insert the clause at 52.225-1, Buy American—Supplies, in solicitations and contracts with a value exceeding the micro-purchase threshold but not exceeding $50,000; and in solicitations and contracts with a value exceeding $50,000, if none of the clauses prescribed in paragraphs (b) and (c) of this section apply, except if—

(A) The solicitation is restricted to domestic end products in accordance with 6.103;

(B) The acquisition is for supplies for use within the United States and an exception to the Buy American statute applies (*e.g.*, public interest, or information technology that is a commercial product), other than individual nonavailability waiver determinations (see 25.103(b)(2)); or

(C) The acquisition is for supplies for use outside the United States.

(ii) The contracting officer must use the clause with its Alternate I to reflect the domestic content threshold that will apply to the entire period of performance, when the senior procurement executive allows for application of an alternate domestic content test for the contract in accordance with 25.101(d). For contracts that the contracting officer estimates will be awarded in calendar year 2022 or 2023, the contracting officer must insert "60" in paragraph (1)(ii)(A) of the definition of "domestic end product." For contracts that the contracting officer estimates will be awarded in calendar year 2024, 2025, 2026, 2027, or 2028, the contracting officer must insert "65". For contracts that the contracting officer estimates will be awarded after calendar year 2028 the contracting officer must insert "75".

(2) Insert the provision at 52.225-2, Buy American Certificate, in solicitations containing the clause at 52.225-1.

(b) (1) (i) Insert the clause at 52.225-3, Buy American—Free Trade Agreements—Israeli Trade Act, in solicitations and contracts if—

(A) The acquisition is for supplies, or for services involving the furnishing of supplies, for use within the United States, and the acquisition value is $50,000 or more, but is less than $174,000;

(B) The acquisition is not for information technology that is a commercial product, using fiscal year 2004 or subsequent fiscal year funds; and

(C) No exception in 25.401 applies. For acquisitions of agencies not subject to the Israeli Trade Act (see 25.406), see agency regulations.

(ii) If the acquisition value is $50,000 or more but is less than $100,000, use the clause with its Alternate II.

(iii) If the acquisition value is $100,000 or more but is less than $105,767, use the clause with its Alternate III.

(iv) The contracting officer must use the clause with its Alternate IV to reflect the domestic content threshold that will apply to the entire period of performance, when the senior procurement executive allows for application of an alternate domestic content test for the contract in accordance with 25.102(d). For contracts that the contracting officer estimates will be awarded in calendar year 2022 or 2023, the contracting officer must insert "60" in paragraph (1)(ii)(A) of the definition of "domestic end product." For contracts that the contracting officer estimates will be awarded in calendar year 2024, 2025, 2026, 2027, or 2028, the contracting officer must insert "65". For contracts that the contracting officer estimates will be awarded after calendar year 2028 the contracting officer must insert "75".

(2) (i) Insert the provision at 52.225-4, Buy American—Free Trade Agreements—Israeli Trade Act Certificate, in solicitations containing the clause at 52.225-3.

(ii) If the acquisition value is $50,000 or more but is less than $100,000, use the provision with its Alternate II.

(iii) If the acquisition value is $100,000 or more, but is less than $105,767, use the provision with its Alternate III.

(c) (1) Insert the clause at 52.225-5, Trade Agreements, in solicitations and contracts valued at $174,000 or more, if the acquisition is covered by the WTO GPA (see subpart 25.4) and the agency has determined that the restrictions of the Buy American statute are not applicable to U.S.-made end products. If the agency has not made such a determination, the contracting officer must follow agency procedures.

(2) Insert the provision at 52.225-6, Trade Agreements Certificate, in solicitations containing the clause at 52.225-5.

(d) Insert the provision at 52.225-7, Waiver of Buy American Statute for Civil Aircraft and Related Articles, in solicitations for civil aircraft and related articles (see 25.407), if the acquisition value is less than $174,000.

(e) Reserved.

(f) Insert the provision at 52.225-18, Place of Manufacture, in solicitations that are predominantly for the acquisition of manufactured end products, (*i.e.*, the estimated value of the manufactured end products exceeds the estimated value of other items to be acquired as a result of the solicitation).

25.602 Acquisition of construction.

The following provisions and clauses apply to the acquisition of construction.

(a) Insert the clause at 52.225-9, Buy American—Construction Materials, in solicitations and contracts for construction that is performed in the United States valued at less than $6,683,000.

(1) List in paragraph (b)(2) of the clause all foreign construction material excepted from the requirements of the Buy American statute.

(2) If the head of the agency determines that a higher percentage is appropriate, substitute the higher evaluation percentage in paragraph (b)(3)(i) of the clause.

(3) The contracting officer must use the clause with its Alternate I to reflect the domestic content threshold that will apply to the entire period of performance, when the senior procurement executive allows for application of an alternate domestic content test for the contract in accordance with 25.201(c). For contracts that the contracting officer estimates will be awarded in calendar year 2022 or 2023, the contracting officer must insert "60" in paragraph (1)(ii)(A) of the definition of "domestic construction material." For contracts that the contracting officer estimates will be awarded in calendar year 2024, 2025, 2026, 2027, or 2028, the contracting officer must insert "65". For contracts that the contracting officer estimates will be awarded after calendar year 2028 the contracting officer must insert "75".

(b)

(1) Insert the provision at 52.225-10, Notice of Buy American Requirement—Construction Materials, in solicitations containing the clause at 52.225-9.

(2) If insufficient time is available to process a determination regarding the inapplicability of the Buy American statute before receipt of offers, use the provision with its *Alternate I.*

(c) Insert the clause at 52.225-11, Buy American—Construction Materials under Trade Agreements, in solicitations and contracts for construction that is performed in the United States valued at $6,683,000 or more.

(1) List in paragraph (b)(3) of the clause all foreign construction material excepted from the requirements of the Buy American statute, other than designated country construction material.

(2) If the head of the agency determines that a higher percentage is appropriate, substitute the higher evaluation percentage in paragraph (b)(4)(i) of the clause.

(3) For acquisitions valued at $6,683,000 or more, but less than $13,749,689, use the clause with its Alternate I. List in paragraph (b)(3) of the clause all foreign construction material excepted from the requirements of the Buy American statute, unless the excepted foreign construction material is from a designated country other than Bahrain, Mexico, and Oman.

(4) The contracting officer must use the clause with its Alternate II to reflect the domestic content threshold that will apply to the entire period of performance, when the senior procurement executive allows for application of an alternate domestic content test for the contract in accordance with 25.201(c). For contracts that the contracting officer estimates will be awarded in calendar year 2022 or 2023, the contracting officer must insert "60" in paragraph (1)(ii)(A) of the definition of "domestic construction material." For contracts that the contracting officer estimates will be awarded in calendar year 2024, 2025, 2026, 2027, or 2028, the contracting officer must insert "65". For contracts that the contracting officer estimates will be awarded after calendar year 2028 the contracting officer must insert "75".

(d)

(1) Insert the provision at 52.225-12, Notice of Buy American Requirement—Construction Materials under Trade Agreements, in solicitations containing the clause at 52.225-11.

(2) If insufficient time is available to process a determination regarding the inapplicability of the Buy American statute before receipt of offers, use the provision with its *Alternate I.*

(3) For acquisitions valued at $6,683,000 or more, but less than $13,749,689, use the provision with its Alternate II.

25.603 Other clause.

Insert the clause at 52.225-14, Inconsistency Between English Version and Translation of Contract, in solicitations and contracts if anticipating translation into another language.

Subpart 25.7 —Contracts Performed Outside the United States

25.701 Contractor personnel in a designated operational area or supporting a diplomatic or consular mission outside the United States.

25.701-1 Scope.

(a) This section applies to contracts requiring contractor personnel to perform outside the United States—

(1) In a designated operational area during—

(i) Contingency operations;

(ii) Humanitarian or peacekeeping operations; or

(iii) Other military operations or military exercises, when designated by the combatant commander; or

(2) When supporting a diplomatic or consular mission—

(i) That has been designated by the Department of State as a danger pay post, see *https://aoprals.state.gov/*; or

(ii) That the contracting officer determines is a post at which application of the clause at FAR 52.225-19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States, is appropriate.

(b) Any of the types of operations listed in paragraph (a)(1) of this section may include stability operations such as—

(1) Establishment or maintenance of a safe and secure environment; or

(2) Provision of emergency infrastructure reconstruction, humanitarian relief, or essential governmental services (until feasible to transition to local government).

(c) This section does not apply to personal services contracts (see part 37), unless specified otherwise in agency procedures.

25.701-2 Government support.

(a) Generally, contractors are responsible for providing their own logistical and security support, including logistical and security support for their employees. The agency must provide logistical or security support only when the appropriate agency official, in accordance with agency guidance, determines that—

(1) Such Government support is available and is needed to ensure continuation of essential contractor services; and

(2) The contractor cannot obtain adequate support from other sources at a reasonable cost.

(b) The contracting officer must specify in the contract, and in the solicitation if possible, the exact support to be provided, and whether this support is provided on a reimbursable basis, citing the authority for the reimbursement.

25.701-3 Weapons.

The contracting officer must follow agency procedures and the weapons policy established by the combatant commander or the chief of mission when authorizing contractor personnel to carry weapons (see paragraph (i) of the clause at 52.225-19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States).

25.701-4 Contract clause.

Insert the clause at 52.225-19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States, in solicitations and contracts, other than personal service contracts with individuals, that will require contractor personnel to perform outside the United States—

(a) In a designated operational area during—

(1) Contingency operations;

(2) Humanitarian or peacekeeping operations; or

(3) Other military operations or military exercises, when designated by the combatant commander; or

(b) When supporting a diplomatic or consular mission—

(1) That has been designated by the Department of State as a danger pay post, see *https://aoprals.state.gov/*; or

(2) That the contracting officer determines is a post at which application of the clause FAR 52.225-19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States, is appropriate.

25.702 Contractors performing private security functions outside the United States.

25.702-1 Scope.

This section prescribes policy for implementing section 862 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008 (Pub. L. 110-181), as amended by section 853 of the NDAA for FY 2009 (Pub. L. 110-417), and sections 831 and 832 of the NDAA for FY 2011 (Pub. L. 111-383) (see 10 U.S.C. Subtitle A, Part V, Subpart G Note).

25.702-2 Definitions.

As used in this section—

Area of combat operations means an area of operations designated as such by the Secretary of Defense when enhanced coordination of contractors performing private security functions working for Government agencies is required.

Other significant military operations means activities, other than combat operations, as part of a contingency operation outside the United States that are carried out by United States Armed Forces in an uncontrolled or unpredictable high-threat environment where personnel performing security functions may be called upon to use deadly force (see 25.702-3(a)(2)).

Private security functions means activities engaged in by a contractor, as follows—

(1) Guarding of personnel, facilities, designated sites, or property of a Federal agency, the contractor or subcontractor, or a third party; or

(2) Any other activity for which personnel are required to carry weapons in the performance of their duties in accordance with the terms of the contract.

25.702-3 Applicability.

(a) This section applies to contracts that require performance outside the United States—

(1) In an area of combat operations as designated by the Secretary of Defense; or

(2) In an area of other significant military operations as designated by the Secretary of Defense, and only upon agreement of the Secretary of Defense and the Secretary of State.

(b) For these designations contact the Department of Defense (DoD) at *https://www.acq.osd.mil/asda/dpc/contact-us.html.*

(c) When the applicability requirements of this subsection are met, contractors and subcontractors must comply with 32 CFR part 159, whether the contract is for the performance of private security functions as a primary deliverable or the provision of private security functions is ancillary to the stated deliverables.

(d) The requirements of section 25.702 do not apply to—

(1) Contracts entered into by elements of the intelligence community in support of intelligence activities; or

(2) Temporary arrangements entered into on a non-DoD contract for the performance of private security functions by individual indigenous personnel not affiliated with a local or expatriate security company. These temporary arrangements must still comply with local law.

25.702-4 Policy.

(a) *General.*

(1) The policy, responsibilities, procedures, accountability, training, equipping, and conduct of personnel performing private security functions in designated areas are addressed at 32 CFR part 159, entitled “Private Security Contractors Operating in Contingency Operations.” Contractor responsibilities include ensuring that employees are aware of, and comply with, relevant orders, directives, and instructions; keeping appropriate personnel records; accounting for weapons; registering and identifying armored vehicles, helicopters, and other military vehicles; and reporting specified incidents in which personnel performing private security functions under a contract are involved.

(2) In addition, contractors are required to fully cooperate with any Government-authorized investigation into incidents reported pursuant to paragraph (c)(3) of the clause at 52.225-26, Contractors Performing Private Security Functions Outside the United States, by providing access to employees performing private security functions and relevant information in the possession of the contractor regarding the incident concerned.

(b) *Implementing guidance.* In accordance with 32 CFR part 159—

(1) Geographic combatant commanders will provide the DoD contractors performing private security functions with guidance and procedures for the operational environment in their area of responsibility; and

(2) In a designated area of combat operations, or areas of other significant military operations, as designated by the Secretary of Defense and only upon agreement of the Secretary of Defense and the Secretary of State, the relevant Chief of Mission will provide implementing instructions for non-DoD contractors performing private security functions and their personnel consistent with the standards set forth by the geographic combatant commander. In accordance with 32 CFR 159.4(c), the Chief of Mission has the option of instructing non-DoD contractors performing private security functions

and their personnel to follow the guidance and procedures of the geographic combatant commander and/or a sub-unified commander or joint force commander where specifically authorized by the combatant commander to do so and notice of that authorization is provided to non-DoD agencies.

25.702-5 Remedies.

(a) In addition to other remedies available to the Government—

(1) The contracting officer may direct the contractor, at its own expense, to remove and replace any contractor or subcontractor personnel performing private security functions who fail to comply with or violate applicable requirements. Such action may be taken at the Government's discretion without prejudice to its rights under any other contract provision, *e.g.,* termination for default;

(2) The contracting officer must include the contractor's failure to comply with the requirements of this section in appropriate databases of past performance and consider any such failure in any responsibility determination or evaluation of past performance; and

(3) In the case of award-fee contracts, the contracting officer must consider a contractor's failure to comply with the requirements of this subsection in the evaluation of the contractor's performance during the relevant evaluation period, and may treat such failure as a basis for reducing or denying award fees for such period or for recovering all or part of award fees previously paid for such period.

(b) If the performance failures are severe, prolonged, or repeated, the contracting officer must refer the matter to the appropriate suspending and debarring official.

25.702-6 Contract clause.

(a) Use the clause at 52.225-26, Contractors Performing Private Security Functions Outside the United States, in solicitations and contracts for performance outside the United States in an area of—

(1) Combat operations, as designated by the Secretary of Defense; or

(2) Other significant military operations, as designated by the Secretary of Defense and only upon agreement of the Secretary of Defense and the Secretary of State.

(b) The clause is not required to be used for—

(1) Contracts entered into by elements of the intelligence community in support of intelligence activities; or

(2) Temporary arrangements entered into by non-DoD contractors for the performance of private security functions by individual indigenous personnel not affiliated with a local or expatriate security company.

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Subpart 25.8 —Other International Agreements and Coordination

25.801 General.

Treaties and agreements between the United States and foreign governments affect the evaluation of offers from foreign entities and the performance of contracts in foreign countries.

25.802 Procedures.

(a) When placing contracts with contractors located outside the United States, for performance outside the United States, contracting officers must—

(1) Determine the existence and applicability of any international agreements and ensure compliance with these agreements; and

(2) Conduct the necessary advance acquisition planning and coordination between the appropriate U.S. executive agencies and foreign interests as required by these agreements.

(b) The Department of State publishes many international agreements in the "United States Treaties and Other International Agreements" series. Copies of this publication normally are available in overseas legal offices and U.S. diplomatic missions.

(c) Contracting officers must award all contracts with Taiwanese firms or organizations through the American Institute of Taiwan (AIT). AIT is under contract to the Department of State.

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Subpart 25.9 —Customs and Duties

25.900 Scope of subpart.

This subpart provides policies and procedures for exempting from import duties certain supplies purchased under Government contracts.

25.901 Policy.

United States laws impose duties on foreign supplies imported into the customs territory of the United States. Certain exemptions from these duties are available to Government agencies. Agencies must use these exemptions when the anticipated savings to appropriated funds will outweigh the administrative costs associated with processing required documentation.

25.902 Procedures.

For regulations governing importations and duties, see the Customs Regulations issued by the U.S. Customs Service, Department of the Treasury (19 CFR Chapter 1). Except as provided elsewhere in the Customs Regulations (see 19 CFR 10.100), all shipments of imported supplies purchased under Government contracts are subject to the usual Customs entry and examination requirements. Unless the agency obtains an exemption (see 25.903), those shipments are also subject to duty.

25.903 Exempted supplies.

(a) Subchapters VIII and X of Chapter 98 of the Harmonized Tariff Schedule of the United States (19 U.S.C. 1202) list supplies for which exemptions from duty may be obtained when imported into the customs territory of the United States under a Government contract. For certain of these supplies, the contracting agency must certify to the Commissioner of Customs that they are for the purpose stated in the Harmonized Tariff Schedule (see 19 CFR 10.102-104, 10.114, and 10.121 and 15 CFR part 301 for requirements and formats).

(b) Supplies (excluding equipment) for Government-operated vessels or aircraft may be withdrawn from any customs-bonded warehouse, from continuous customs custody elsewhere than in a bonded warehouse, or from a foreign-trade zone, free of duty and internal revenue tax as provided in 19 U.S.C. 1309 and 1317. The contracting activity must cite this authority on the appropriate customs form when making purchases (see 19 CFR 10.59-10.65).

25.904 Contract clause.

Insert the clause at 52.225-8, Duty-Free Entry, in solicitations and contracts for supplies that may be imported into the United States and for which duty-free entry may be obtained in accordance with 25.903(a), if the value of the acquisition—

(a) Exceeds the simplified acquisition threshold; or

(b) Does not exceed the simplified acquisition threshold, but the savings from waiving the duty is anticipated to be more than the administrative cost of waiving the duty. When used for acquisitions that do not exceed the simplified acquisition threshold, the contracting officer may modify paragraphs (c)(1) and (j)(2) of the clause to reduce the dollar figure.

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Subpart 25.10 —Additional Foreign Acquisition Regulations

25.1001 Waiver of right to examination of records.

(a) *Policy.* The clause at 52.215-2, Audit and Records—Negotiation, prescribed at 15.210(b)(1), and paragraph (b)(1)(iii) of 12.205, implement 10 U.S.C. 3841 and 41 U.S.C. 4706.

(1) Insert the appropriate basic clause, whenever possible, in negotiated contracts with foreign contractors.

(2) The contracting officer may use 52.215-2 with its *Alternate III* after—

(i) Exhausting all reasonable efforts to include the basic clause;

(ii) Considering factors such as alternate sources of supply, additional cost, and time of delivery; and

(iii) The head of the agency has executed a determination and findings in accordance with paragraph (b) of this section, with the concurrence of the Comptroller General. However, concurrence of the Comptroller General is not required if the contractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its records available for examination.

(b) *Determination and findings.* The determination and findings must—

(1) Identify the contract and its purpose, and identify if the contract is with a foreign contractor or with a foreign government or an agency of a foreign government;

(2) Describe the efforts to include the basic clause;

(3) State the reasons for the contractor's refusal to include the basic clause;

(4) Describe the price and availability of the supplies or services from the United States and other sources; and

(5) Determine that it will best serve the interest of the United States to use the appropriate alternate clause in paragraph (a)(2) of this section.

25.1002 Use of foreign currency.

25.1002-1 Policy.

(a) Unless an international agreement or the WTO GPA (see 25.408(a)(4)) requires a specific currency, contracting officers must determine whether solicitations for contracts to be entered into and performed outside the United States will require submission of offers in U.S. currency or a specified foreign currency. In unusual circumstances, the contracting officer may permit submission of offers in other than a specified currency.

(b) To ensure a fair evaluation of offers, solicitations generally should require all offers to be priced in the same currency. However, if the solicitation permits submission of offers in other than a specified currency, the contracting officer must convert the offered prices to U.S. currency for evaluation purposes. The contracting officer must use the current market exchange rate from a commonly used source in effect as follows:

(1) For acquisitions conducted using sealed bidding procedures, on the date of bid opening.

(2) For acquisitions conducted using negotiation procedures—

(i) On the date specified for receipt of offers, if award is based on initial offers; otherwise

(ii) On the date specified for receipt of final proposal revisions.

(c) If a contract is priced in foreign currency, the agency must ensure that adequate funds are available to cover currency fluctuations to avoid a violation of the Anti-Deficiency Act (31 U.S.C. 1341, 1342, 1511-1519).

25.1002-2 Solicitation provision.

Insert the provision at 52.225-17, Evaluation of Foreign Currency Offers, in solicitations that permit the use of other than a specified currency. Insert in the provision the source of the rate to be used in the evaluation of offers.

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Subpart 25.11 [Reserved]

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PART 26 - OTHER SOCIOECONOMIC PROGRAMS

Sec.

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Subpart 26.1 - Indian Incentive Program

26.101 Definitions.

As used in this subpart-

Indian means any person who is a member of any Indian tribe, band, group, pueblo, or community that is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs (BIA) (see 25 U.S.C. 1452) and any "Native" as defined in the Alaska Native Claims Settlement Act (see 43 U.S.C. 1602).

Indian organization means the governing body of any Indian tribe or entity established or recognized by the governing body of an Indian tribe for the purposes of 25 U.S.C., chapter 17.

Indian-owned economic enterprise means any Indian-owned (as determined by the Secretary of the Interior) commercial, industrial, or business activity established or organized for the purpose of profit, provided that Indian ownership constitutes not less than 51 percent of the enterprise.

Indian tribe means any Indian tribe, band, group, pueblo, or community, including native villages and native groups (including corporations organized by Kenai, Juneau, Sitka, and Kodiak) as defined in the Alaska Native Claims Settlement Act, that is recognized by the Federal Government as eligible for services from BIA. See 25 U.S.C. 1452.

Interested party means a prime contractor or an actual or prospective offeror whose direct economic interest would be affected by the award of a subcontract or by the failure to award a subcontract.

26.102 Presolicitation.

26.102-1 Policy.

Agencies may allow an incentive payment to prime contractors equal to 5 percent of the amount paid to a subcontractor that is an Indian organization or Indian-owned economic enterprise (see 25 U.S.C. 1544).

26.102-2 Contract clause.

Contracting officers in civilian agencies may insert the clause at 52.226-1, Utilization of Indian Organizations and Indian-Owned Economic Enterprises, in solicitations and contracts if-

(a) In the opinion of the contracting officer, subcontracting possibilities exist for Indian organizations or Indian-owned economic enterprises; and

(b) Funds are available for any increased costs as described in paragraph (b)(2) of the clause at 52.226-1.

26.103 Postaward.

(a) Contracting officers and prime contractors may rely on the representation of an Indian organization or Indian-owned economic enterprise as to its eligibility, unless an interested party challenges its status or the contracting officer has independent reason to question that status.

(b) Contracting officers must refer challenges to the U.S. Department of the Interior, Bureau of Indian Affairs (BIA), Acquisition Management Director (https://www.bia.gov/as-ia/ocfo/acquisitions). The BIA will determine the eligibility and notify the contracting officer.

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Subpart 26.2 - Major Disaster and Emergency Assistance Activities

26.201 Definitions.

As used in this subpart—

Emergency response contract means a contract with private entities that provide assistance activities in a major disaster or emergency area, such as debris clearance, distribution of supplies, or reconstruction.

Local firm means a private organization, firm, or individual residing or doing business primarily in a major disaster or emergency area.

Major disaster or emergency area means the area included in the official Presidential declaration(s) and any additional areas identified by the Department of Homeland Security. Major disaster declarations and emergency declarations are published in the Federal Register and are available at https://www.fema.gov/disasters/disaster/declarations.

26.202 Presolicitation.

26.202-1 Policy.

(a) Local area preference. Contracting officers must, when practicable, award emergency response contracts to local firms (see 42 U.S.C. 5150). To support this policy, contracting officers may—

(1) Set aside acquisitions to allow only local firms within a specific geographic area to compete (see part 6); or

(2) Use an evaluation preference.

(b) Transition of work.

(1) Agencies may award emergency response contracts before a major disaster or emergency occurs to ensure immediate relief is available. Structure such contracts to support timely transition of work to local firms after a major disaster or emergency area has been established.

(2) Agencies must transition emergency response contracts to local firms after a major disaster or emergency is declared, unless the head of the agency determines on an individual or class basis that is not practicable. However, agencies are not required to terminate or renegotiate existing contracts to make the transition.

26.202-2 Procedures.

(a) Elevated thresholds. When contracting for emergency response activities, the elevated micro-purchase and simplified acquisition thresholds in 2.101 apply.

(b) Non-local justification requirements. After the President declares a major disaster or emergency, agencies must justify spending any Federal funds on emergency response contracts not awarded to a local firm. Agencies must document such justification in writing, and contracting officers must keep it in the contract file.

(c) Area. A major disaster or emergency area may span counties in several neighboring States. When establishing a geographic area for a local firm set-aside, the contracting officer must stay within the declared area(s), but is not required to include all the counties within the declared areas(s).

(d) Disaster response registry. Contracting officers must consult the Disaster Response Registry via https://www.sam.gov to determine contractor availability for emergency response activities inside the United States and outlying areas.

26.202-3 Solicitation provision and contract clauses.

(a) Insert the provision at 52.226-3, Disaster or Emergency Area Representation, and fill in the geographic area in paragraph (a), in solicitations involving local area set-asides.

(b) Insert the clause at 52.226-4, Notice of Disaster or Emergency Area Set-aside, and fill in the geographic area in paragraph (a), in solicitations and contracts involving local area set-asides.

(c) Insert the clause at 52.226-5, Restrictions on Subcontracting Outside Disaster or Emergency Area, in solicitations and contracts involving local area set-asides.

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Subpart 26.3 - Historically Black Colleges and Universities and Minority Institutions

26.301 Presolicitation.

26.301-1 General.

(a) As established in Executive Order 12928 of September 16, 1994, agencies should promote participation of Historically Black Colleges and Universities and Minority Institutions in Federal procurement.

(b) This subpart does not apply to contracts performed entirely outside the United States and its outlying areas.

26.301-2 Solicitation provision.

Insert the provision at 52.226-2, Historically Black College or University and Minority Institution Representation, in solicitations that exceed the micro-purchase threshold, and that are for research, studies, supplies, or services of the type normally acquired from higher educational institutions.

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Subpart 26.4 - Food Donations to Nonprofit Organizations

26.401 Definitions.

As used in this subpart-

Apparently wholesome food means food that meets all quality and labeling standards imposed by Federal, State, and local laws and regulations even though the food may not be readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.

Excess food means food that-

(1) Is not required to meet the needs of the agencies; and

(2) Would otherwise be discarded.

Food-insecure means inconsistent access to sufficient, safe, and nutritious food.

Nonprofit organization means any organization that is-

(1) Described in section 501(c) of the Internal Revenue Code of 1986; and

(2) Exempt from tax under section 501(a) of that Code.

26.402 Presolicitation.

26.402-1 Policy.

(a) The Government encourages agencies and their contractors to donate excess, apparently wholesome food to nonprofit organizations helping food-insecure people in the United States (see 42 U.S.C. 1792).

(b) The following limitations apply—

(1) Costs. Agencies may not assume responsibility for the costs and logistics of collecting, transporting, maintaining the safety of, or distributing excess food donations.

(2) Liability. An agency (including an agency that enters into a contract with a contractor) and any contractor making food donations following this policy is exempt from civil and criminal liability to the extent provided under 42 U.S.C. 1791.

26.402-2 Contract clause.

Insert the clause at 52.226-6, Promoting Excess Food Donation to Nonprofit Organizations, in solicitations and contracts greater than $35,000 for providing, serving, or selling food in the United States.

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Subpart 26.5 - Drug-Free Workplace

26.501 Applicability.

This subpart applies to contracts, except those-

(a) At or below the simplified acquisition threshold; however, the requirements of this subpart apply to all contracts of any value awarded to an individual;

(b) For commercial products and commercial services (see part 12);

(c) Performed outside the United States and its outlying areas or any part of a contract performed outside the United States and its outlying areas;

(d) Awarded by law enforcement agencies, if the head of the law enforcement agency involved determines that applying this subpart would be inappropriate in connection with the law enforcement agency's undercover operations; or

(e) Where application would be inconsistent with the international obligations of the United States or with the laws and regulations of a foreign country.

26.502 Definitions.

As used in this subpart-

Controlled substance means a controlled substance in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812), and as further defined in regulation at 21 CFR 1308.11-1308.15.

Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes.

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, possession, or use of any controlled substance.

Employee means an employee of a contractor directly engaged in performing work under a Government contract. "Directly engaged" includes all direct cost employees and any other contractor employee who has other than a minimal impact or involvement in contract performance.

Individual means an offeror or contractor that has no more than one employee including the offeror or contractor.

26.503 Presolicitation.

26.503-1 Contract clause.

Insert the clause at 52.226-7, Drug-Free Workplace, in solicitations and contracts except as provided in 26.501.

26.504 Evaluation and award.

26.504-1 Policy.

(a) Contracting officers may not consider an offeror, other than an individual, a responsible source unless it agrees to provide a drug-free workplace according to the clause at 52.226-7.

(b) Contracting officers may not award a contract of any dollar value to an individual unless that individual agrees to not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance while performing the contract.

26.505 Postaward.

26.505-1 Suspension of payments, contract termination, and debarment and suspension actions.

(a) Contracting officers may suspend contract payments when they determine in writing that there is adequate evidence of any of the causes at paragraph (d) of this section.

(b) Contracting officers may terminate contracts for default when they determine in writing any of the causes at paragraph (d) of this section exist.

(c) When a contracting officer initiates action under paragraph (a) or (b) of this section, they must refer the case to the agency suspending and debarring official (see part 9).

(d) The specific causes for suspension of contract payments, termination of a contract for default, or suspension and debarment are—

(1) The contractor has failed to comply with the requirements of the clause at 52.226-7, Drug-Free Workplace; or

(2) The number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace indicates that the contractor has failed to make a good faith effort to provide a drug-free workplace.

(e) An agency head may waive a suspension of payments, termination of contract, or suspension or debarment of a contractor under this section, if considered necessary to prevent a severe disruption of the agency operation to the detriment of the Government or the general public. The agency head cannot delegate the waiver authority.

Subpart 26.6 - Texting While Driving

26.601 Presolicitation.

26.601-1 Policy.

Agencies must encourage contractors and subcontractors to adopt and enforce policies that ban text messaging while driving-

(a) Company-owned or rented vehicles or Government-owned vehicles; or

(b) Privately-owned vehicles when on official Government business or when performing any work for or on behalf of the Government.

26.601-2 Contract clause.

Insert the clause at 52.226-8, Encouraging Contractor Policies to Ban Text Messaging While Driving, in all solicitations and contracts.

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PART 27 - PATENTS, DATA, AND COPYRIGHTS

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27.000 Scope of part.

This part provides policies, procedures, solicitation provisions, and contract clauses pertaining to patents, data, and copyrights.

27.001 Definition.

United States, as used in this part, means the 50 States and the District of Columbia, U.S. territories and possessions, Puerto Rico, and the Northern Mariana Islands.

Subpart 27.1 - General

27.101 Applicability.

This part applies to all agencies. However, agencies may adopt alternative policies, procedures, solicitation provisions, and contract clauses to the extent necessary to meet the specific requirements of laws, executive orders, treaties, or international agreements.

27.102 [Reserved]

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Subpart 27.2 - Patents and Copyrights

27.200 Scope of subpart.

This subpart provides policies and procedures regarding—

(a) Patent and copyright infringement liability;

(b) Royalties; and

(c) Security requirements for patent applications containing classified subject matter;

27.201 Patent and copyright infringement liability.

27.201-1 General.

(a) Pursuant to 28 U.S.C. 1498, the exclusive remedy for patent or copyright infringement by or on behalf of the Government is a suit for monetary damages against the Government in the Court of Federal Claims. No injunctive relief is available, and no direct cause of action lies against a contractor that is infringing a patent or copyright with the authorization or consent of the Government (*e.g.*, while performing a contract).

(b) The Government may expressly authorize and consent to a contractor's use or manufacture of inventions covered by U.S. patents by inserting the clause at 52.227-1, Authorization and Consent.

(c) Because of the exclusive remedies granted in 28 U.S.C. 1498, the Government requires notice and assistance from its contractors regarding any claims for patent or copyright infringement by inserting the clause at 52.227-2, Notice and Assistance, Regarding Patent and Copyright Infringement.

(d) The Government may require a contractor to reimburse it for liability for patent infringement arising out of a contract for commercial products or commercial services by inserting the clause at 52.227-3, Patent Indemnity.

27.201-2 Contract clauses.

(a) (1) Insert the clause at 52.227-1, Authorization and Consent, in solicitations and contracts except that use of the clause is—

(i) Optional when using simplified acquisition procedures; and

(ii) Prohibited when both complete performance and delivery are outside the United States.

(2) Use the clause with its Alternate I in all R&D solicitations and contracts for which the primary purpose is R&D work, except do not use this alternate in construction and architect-engineer contracts unless the contract calls exclusively for R&D work.

(3) Use the clause with its Alternate II in solicitations and contracts for communication services with a common carrier where the services are unregulated and not priced by a tariff schedule set by a regulatory body.

(b) Insert the clause at 52.227-2, Notice and Assistance Regarding Patent and Copyright Infringement, in all solicitations and contracts that include the clause at 52.227-1, Authorization and Consent.

(c) (1) Insert the clause at 52.227-3, Patent Indemnity, in solicitations and contracts that may result in the delivery of commercial products or the provision of commercial services, unless—

(i) Part 12 procedures are used;

(ii) The simplified acquisition procedures of Part 13 are used;

(iii) Both complete performance and delivery are outside the United States; or

(iv) The contracting officer determines after consultation with legal counsel that omission of the clause would be consistent with commercial practice.

(2) Use the clause with either its Alternate I (identification of excluded items) or II (identification of included items) if —

(i) The contract also requires delivery of items that are not commercial products or the provision of services that are not commercial services; or

(ii) The contracting officer determines after consultation with legal counsel that limitation of applicability of the clause would be consistent with commercial practice.

(3) Use the clause with its Alternate III if the solicitation or contract is for communication services and facilities by a common carrier, and the services are unregulated and are not priced by a tariff schedule set by a regulatory body.

(d) (1) Insert the clause at 52.227-4, Patent Indemnity—Construction Contracts, in solicitations and contracts for construction or that are fixed-price for dismantling, demolition, or removal of improvements. Do not insert the clause in contracts solely for architect-engineer services.

(2) If the contracting officer determines that the construction will necessarily involve the use of structures, products, materials, equipment, processes, or methods that are nonstandard, noncommercial, or special, the contracting officer may expressly exclude them from the patent indemnification by using the clause with its Alternate I. Note that this exclusion is for items, as distinguished from identified patents (see paragraph (e) of this subsection).

(e) When in the Government's interest, the agency head may exempt specific U.S. patents, as distinguished from items, from the patent indemnity clause. Upon written approval of the agency head, the contracting officer may insert the clause at 52.227-5, Waiver of Indemnity, in solicitations and contracts in addition to the appropriate patent indemnity clause.

(f) When in the Government's interest, the contracting officer may include a patent indemnity clause not otherwise prescribed in the solicitation and contract.

(g) Do not include in any solicitation or contract any clause whereby the Government agrees to indemnify a contractor for patent infringement.

27.202 Royalties.

27.202-1 [Reserved]

27.202-2 [Reserved]

27.202-3 [Reserved]

27.202-4 [Reserved]

27.202-5 Solicitation provisions and contract clause.

(a) (1) Insert a solicitation provision substantially the same as the provision at 52.227-6, Royalty Information, in—

(i) Any solicitation that may result in a negotiated contract for which royalty information is desired and for which certified cost or pricing data are obtained under 15.403; or

(ii) Sealed bid solicitations only if the need for such information is approved at a level above the contracting officer as being necessary for proper protection of the Government's interests.

(2) If the solicitation is for communication services and facilities by a common carrier, use the provision with its Alternate I.

(b) If the clause at 52.227-6 is not included in the solicitation, the contracting officer may require offerors to provide information sufficient to provide this notice to the other offerors.

(c) Insert the clause at 52.227-9, Refund of Royalties, in negotiated fixed-price solicitations and contracts when royalties may be paid under the contract. For fixed-price incentive contracts, change "price" to "target cost and target profit" wherever it appears in the clause. The clause may be used in cost-reimbursement contracts where agency approval of royalties is necessary to protect the Government's interests.

27.203 Security requirements for patent applications containing classified subject matter.

27.203-1 General.

(a) Unauthorized disclosure of classified subject matter, whether in patent applications or resulting from the issuance of a patent, may violate 18 U.S.C. 792, *et seq.* (Chapter 37—Espionage and Censorship), and related statutes, and may be contrary to national security interests.

(b) Upon receipt of a patent application under paragraph (a) or (b) of the clause at 52.227-10, Filing of Patent Applications —Classified Subject Matter, ascertain the proper security classification of the patent application. If the application contains classified subject matter, inform the contractor how to transmit the application to the United States Patent Office in accordance with procedures provided by legal counsel. If the material is classified "Secret" or higher, notify the contractor within 30 days, if possible, of the Government's determination, pursuant to paragraph (a) of the clause.

(c) Upon receipt of information furnished by the contractor under paragraph (d) of the clause at 52.227-10, promptly submit that information to legal counsel regarding the security of the application.

(d) Act promptly on requests for approval of foreign filing under paragraph (c) of the clause at 52.227-10 to avoid jeopardizing patent rights of the Government or the contractor.

27.203-2 Contract clause.

Insert the clause at 52.227-10, Filing of Patent Applications—Classified Subject Matter, in all classified solicitations and contracts and in all solicitations and contracts where the nature of the work reasonably might result in a patent application containing classified subject matter.

27.204 [Reserved]

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Subpart 27.3 - Patent Rights under Government Contracts

27.300 Scope of subpart.

This subpart provides procedures, solicitation provisions, and contract clauses pertaining to inventions made in the performance of work under a Government contract or subcontract for experimental, developmental, or research work.

27.301 Definitions.

As used in this subpart—

Invention means any invention or discovery that is or may be patentable or otherwise protectable under title 35 of the U.S. Code, or any variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S .C. 2321, *et seq*.).

Made means—

(1) When used in relation to any invention other than a plant variety, means the conception or first actual reduction to practice of the invention; or

(2) When used in relation to a plant variety, means that the contractor has at least tentatively determined that the variety has been reproduced with recognized characteristics.

Nonprofit organization means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)), or any nonprofit scientific or educational organization qualified under a State nonprofit organization statute.

Practical application means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

Subject invention means any invention of the contractor made in the performance of work under a Government contract.

27.302 [Reserved]

27.303 Contract clauses.

(a) (1) Insert a patent rights clause in all solicitations and contracts for experimental, developmental, or research work as prescribed in this section.

(2) This section also applies to solicitations or contracts for construction work or architect-engineer services that include-

(i) Experimental, developmental, or research work;

(ii) Test and evaluation studies; or

(iii) The design of a Government facility that may involve novel structures, machines, products, materials, processes, or equipment (including construction equipment).

(3) Do not include a patent rights clause in solicitations or contracts for construction work or architect-engineer services that call for or can be expected to involve only "standard types of construction" "Standard types of construction" are those involving previously developed equipment, methods, and processes and in which the distinctive features include only-

(i) Variations in size, shape, or capacity of conventional structures; or

(ii) Purely artistic or aesthetic (as distinguished from functionally significant) architectural configurations and designs of both structural and nonstructural members or groupings, whether or not they qualify for design patent protection.

(b) (1) Unless an alternative patent rights clause is used in accordance with paragraph (c), (d), or (e) of this section, insert the clause at 52.227-11, Patent Rights-Ownership by the Contractor.

(2) To the extent the contract does not elsewhere require the information, and unless agency supplemental regulations specify otherwise, the contracting officer may modify 52.227-11(e) or otherwise supplement the clause to require the contractor to do one or more of the following:

(i) Provide periodic (but not more frequently than annually) listings of all subject inventions required to be disclosed during the period covered by the report.

(ii) Provide a report prior to the closeout of the contract listing all subject inventions or stating that there were none.

(iii) Provide the filing date, serial number, title, patent number and issue date for any patent application filed on any subject invention in any country or, upon request, copies of any patent application so identified.

(iv) Furnish the Government an irrevocable power to inspect and make copies of the patent application file when a Government employee is a co-inventor.

(3) Use the clause with its Alternate I if the Government must grant a foreign government a sublicense in subject inventions pursuant to a specified treaty or executive agreement. The contracting officer may modify Alternate I, if the agency head determines, at contract award, that it would be in the national interest to sublicense foreign governments or international organizations pursuant to any existing or future treaty or agreement. When necessary to effectuate a treaty or agreement, Alternate I may be appropriately modified.

(4) Use the clause with its Alternate II in contracts that may be affected by existing or future treaties or agreements.

(5) Use the clause with its Alternate III in contracts with nonprofit organizations for the operation of a Government-owned facility.

(6) If the contract is for the operation of a Government-owned facility, the contracting officer may use the clause with its Alternate IV.

(7) If the contract is for the performance of services at a Government owned and operated laboratory or at a Government owned and contractor operated laboratory directed by the Government to fulfill the Government's obligations under a Cooperative Research and Development Agreement (CRADA) authorized by 15 U.S.C. 3710a, the contracting officer may use the clause with its Alternate V. This provision is an exercise of an agency's "exceptional circumstances" authority, and the contracting officer must therefore comply with 37 CFR 401.3(e) and 401.4.

(c) Insert a patent rights clause in accordance with the procedures at 27.304-2 if the solicitation or contract is made on behalf of another Government agency.

(d) Insert a patent rights clause in accordance with agency procedures if the solicitation or contract is for DoD, DOE, or NASA, and the contractor is other than a small business concern or nonprofit organization.

(e) (1) Except as provided in paragraph (e)(2) of this section, and after compliance with the applicable procedures in 27.304-1(b), the contracting officer may insert the clause at 52.227-13, Patent Rights—Ownership by the Government, or a clause prescribed by agency supplemental regulations, if—

(i) The contractor is not located in the United States or does not have a place of business located in the United States or is subject to the control of a foreign government;

(ii) Exceptional circumstances apply, and the agency head determines that restriction or elimination of the right to retain title to any subject invention will better promote the policy and objectives of chapter 18 of title 35 of the United States Code;

(iii) A Government authority authorized by statute or executive order to conduct foreign intelligence or counterintelligence activities determines that restriction or elimination of the right to retain any subject invention is necessary to protect the security of such activities; or

(iv) The contract includes the operation of a Government-owned, contractor-operated facility of DOE primarily dedicated to that Department's naval nuclear propulsion or weapons related programs.

(2) If an agency exercises the exceptions at paragraph (e)(1)(ii) or (iii) of this section in a contract with a small business concern or a nonprofit organization, use the clause at 52.227-11 with only those modifications necessary to address the exceptional circumstances and include in the modified clause greater rights determinations procedures equivalent to those at 52.227-13(b)(2).

(3) When using the clause at 52.227-13, Patent Rights-Ownership by the Government, the contracting officer may supplement the clause to require the contractor to-

(i) Furnish a copy of each subcontract containing a patent rights clause (but if a copy of a subcontract is furnished under another clause, a duplicate shall not be requested under the patent rights clause);

(ii) Submit interim and final invention reports listing subject inventions and notifying the contracting officer of all subcontracts awarded for experimental, developmental, or research work;

(iii) Provide the filing date, serial number, title, patent number, and issue date for any patent application filed on any subject invention in any country or, upon specific request, copies of any patent application so identified; and

(iv) Submit periodic reports on the utilization of a subject invention.

(4) Use the clause at 52.227-13 with its Alternate I if-

(i) The Government must grant a foreign government a sublicense in subject inventions pursuant to a treaty or executive agreement; or

(ii) At contract award, the agency head determines, in the national interest, to sublicense foreign governments or international organizations pursuant to any existing or future treaty or agreement. If other rights are necessary to effectuate any treaty or agreement, modify Alternate I as appropriate.

(5) Use the clause at 52.227-13 with its Alternate II in the contract when necessary to effectuate an existing or future treaty or agreement.

27.304 Procedures.

27.304-1 General.

(a) [Reserved]

(b) *Exceptions*. (1) Before using any of the exceptions under 27.303(e)(1) in a contract with a small business concern or a nonprofit organization and before using the exception of 27.303(e)(1)(ii) for any contractor, the agency must follow applicable procedures at 37 CFR 401.

(2) A small business concern or nonprofit organization is entitled to an administrative review of the use of the exceptions at 27.303(e)(1)(i) through (e)(1)(iv) in accordance with agency procedures and 37 CFR part 401.

(c) *Greater rights determinations*. Whenever the contract contains the clause at 52.227-13, Patent Rights—Ownership by the Government, or a patent rights clause modified pursuant to 27.303(e)(2), the contractor (or an employee-inventor of the contractor after consultation with the contractor) may request greater rights to an identified invention within the period specified in the clause. The contracting officer may grant requests for greater rights if the contracting officer determines that the interests of the United States and the general public will be better served. In making these determinations, the contracting officer must consider at least the following objectives (see 37 CFR 401.3(b)):

(1) Promoting the utilization of inventions arising from federally supported research and development.

(2) Ensuring that inventions are used in a manner to promote full and open competition and free enterprise without unduly encumbering future research and discovery.

(3) Promoting public availability of inventions made in the United States by United States industry and labor.

(4) Ensuring that the Government obtains sufficient rights in federally supported inventions to meet the needs of the Government and protect the public against nonuse or unreasonable use of inventions.

(d) *Retention of rights by inventor*. If the contractor elects not to retain title to a subject invention, the agency may consider and, after consultation with the contractor, grant requests for retention of rights by the inventor. Retention of rights by the inventor will be subject to the conditions in paragraphs (d) (except paragraph (d)(1)(i)), (e)(4), (f), (g), and (h) of the clause at , Patent Rights-Ownership by the Contractor.

(e) *Government assignment to contractor of rights in Government employees' inventions*. When a Government employee is a co-inventor of an invention made under a contract with a small business concern or nonprofit organization, the agency employing the co-inventor may license or assign whatever rights it may acquire in the subject invention from its employee to the contractor, subject at least to the conditions of 35 U.S.C. 202-204.

(f) *Revocation or modification of contractor's minimum rights*. Before revoking or modifying the contractor's license, the contracting officer must furnish the contractor a written notice of intention to revoke or modify the license. The agency must allow the contractor at least 30 days (or another time as may be authorized for good cause by the contracting officer) after the notice to show cause why the license should not be revoked or modified. The contractor has the right to appeal, in accordance with applicable regulations in 37 CFR part 404 and agency licensing regulations, any decisions concerning the revocation or modification.

(g) *Exercise of march-in rights*. When exercising march-in rights, agencies shall follow the procedures set forth in 37 CFR 401.6.

(h) *Licenses and assignments under contracts with nonprofit organizations*. If the contractor is a nonprofit organization, paragraph (i) of the clause at 52.227-11 provides that certain contractor actions require agency approval.

27.304-2 Contracts placed by or for other Government agencies.

Apply the following procedures unless an interagency agreement provides otherwise:

(a) When a Government agency requests another Government agency award a contract on its behalf, the request should explain any special circumstances surrounding the contract and specify the patent rights clause. The clause should be selected and modified, if necessary, in accordance with the policies and procedures of this subpart. If, however, the request states that a clause of the requesting agency is required (e.g., because of statutory requirements, a deviation, or exceptional circumstances), then use that clause rather than those of this subpart.

(1) If the request states that an agency clause is required and the work to be performed under the contract is not severable and is funded wholly or in part by the requesting agency, then use the requesting agency clause and no other patent rights clause in the contract.

(2) If the request states that an agency clause is required, and the work to be performed under the contract is severable, then apply the requesting agency clause only to the severable portion of the work. Apply the appropriate patent rights clause to the work for the awarding agency.

(3) If the request states that a requesting agency clause is not required in any resulting contract, then use the appropriate patent rights clause, if any.

(b) Any action requiring an agency determination, report, or deviation involved in the use of the requesting agency's clause is the responsibility of the requesting agency unless the agencies agree otherwise. However, do not alter the requesting agency's clause without prior approval of the requesting agency.

(c) The requesting agency may require, and provide instructions regarding, the forwarding or handling of any invention disclosures or other reporting requirements of the specified clauses. Normally, the requesting agency is responsible for the administration of any subject inventions. Establish this responsibility before awarding any contracts.

27.304-3 Subcontracts.

(a) The policies and procedures in this subpart apply to all subcontracts at any tier.

(b) Whenever a prime contractor or a subcontractor considers including a particular clause in a subcontract inappropriate, or a subcontractor refuses to accept the clause, consult with counsel before resolving the matter.

(c) Government policy holds that contractors must not use their ability to award subcontracts as economic leverage to acquire rights for themselves in inventions resulting from subcontracts.

27.304-4 Appeals.

(a) The designated agency official must provide the contractor with a written statement of the basis, including any relevant facts, for taking any of the following actions:

(1) A refusal to grant an extension to the invention disclosure period under paragraph (c)(4) of the clause at 52.227-11;

(2) A demand for a conveyance of title to the Government;

(3) A refusal to grant a waiver of requirements in the patent rights clause related to Preferences for United States industry; or

(4) A refusal to approve an assignment under 27.304-1(h).

(b) Each agency may establish and publish procedures under which any of these actions may be appealed. These appeal procedures should include administrative due process procedures and standards for fact-finding. The resolution of any appeal must consider both the factual and legal basis for the action and its consistency with the policy and objectives of 35 U.S.C. 200-206 and 2 10.

(c) To the extent that any of the actions described in paragraph (a) of this section are subject to appeal under the Contract Disputes statute, the procedures under that statute will satisfy the requirements of paragraph (b).

27.305 [Reserved]

27.306 Licensing background patent rights to third parties.

(a) A contract with a small business concern or nonprofit organization must not contain a provision allowing the Government to require the licensing to third parties of inventions owned by the contractor that are not subject inventions unless the agency head on a nondelegable basis approves and signs a written justification in accordance with paragraph (b) of this section. The agency head may exercise the authority only upon determining that the—

(1) Use of the invention by others is necessary for the practice of a subject invention or for the use of a work object of the contract; and

(2) Action is necessary to achieve the practical application of the subject invention or work object.

(b) Any determination will be on the record after an opportunity for a hearing, and the agency must notify the contractor of the determination by certified or registered mail. The notification must include a statement that the contractor must bring any action for judicial review of the determination within 60 days after the notification.

Subpart 27.4 - Rights in Data and Copyrights

27.400 Scope of subpart.

This subpart provides policies and procedures regarding rights in data and copyrights, and acquisition of data. This subpart applies to all executive agencies except the Department of Defense.

27.401 Definitions.

As used in this subpart-

Data means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information.

Form, fit, and function data means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, and data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements. For computer software it means data identifying source, functional characteristics, and performance requirements, but specifically excludes the source code, algorithms, processes, formulas, and flow charts of the software.

Limited rights means the rights of the Government in limited rights data as set forth in a Limited Rights Notice.

Limited rights data means data, other than computer software, that embody trade secrets or are commercial or financial and confidential or privileged, to the extent that such data pertain to items, components, or processes developed at private expense, including minor modifications. (Agencies may, however, adopt the following alternate definition: Limited rights data means data (other than computer software) developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged (see 27.404-2(b)).

Restricted computer software means computer software developed at private expense and that is a trade secret, is commercial or financial and confidential or privileged, or is copyrighted computer software, including minor modifications of the computer software.

Restricted rights means the rights of the Government in restricted computer software as set forth in a Restricted Rights Notice.

Unlimited rights means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

27.402 [Reserved]

27.403 Data rights-General.

All contracts requiring data to be produced, furnished, acquired, or used in meeting contract performance requirements, must contain terms that delineate the respective rights and obligations of the Government and the contractor regarding the use, reproduction, and disclosure of that data. Data rights clauses, as applicable, do not specify the type, quantity or quality of data to be delivered but only the respective rights of the Government and the contractor regarding the use, disclosure, or reproduction of the data. Accordingly, the contract must specify the data to be delivered.

27.404 Basic rights in data clause.

This section describes the operation of the clause at 52.227-14, Rights in Data—General, and the use of the provision at 52.227-15, Representation of Limited Rights Data and Restricted Computer Software.

27.404-1 Unlimited rights data.

The Government acquires unlimited rights in the following data except for copyrighted works as provided in 27.404-3:

(a) Data first produced in the performance of a contract (except to the extent the data constitute minor modifications to data that are limited rights data or restricted computer software).

(b) Form, fit, and function data delivered under contract.

(c) Data (except as may be included with restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under a contract.

(d) All other data delivered under the contract other than limited rights data or restricted computer software (see 27.404-2).

27.404-2 Limited rights data and restricted computer software.

(a) *General*. The basic clause at 52.227-14, Rights in Data-General, enables the contractor to protect qualifying limited rights data and restricted computer software by withholding the data from the Government and instead delivering form, fit, and function data.

(b) *Alternate definition of limited rights data*. For contracts not requiring the development, use, or delivery of items, components, or processes intended to be acquired by or for the Government, an agency may adopt the alternate definition of limited rights data set forth in Alternate I to the clause at 52.227-14. The alternate definition does not require that the data pertain to items, components, or processes developed at private expense. The alternate definition instead requires that the data were developed at private expense and embody a trade secret or are commercial or financial and confidential or privileged.

(c) Protection of limited rights data specified for delivery. (1) The clause at 52.227-14 with its Alternate II enables the Government to require delivery of limited rights data rather than allow the contractor to withhold the data. To obtain delivery, the contract may identify and specify data to be delivered, or the contracting officer may require, by written request during contract performance, the delivery of data that has been withheld or identified to be withheld under paragraph (g)(1) of the clause. In addition, the contract may specifically identify data that are not to be delivered under Alternate II or that, if delivered, will be delivered with limited rights. The limited rights obtained by the Government are set forth in the Limited Rights Notice contained in paragraph (g)(3) of Alternate II. Agencies must not, without permission of the contractor, use limited rights data for purposes of manufacture or disclose the data outside the Government except as set forth in the Notice. Any disclosure by the Government must be subject to prohibition against further use and disclosure by the recipient. Here follow examples of specific purposes an agency may adopt in its supplement and added to the Limited Rights Notice of paragraph (g)(3) of Alternate II of the clause:

(i) Use (except for manufacture) by support service contractors.

(ii) Evaluation by nongovernment evaluators.

(iii) Use (except for manufacture) by other contractors participating in the Government's program of which the specific contract is a part.

(iv) Emergency repair or overhaul work.

(v) Release to a foreign government, or its instrumentalities, if required to serve the interests of the U.S. Government, for information or evaluation, or for emergency repair or overhaul work by the foreign government.

(2) The provision at 52.227-15, Representation of Limited Rights Data and Restricted Computer Software, helps determine use of the clause at 52.227-14 with its Alternate II by requesting the offeror state whether limited rights data are likely to be delivered. Where limited rights data are expected to be delivered, use Alternate II. Where negotiations are based on an unsolicited proposal, address the need for Alternate II of the clause at 52.227-14 during negotiations or discussions, and include Alternate II by modification, if needed, during contract performance.

(3) If data that would otherwise qualify as limited rights data is delivered as a computer database, treat the data as limited rights data, rather than restricted computer software, for the purposes of paragraph (g) of the clause at 52.227-14.

(d) Protection of restricted computer software specified for delivery. (1) Alternate III of the clause at 52.227-14, enables the Government to require delivery of restricted computer software rather than allow the contractor to withhold such software. To obtain delivery of restricted computer software—

(i) Identify and specify the deliverable computer software in the contract; or

(ii) Require by written request during contract performance, the delivery of computer software that has been withheld or identified to be withheld under paragraph (g)(1) of the clause.

(2) In considering whether to use Alternate III, note that, unlike other data, computer software is itself also an end item. Therefore, use Alternate III where the contract requires delivery of restricted computer software.

(3) Unless otherwise agreed (see paragraph (d)(4) of this subsection), the restricted rights the Government obtains are set forth in the Restricted Rights Notice contained in paragraph (g)(4) (Alternate III). The Government will not use or reproduce such restricted computer software, or disclose it outside the Government, except that the Government may—

(i) Use or copy the software for the computers for which it was acquired, including use at any Government installation to which the computers may be transferred;

(ii) Use or copy the software for a backup computer if any computer for which it was acquired is inoperative;

(iii) Reproduce the software for safekeeping (archives) or backup purposes;

(iv) Modify, adapt or combine the software with other computer software, provided that the modified, adapted, or combined portions of the derivative software incorporating any of the delivered, restricted computer software must be subject to the same restricted rights;

(v) Disclose to and reproduce the software for use by support service contractors or their subcontractors, in accordance with paragraphs (3)(i) through (iv) of this section; and

(vi) Use or copy the software for a replacement computer.

(4) The restricted rights set forth in paragraph (d)(3) of this subsection comprise the minimum rights the Government normally obtains with restricted computer software and will automatically apply when the Government acquires such software under the Restricted Rights Notice of paragraph (g)(4) of Alternate III of the clause at 52.227-14. However, the contracting officer may specify different rights in the contract, consistent with the purposes and needs for which the software is to be acquired. For example, the contracting officer should consider any networking needs or any requirements for use of the computer software from remote terminals. Also, in addressing such needs, the scope of the restricted rights may differ for the documentation accompanying the computer software than for the programs and databases. The contract, or a collateral agreement incorporated in and made part of the contract, must expressly state any additions to, or limitations on, the restricted rights set forth in the Restricted Rights Notice of paragraph (g)(4) of Alternate III of the clause at 52.227-14; modify the notice accordingly.

(5) The provision at 52.227-15, Representation of Limited Rights Data and Restricted Computer Software, helps determine use of the clause at 52.227-14 with its Alternate III by requesting the offeror state whether restricted computer software is likely to be delivered under the contract. In addition, address the need for Alternate III during negotiations or discussions with an offeror, particularly negotiations upon an unsolicited proposal. However, add Alternate III by modification, if needed, during contract performance.

27.404-3 Copyrighted works.

(a) *Data first produced in the performance of a contract*. (1) Generally, the contractor must obtain permission from the contracting officer prior to asserting rights in any copyrighted work containing data first produced in the performance of a contract. However, contractors are normally authorized, without such prior permission, to assert copyright in technical or scientific articles based on or containing such data that is published in academic, technical or professional journals, symposia proceedings and similar works.

(2) The contractor must make a written request to the contracting officer for permission to assert its copyright in works containing data first produced under the contract. In its request, the contractor should identify the data involved or furnish copies of the data for which permission is requested, as well as a statement as to the intended publication or dissemination media or other purpose for which the permission is requested. Generally, grant the contractor's request when copyright protection will enhance the appropriate dissemination or use of the data unless the—

(i) Data consist of a report that represents the official views of the agency or that the agency is required by statute to prepare;

(ii) Government intends primarily to use the data internally;

(iii) Data are of the type that the agency itself distributes to the public under an agency program;

(iv) Government determines that limitation on distribution of the data is in the national interest; or

(v) Government determines that the data should be disseminated without restriction.

(3) Alternate IV of the clause at 52.227-14 provides a substitute paragraph (c)(1) granting permission for contractors to assert copyright in any data first produced in the performance of the contract without the need for any further requests. Except for contracts for management or operation of Government facilities, and contracts and subcontracts in support of programs conducted at those facilities, or where international agreements require otherwise, use Alternate IV in all contracts for basic or applied research performed solely by colleges and universities. Do not use Alternate IV in contracts with colleges and universities if a purpose of the contract is development of computer software for distribution to the public (including use in solicitations) by or on behalf of the Government. In addition, use Alternate IV in other contracts, as needed, if an agency determines that further permission to assert copyright in data first produced in performance of the contract is unnecessary. Exclude, as necessary, any data, or items or categories of data, from the provisions of Alternate IV expressly in the contract or otherwise add a paragraph (d)(4) to the clause, consistent with 27.404-4(b).

(4) Pursuant to paragraph (c)(1) of the clause at 52.227-14, the contractor grants the Government a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute to the public, perform publicly and display publicly by or on behalf of the Government, for all data (other than computer software) first produced in the performance of a contract. For computer software, the scope of the Government's license includes all the above rights except the right to distribute to the public. Agencies may also obtain a license of different scope if the contracting officer determines, after consulting with legal counsel, such a license will substantially enhance the dissemination of any data first produced under the contract or if such a license is required to comply with international agreements. If an agency obtains a

different license, the contractor must clearly state the scope of that license in a conspicuous place on the medium on which the data is recorded. For example, if the data is delivered as a report, the cover, or first page, of the report must state the terms of the license.

(5) The clause requires the contractor to affix the applicable copyright notices of 17 U.S .C. 401 or 402, and acknowledgment of Government sponsorship, (including the contract number) to data when it asserts copyright in data. Failure to do so could result in such data being treated as unlimited rights data (see 27.404-5(b)).

(b) Data not first produced in the performance of a contract. (1) Contractors must not deliver any data that is not first produced under the contract without either-

(i) Acquiring for or granting to the Government a copyright license for the data; or

(ii) Obtaining permission from the contracting officer to do otherwise.

(2) The copyright license the Government acquires for such data will normally be of the same scope as discussed in paragraph (a)(4) of this subsection, and paragraph (c)(2) of the clause at 52.227-14 sets forth the license. However, agencies may obtain a license of different scope if the agency determines, after consultation with legal counsel, that such different license will accord with the purpose of acquiring the data. Both the contract and the data when delivered to the Government must clearly state that a license of a different scope applies. If the contractor delivers computer software not first produced under the contract, the contractor must grant the Government the license set forth in paragraph (g)(4) of Alternate III if included in the clause at 52.227-14, or a license agreed to in a collateral agreement made part of the contract.

27.404-4 Contractor's release, publication, and use of data.

(a) In contracts for basic or applied research with universities or colleges, agencies must not restrict the conduct of or reporting on the results of unclassified basic or applied research, except as provided in applicable U.S. statutes. However, agencies may restrict the release or disclosure of computer software that is or is intended to be developed to the point of practical application (including for agency distribution under established programs). This is not a restriction on the reporting of the results of basic or applied research. Agencies may also preclude a contractor from asserting copyright in any computer software for purposes of established agency distribution programs, or where required to accomplish the purpose for acquiring the software.

(b) Except for the results of basic or applied research under contracts with universities or colleges, agencies may, to the extent provided in their FAR supplements, place limitations or restrictions on the contractor's exercise of its rights in data first produced in the performance of the contract, including a requirement to assign copyright to the Government or another party. Include any of these restrictions in the contract.

27.404-5 Unauthorized, omitted, or incorrect markings.

(a) *Unauthorized marking of data*. (1) The Government has, in accordance with paragraph (e) of the clause at 52.227-14, the right either to return data containing unauthorized markings or to cancel or ignore the markings.

(2) Agencies must not cancel or ignore markings without making written inquiry of the contractor and affording the contractor at least 60 days to provide a written justification substantiating the propriety of the markings.

(i) If the contractor either fails to respond or fails to provide a written justification substantiating the propriety of the markings within the time afforded, the Government may cancel or ignore the markings.

(ii) If the contractor provides a written justification substantiating the propriety of the markings, consider the justification.

(A) Upon determining that the markings are authorized, notify the contractor in writing.

(B) If the contracting officer determines, with concurrence of the head of the contracting activity, that the markings are not authorized, furnish the contractor a written determination regarding the appropriateness of the markings. The determination must state that the Government will cancel or ignore the markings, and that the data will no longer be subject to disclosure prohibitions, unless the contractor files suit within 90 days in a court of competent jurisdiction. Absent such a suit, the contracting officer's determination ordinarily becomes the final agency decision. Therefore, do not cancel or ignore the markings until final resolution of the matter, either by the determination becoming the final agency decision or by final disposition of the matter by court decision if the contractor files suit.

(3) Modify the foregoing procedures in accordance with agency regulations implementing the Freedom of Information Act (5 U.S.C. 552) as necessary to respond to a request. In addition, the contractor may bring a claim, in accordance with the Disputes clause of the contract, that may arise as the result of the Government's action to remove or ignore any markings on data, unless the action occurs as the result of a final disposition of the matter by a court of competent jurisdiction.

(b) *Omitted or incorrect notices*. (1) For data delivered under a contract containing the clause without a limited rights notice or restricted rights notice, and without a copyright notice, presume the contractor delivered the data with unlimited rights, and the Government assumes no liability for the disclosure, use, or reproduction of the data. However, to the extent the data has not been disclosed without restriction outside the Government, the contractor may, within 6 months (or a longer period approved by the contracting officer for good cause shown), request permission of the contracting officer to have the omitted limited rights or restricted rights notices, as applicable, placed on qualifying data at the contractor's expense. The contracting officer may permit adding appropriate notices if the contractor—

(i) Identifies the data for which a notice would be added;

(ii) Demonstrates that the omission of the proposed notice was inadvertent;

(iii) Establishes that use of the proposed notice is authorized; and

(iv) Acknowledges that the Government has no liability with respect to any disclosure or use of any such data made prior to the addition of the notice or resulting from the omission of the notice.

(2) The contracting officer may also-

(i) Permit correction, at the contractor’s expense, of incorrect notices if the contractor identifies the data on which correction of the notice is to be made, and demonstrates that the correct notice is authorized; or

(ii) Correct any incorrect notices.

27.404-6 Inspection of data at the contractor’s facility.

Contracting officers may obtain the right to inspect data at the contractor's facility by use of the clause at 52.227-14 with its Alternate V, which adds paragraph (j) to provide that right. Agencies may also adopt Alternate V for general use. The data subject to inspection may be data withheld or withholdable under paragraph (g)(1) of the clause. The contracting officer or designee (including nongovernmental personnel under the same conditions as the contracting officer) may inspect data at the contractor's facility to verify a contractor's assertion regarding the limited rights or restricted rights status of the data, or for evaluating work performance under the contract. The Government may exercise this right up to 3 years after acceptance of all items to be delivered under the contract. The contract may specify data items not subject to inspection under paragraph (j) of the Alternate. If the contractor demonstrates to the contracting officer that a conflict of interest would possibly result if inspection were made by a particular representative, then designate an alternate representative.

27.405 Other data rights provisions.

27.405-1 Special works.

(a) Contracts primarily for the production or compilation of data first produced in the performance of the contract (or special works) for the Government's own use, must specifically address the Government's rights to use, disclose, modify, distribute, and reproduce the special works. This may include negotiation of terms limiting distribution and use of special works or obtaining indemnity for liabilities that might arise out of the content, performance, or disclosure of special works. The contract may specify the purposes and conditions (including time limitations) under which the contractor may use, release, or reproduce the special works other than for contract performance.

(b) Contracts for the production of audiovisual works, sound recordings, etc., may include limitations and authorizations in connection with talent releases, music licenses, and the like that are consistent with the purposes for which the works are acquired.

(c) This subsection does not apply to limited rights data or to restricted computer software (see 27.404-2).

(d) Examples of special works include—

(1) The production of audiovisual works, including motion pictures or television recordings with or without accompanying sound, or for the preparation of motion picture scripts, musical compositions, soundtracks, translation, adaptation, and the like;

(2) Histories of the respective agencies, departments, services, or units thereof;

(3) Surveys of Government establishments;

(4) Works pertaining to the instruction or guidance of Government officers and employees in the discharge of their official duties;

(5) The compilation of reports, books, studies, surveys, or similar documents that do not involve research, development, or experimental work;

(6) The collection of data containing personally identifiable information such that the disclosure thereof would violate the right of privacy or publicity of the individual to whom the information relates;

(7) Investigatory reports;

(8) The development, accumulation, or compilation of data (other than that resulting from research, development, or experimental work performed by the contractor), the early release of which could prejudice follow-on acquisition activities or agency regulatory or enforcement activities; and

(9) The development of computer software programs, where the program is agency-mission sensitive, and release could prejudice agency mission, programs, or follow-on acquisitions.

(e) When the audiovisual or other special works are produced to accomplish a public purpose other than acquisition for the Government's own use (such as for production and distribution to the public of the works by other than a Federal agency) agencies are authorized to specially negotiate rights in special works that meet agency mission needs yet protect free speech and freedom of expression, as well as the artistic license of the creator of the work.

27.405-2 Existing works.

For contracts exclusively for the acquisition of existing works (without modification), such as motion pictures, television recordings, and other audiovisual works; sound recordings; musical, dramatic, and literary works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; and works of a similar nature, the contract must specifically address the Government's rights to use, disclose, modify, distribute, and reproduce the existing works. Agencies are authorized to specially negotiate rights in existing works. This includes limitations consistent with the purposes for which the government seeks to acquire the works covered by the contract. Examples of these limitations include means of exhibition or transmission, time, type of audience, and geographical location. However, if the contract requires that works of the type indicated in this paragraph are to be modified through editing, translation, or addition of subject matter, etc. (rather than purchased in existing form), then see 27.405-1.

27.405-3 Commercial computer software.

(a) When acquiring commercial computer software, no specific contract clause prescribed in this subpart is necessary, but the contract must specifically address the Government's rights to use, disclose, modify, distribute, and reproduce the software. Part 12 states guidance for acquisition of commercial computer software, and it states that commercial computer software or commercial computer software documentation must be acquired under licenses customarily provided to the public to the extent the license is consistent with Federal law and otherwise satisfies the Government's needs. In addition, the contract must adequately describe the computer programs and/or databases, the media on which it is recorded, and all the necessary documentation.

(b) If the contract incorporates, refers to, or uses a vendor's standard commercial lease, license, or purchase agreement, ensure that the agreement is consistent with paragraph (a) of this subsection. Exercise caution in accepting a vendor's terms and conditions, because they might pertain to commercial sales and might therefore be inappropriate for Government contracts. Address in the contract any inconsistencies in a vendor's standard commercial agreement, and the contract terms must take precedence over the vendor's standard commercial agreement.

(c) If a prime contractor under a contract containing the clause at 52.227-14, Rights in Data—General, with paragraph (g)(4) (Alternate III) in the clause, acquires restricted computer software from a subcontractor (at any tier) as a separate acquisition for delivery to or for use on behalf of the Government, the contracting officer may approve any additions to, or limitations on the restricted rights in the Restricted Rights Notice of paragraph (g)(4) in a collateral agreement incorporated in and made part of the contract.

27.405-4 Other existing data.

(a) No clause contained in this subpart is required for—

(1) Contracts solely for the acquisition of books, periodicals, and other printed items in the exact form in which these items are to be obtained unless reproduction rights are to be acquired; or

(2) Other contracts that require only existing data (other than limited rights data) to be delivered and the data are available without disclosure prohibitions, unless reproduction rights to the data are to be obtained.

(b) Specifically state such rights in the contract. No clause contained in this subpart is required for contracts substantially for on-line data base services in the same form as they are normally available to the general public.

27.406 Acquisition of data.

27.406-1 General.

(a) [Reserved]

(b) Specify in the contract all known data requirements, including the time and place for delivery and any limitations and restrictions on the contractor for handling the data. Further, and to the extent feasible, in major system acquisitions, state data requirements as separate line items. In establishing the contract data requirements and in specifying data items for delivery under the contract, agencies may develop their own contract schedule provisions. Agency procedures may, among other things, provide for listing, specifying, identifying source, assuring delivery, and handling any data required to be delivered, first produced, or specifically used in the performance of the contract.

(c) [Reserved]

27.406-2 Additional data requirements.

(a) In some situations, such as experimental, developmental, research, or demonstration contracts, ascertaining all data requirements at contract award might be unfeasible. Use the clause at 52.227-16, Additional Data Requirements, as necessary to enable subsequent ordering of additional data first produced or specifically used in the performance of these contracts as the actual requirements become known. Normally use the clause in solicitations and contracts involving experimental, developmental, research or demonstration work (other than basic or applied research to be performed under a contract solely by a university or college when the contract amount will be $500,000 or less) unless all the requirements for data are believed known at the time of contracting and the contract specifies them. If the contract is for basic or applied research to be performed by a university or college, and the contracting officer believes the contract effort will in the future exceed $500,000, even though the initial award does not, include as necessary the clause in the initial award.

(b) The clause at 52.227-16 allows ordering data at any time during contract performance or within a period of 3 years after acceptance of all items to be delivered under the contract. Compensate the contractor for converting the data into the prescribed form, for reproduction, or for delivery. To minimize storage costs for the retention of data, the relieve as necessary the contractor of the retention requirements for specified data items at any time during the retention period required by the clause. Permit as necessary the contractor to identify and specify in the contract data not to be ordered for delivery under the clause if the data is not necessary to meet the Government's requirements for data. Also, alter as necessary the clause by deleting the term “or specifically used” in paragraph (a) of the clause if delivery of the data is unnecessary to meet the Government's data requirements. Any data ordered under this clause will be subject to the clause at 52.227-14, Rights in Data—General, (or other equivalent clause setting forth the respective rights of the Government and the contractor) in the contract. Data authorized to be withheld under such clause will not be required to be delivered under the clause at 52.227-16, except as provided in Alternate II or Alternate III, if included (see 27.404-2(c) and (d)).

(c) Absent an established program for dissemination of computer software, agencies should not order additional computer software under the clause at 52.227-16 for the sole purpose of disseminating or marketing the software to the public. In ordering software for internal purposes, consider, consistent with the Government's needs, not ordering particular source codes, algorithms, processes, formulas, or flow charts of the software where the contractor shows that these aid its efforts to disseminate or market the software.

27.406-3 Major system acquisition.

(a) The clause at 52.227-21, Technical Data Declaration, Revision, and Withholding of Payment—Major Systems, implements 41 U.S.C. 2302(e). When using the clause at 52.227-21, the section of the contract specifying data delivery requirements (see 27.406-1(b)) must expressly identify those line items of technical data to which the clause applies. Upon delivery of the technical data, review the technical data and the contractor's declaration relating to it to assure that the data are complete, accurate, and comply with contract requirements. If the data are not complete, accurate, or compliant, request the contractor to correct the deficiencies and withhold payment as necessary. Do not make final payment under the contract until determining that the delivery requirements of those line items of data to which the clause applies have been satisfactorily met.

(b) In a contract for, or in support of, a major system awarded by a civilian agency other than NASA or the U.S. Coast Guard, the following applies:

(1) Require the delivery of any technical data relating to the major system or supplies for the major system, that are to be developed exclusively with Federal funds where delivery of the technical data is needed to ensure competitive acquisition of supplies or services required in substantial quantities in the future. Use the clause at 52.227-22, Major System —Minimum Rights, in addition to the clause at 52.227-14, Rights in Data—General, and other required clauses, to ensure

that the Government acquires at least those rights required by Pub. L. 98-577 in technical data developed exclusively with Federal funds.

(2) Do not require a person that has developed a product or process, offered or to be offered for sale to the public, to provide technical data relating to a major system, or to supplies for a major system, that also relates to the design, development or manufacture of the product or process, as a condition of procurement of the product or process. This prohibition does not apply to such data that might be necessary for the Government to operate or maintain the product, or to use the process, where the Government obtains the data during contract performance.

27.407 Rights to technical data in successful proposals.

As necessary, negotiate terms defining the Government's license rights in technical data in successful proposals.

27.408 [Reserved]

27.409 Solicitation provisions and contract clauses.

(a) Generally, include only one data rights clause in a contract. However, where more than one is needed, the contract should distinguish the portion of contract performance to which each clause pertains.

(b) (1) Insert the clause at 52.227-14, Rights in Data—General, in solicitations and contracts under which data will be produced, furnished, or acquired, unless the contract is—

(i) For the production of special works, although in these cases insert the clause at 52.227-14, Rights in Data—General, and apply it to data other than special works, as appropriate;

(ii) For the acquisition of existing data, commercial computer software, or other existing data;

(iii) A small business innovation research contract (see paragraph (h) of this section);

(iv) To be performed outside the United States (see paragraph (i)(1) of this section);

(v) For architect-engineer services or construction work (see paragraph (i)(2) of this section);

(vi) For the management, operation, design, or construction of a Government-owned facility to perform research, development, or production work (see paragraph (i)(3) of this section); or

(vii) A contract involving cosponsored research and development in which a clause providing for less than unlimited right has been authorized.

(2) If an agency determines, in accordance with 27.404-2(b), to adopt the alternate definition of "Limited Rights Data" in paragraph (a) of the clause, use the clause with its Alternate I.

(3) Upon determining, in accordance with 27.404-2(c), that obtaining limited rights data is necessary, use the clause with its Alternate II. Complete paragraph (g)(3) to include the purposes, if any, for which limited rights data may be disclosed outside the Government.

(4) Upon determining, in accordance with 27.404-2(d), that obtaining restricted computer software is necessary, use the clause with its Alternate III. Specify in the contract, and modify the notice accordingly, any greater or lesser rights regarding the use, reproduction, or disclosure of restricted computer software than those set forth in the Restricted Rights Notice of paragraph (g)(4) of the clause.

(5) Use the clause with its Alternate IV in contracts for basic or applied research (other than those for the management or operation of Government facilities, and contracts and subcontracts in support of programs being conducted at those facilities or where international agreements require otherwise) to be performed solely by universities and colleges. As necessary, use the clause with its Alternate IV in other contracts if in accordance with 27.404-3(a), the agency determines to grant permission for the contractor to assert claim to copyright subsisting in all data first produced without further request being made by the contractor. When using Alternate IV, the contract may exclude items or categories of data from the permission granted, either by express provisions in the contract or by the addition of a paragraph (d)(4) to the clause (see 27.404-4).

(6) In accordance with 27.404-6, if the Government needs the right to inspect certain data at a contractor's facility, use the clause with its Alternate V.

(c) In accordance with 27.404-2(c)(2) and 27.404-2(d)(5), upon the need to have an offeror state in response to a solicitation whether limited rights data or restricted computer software are likely to be used in meeting the data delivery requirements set forth in the solicitation, insert the provision at 52.227-15, Representation of Limited Rights Data and Restricted Computer Software, in any solicitation containing the clause at 52.227-14, Rights in Data—General. The contractor's response may provide an aid in determining whether the clause should be used with Alternate II and/or Alternate III.

(d) Insert the clause at 52.227-16, Additional Data Requirements, in solicitations and contracts involving experimental, developmental, research, or demonstration work (other than basic or applied research to be performed solely by a university or college where the contract amount will be $500,000 or less) unless all the requirements for data are believed known at the time of contracting and the contract specifies them (see 27.406-2). Use this clause in other contracts as necessary. For example, if the contract is for basic or applied research to be performed by a university or college, and the contracting officer believes the contract effort will in the future exceed $500,000, even though the initial award does not, include the clause in the initial award as necessary.

(e) In accordance with 27.405-1, insert the clause at 52.227-17, Rights in Data-Special Works, in solicitations and contracts primarily for the production or compilation of data (other than limited rights data or restricted computer software) for the Government's internal use, or when there is a specific need to limit distribution and use of the data or to obtain indemnity for liabilities that may arise out of the content, performance, or disclosure of the data. Examples of such contracts are set forth in 27.405-1.

(1) Insert the clause if existing works are to be modified, as by editing, translation, addition of subject matter, etc.

(2) The contract may specify the purposes and conditions (including time limitations) under which the data may be used, released, or reproduced by the contractor for other than contract performance.

(3) Contracts for the production of audiovisual works, sound recordings, etc. may include limitations in connection with talent releases, music licenses, and the like that are consistent with the purposes for which the data is acquired.

(4) The clause may be modified in accordance with paragraphs (c) through (e) of 27.405-1.

(f) [Reserved]

(g) In any event, the contracting officer shall assure that the contract contains terms to obtain sufficient rights for the Government to fulfill the need for which the software is being acquired and is otherwise consistent with 27.405-3).

(h) If the contract is a Small Business Innovation Research (SBIR) contract, insert the clause at 52.227-20, Rights in Data —SBIR Program in all Phase I, Phase II, and Phase III contracts awarded under the Small Business Innovation Research Program established pursuant to 15 U.S.C. 638. The Small Business Administration's "Small Business Innovation Research Program Policy Directive" (September 24, 2002) permits extension of the SBIR protection period.

(i) Agencies may prescribe in their procedures, as appropriate, a clause in contracts—

(1) To be performed outside the United States;

(2) For architect-engineer services and construction work; or

(3) For management, operation, design, or construction of Government-owned research, development, or production facilities, and in contracts and subcontracts in support of programs being conducted at such facilities.

(j) In accordance with 27.406-3(a), insert the clause at 52.227-21, Technical Data Declaration, Revision, and Withholding of Payment—Major Systems, in contracts for major systems acquisitions or for support of major systems acquisitions. This requirement includes contracts for detailed design, development, or production of a major system and contracts for any individual part, component, subassembly, assembly, or subsystem integral to the major system, and other property that may be replaced during the service life of the system, including spare parts. This clause requires specifying in the contract the technical data to which it applies (see 27.406-3(a)).

(k) In accordance with 27.406-3(b), in the case of civilian agencies other than NASA and the U.S. Coast Guard, insert the clause at 52.227-22, Major System-Minimum Rights, in contracts for major systems or contracts in support of major systems.

(l) [Reserved]

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Subpart 27.5 - [Reserved]

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PART 28 - BONDS AND INSURANCE

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28.000 Scope of part.

This part prescribes requirements for obtaining financial protection against losses under contracts that result from the use of the sealed bid or negotiated methods. It covers bid guarantees, bonds, alternative payment protections, security for bonds, and insurance.

28.001 Definitions.

As used in this part-

Attorney-in-fact means an agent, independent agent, underwriter, or any other company or individual holding a power of attorney granted by a surety.

Bid means any response to a solicitation, including a proposal under a negotiated acquisition.

Bid guarantee means a form of security assuring that the bidder-

(1) Will not withdraw a bid within the period specified for acceptance; and

(2) Will execute a written contract and furnish required bonds, including any necessary coinsurance or reinsurance agreements, within the time specified in the bid, unless a longer time allowed, after receipt of the specified forms.

Bidder means any entity that is responding or has responded to a solicitation, including an offeror under a negotiated acquisition.

Bond means a written instrument executed by a bidder or contractor (the "principal"), and a second party (the "surety" or "sureties") (except as provided in 28.204), to assure fulfillment of the principal's obligations to a third party (the "obligee" or "Government"), identified in the bond. If the principal's obligations are not met, the bond assures payment, to the extent stipulated, of any loss sustained by the obligee. The types of bonds and related documents are as follows:

(1) An advance payment bond secures fulfillment of the contractor's obligations under an advance payment provision.

(2) An annual bid bond is a single bond furnished by a bidder, in lieu of separate bid bonds, which secures all bids (on other than construction contracts) requiring bonds submitted during a specific Government fiscal year.

(3) An annual performance bond is a single bond furnished by a contractor, in lieu of separate performance bonds, to secure fulfillment of the contractor's obligations under contracts (other than construction contracts) requiring bonds entered into during a specific Government fiscal year.

(4) A patent infringement bond secures fulfillment of the contractor's obligations under a patent provision.

(5) A payment bond assures payments as required by law to all persons supplying labor or material in the prosecution of the work provided for in the contract.

(6) A performance bond secures performance and fulfillment of the contractor's obligations under the contract.

Consent of surety means an acknowledgment by a surety that its bond given in connection with a contract continues to apply to the contract as modified.

Penal sum or *penal amount* means the amount of money specified in a bond (or a percentage of the bid price in a bid bond) as the maximum payment for which the surety is obligated or the amount of security required to be pledged to the Government in lieu of a corporate or individual surety for the bond.

Reinsurance means a transaction which provides that a surety, for a consideration, agrees to indemnify another surety against loss which the latter may sustain under a bond which it has issued.

Subpart 28.1 - Bonds and Other Financial Protections

28.100 Scope of subpart.

This subpart prescribes requirements and procedures for the use of bonds, alternative payment protections, and all types of bid guarantees.

28.101 Bid guarantees.

28.101-1 Policy on use.

(a) A contracting officer must not require a bid guarantee unless a performance bond or a performance and payment bond is also required (see 28.102 and 28.103). Except as provided in paragraph (c) of this subsection, bid guarantees must be required whenever a performance bond or a performance and payment bond is required.

(b) All types of bid guarantees are acceptable for supply or service contracts (see annual bid bonds and annual performance bonds coverage in 28.001). Only separate bid guarantees are acceptable in connection with construction contracts. Agencies may specify that only separate bid bonds are acceptable in connection with construction contracts.

(c) The chief of the contracting office may waive the requirement to obtain a bid guarantee when a performance bond or a performance and payment bond is required if it is determined that a bid guarantee is not in the best interest of the Government for a specific acquisition (*e.g.,* overseas construction, emergency acquisitions, sole-source contracts). Class waivers may be authorized by the agency head or designee.

28.101-2 Solicitation provision or contract clause.

(a) The contracting officer must insert a provision or clause substantially the same as the provision at 52.228-1, Bid Guarantee, in solicitations or contracts that require a bid guarantee or similar guarantee. For example, the contracting officer may modify this provision-

(1) To set a period of time that is other than 10 days for the return of executed bonds;

(2) For use in connection with construction solicitations when the agency has specified that only separate bid bonds are acceptable in accordance with 28.101-1(b);

(3) For use in solicitations for negotiated contracts; or

(4) For use in service contracts containing options for extended performance.

(b) The contracting officer must determine the amount of the bid guarantee for insertion in the provision at 52.228-1 (see 28.102-2(a)). The amount must be adequate to protect the Government from loss should the successful bidder fail to execute further contractual documents and bonds as required. The bid guarantee amount must be at least 20 percent of the bid price but must not exceed $3 million. When the penal sum is expressed as a percentage, a maximum dollar limitation may be stated.

28.101-3 Authority of an attorney-in-fact for a bid bond.

(a) Any person signing a bid bond as an attorney-in-fact must include with the bid bond evidence of authority to bind the surety.

(b) An original, or a photocopy or facsimile of an original, power of attorney is sufficient evidence of such authority.

(c) For purposes of this section, electronic, mechanically-applied and printed signatures, seals and dates on the power of attorney must be considered original signatures, seals and dates, without regard to the order in which they were affixed.

(d) The contracting officer must-

(1) Treat the failure to provide a signed and dated power of attorney at the time of bid opening as a matter of responsiveness; and

(2) Treat questions regarding the authenticity and enforceability of the power of attorney at the time of bid opening as a matter of responsibility. These questions are handled after bid opening.

(e) (1) If the contracting officer contacts the surety to validate the power of attorney, the contracting officer must document the file providing, at a minimum, the following information:

(i) Name of person contacted.

(ii) Date and time of contact.

(iii) Response of the surety.

(2) If, upon investigation, the surety declares the power of attorney to have been valid at the time of bid opening, the contracting officer may require correction of any technical error.

(3) If the surety declares the power of attorney to have been invalid, the contracting officer must not allow the bidder to substitute a replacement power of attorney or a replacement surety.

(f) Determinations of non-responsibility based on the unacceptability of a power of attorney are not subject to the Certificate of Competency process of part 19 if the surety has disavowed the validity of the power of attorney.

28.101-4 Noncompliance with bid guarantee requirements.

(a) In sealed bidding, noncompliance with a solicitation requirement for a bid guarantee requires rejection of the bid, except in the situations described in paragraph (c) of this subsection when the noncompliance must be waived.

(b) In negotiation, noncompliance with a solicitation requirement for a bid guarantee requires rejection of an initial proposal as unacceptable, if a determination is made to award the contract based on initial proposals without discussion, except in the situations described in paragraph (c) of this subsection when noncompliance must be waived. (See part 15) for conditions regarding making awards based on initial proposals.) If the conditions for awarding based on initial proposals are not met, deficiencies in bid guarantees submitted by offerors determined to be in the competitive range must be addressed during discussions and the offeror must be given an opportunity to correct the deficiency.

(c) Noncompliance with a solicitation requirement for a bid guarantee must be waived in the following circumstances unless the contracting officer determines in writing that acceptance of the bid would be detrimental to the Government's interest when-

(1) Only one offer is received. In this case, the contracting officer may require the furnishing of the bid guarantee before award;

(2) The amount of the bid guarantee submitted is less than required, but is equal to or greater than the difference between the offer price and the next higher acceptable offer;

(3) The amount of the bid guarantee submitted, although less than that required by the solicitation for the maximum quantity offered, is sufficient for a quantity for which the offeror is otherwise eligible for award. Any award to the offeror must not exceed the quantity covered by the bid guarantee;

(4) The bid guarantee is received late, and late receipt is waived under part 14;

(5) A bid guarantee becomes inadequate as a result of the correction of a mistake under part 14 (but only if the bidder will increase the bid guarantee to the level required for the corrected bid);

(6) An otherwise acceptable bid bond was submitted with a signed offer, but the bid bond was not signed by the offeror;

(7) An otherwise acceptable bid bond is erroneously dated or bears no date at all; or

(8) A bid bond does not list the United States as obligee, but correctly identifies the offeror, the solicitation number, and the name and location of the project involved, so long as it is acceptable in all other respects.

28.102 Performance and payment bonds and alternative payment protections for construction contracts.

28.102-1 General.

(a) 40 U.S.C. chapter 31, subchapter III, Bonds (formerly known as the Miller Act), requires performance and payment bonds for any construction contract exceeding $150,000, except that this requirement may be waived-

(1) By the contracting officer for as much of the work as is to be performed in a foreign country upon finding that it is impracticable for the contractor to furnish such bonds; or

(2) As otherwise authorized by the Bonds statute or other law.

(b) (1) Pursuant to 40 U.S.C. 3132, for construction contracts greater than $35,000, but not greater than $150,000, the contracting officer must select two or more of the following payment protections, giving particular consideration to inclusion of an irrevocable letter of credit as one of the selected alternatives:

(i) A payment bond.

(ii) An irrevocable letter of credit (ILC).

(iii) *A tripartite escrow agreement*. The prime contractor establishes an escrow account in a federally insured financial institution and enters into a tripartite escrow agreement with the financial institution, as escrow agent, and all of the suppliers of labor and material. The escrow agreement must establish the terms of payment under the contract and of resolution of disputes among the parties. The Government makes payments to the contractor's escrow account, and the escrow agent distributes the payments in accordance with the agreement, or triggers the disputes resolution procedures if required.

(iv) *Certificates of deposit*. The contractor deposits certificates of deposit from a federally insured financial institution with the contracting officer, in an acceptable form, executable by the contracting officer.

(v) A deposit of the types of security listed in 28.204-1 and 28.204-2.

(2) The contractor must submit to the Government one of the payment protections selected by the contracting officer.

(c) The contractor must furnish all bonds or alternative payment protection, including any necessary reinsurance agreements, before receiving a notice to proceed with the work or being allowed to start work.

28.102-2 Amount required.

(a) *Definition*. As used in this subsection-

Original contract price means the award price of the contract; or, for requirements contracts, the price payable for the estimated total quantity; or, for indefinite-quantity contracts, the price payable for the specified minimum quantity. Original contract price does not include the price of any options, except those options exercised at the time of contract award.

(b) *Contracts exceeding $150,000.* (1) *Performance bonds*. Unless the contracting officer determines that a lesser amount is adequate for the protection of the Government, the penal amount of performance bonds must equal-

(i) 100 percent of the original contract price; and

(ii) If the contract price increases, an additional amount equal to 100 percent of the increase.

(2) *Payment bonds*. (i) Unless the contracting officer makes a written determination supported by specific findings that a payment bond in this amount is impractical, the amount of the payment bond must equal-

(A) 100 percent of the original contract price; and

(B) If the contract price increases, an additional amount equal to 100 percent of the increase.

(ii) The amount of the payment bond must be no less than the amount of the performance bond.

(c) *Contracts exceeding $35,000 but not exceeding $150,000*. Unless the contracting officer determines that a lesser amount is adequate for the protection of the Government, the penal amount of the payment bond or the amount of alternative payment protection must equal-

(1) 100 percent of the original contract price; and

(2) If the contract price increases, an additional amount equal to 100 percent of the increase.

(d) *Securing additional payment protection*. If the contract price increases, the Government must secure any needed additional protection by directing the contractor to-

(1) Increase the penal sum of the existing bond;

(2) Obtain an additional bond; or

(3) Furnish additional alternative payment protection.

(e) *Reducing amounts*. The contracting officer may reduce the amount of security to support a bond, subject to the conditions of 28.203-3(c) or 28.204(b).

28.102-3 Contract clauses.

(a) Insert a clause substantially the same as the clause at 52.228-15, Performance and Payment Bonds—Construction, in solicitations and contracts for construction that contain a requirement for performance and payment bonds if the resultant contract is expected to exceed $150,000. The contracting officer may revise paragraphs (b)(1) and/or (b)(2) of the clause to establish a lower percentage in accordance with 28.102-2(b). If the provision at 52.228-1 is not included in the solicitation, the contracting officer must set a period of time for return of executed bonds.

(b) Insert the clause at 52.228-13, Alternative Payment Protections, in solicitations and contracts for construction, when the estimated or actual value exceeds $35,000 but does not exceed $150,000. Complete the clause by specifying the payment protections selected (see 28.102-1(b)(1)) and the deadline for submission. The contracting officer may revise paragraph (b) of the clause to establish a lower percentage in accordance with 28.102-2(c).

28.103 Performance and payment bonds for other than construction contracts.

28.103-1 General.

(a) Generally, agencies must not require performance and payment bonds for other than construction contracts. However, performance and payment bonds may be used as permitted in 28.103-2 and 28.103-3.

(b) The contractor must furnish all bonds before receiving a notice to proceed with the work.

(c) No bond must be required after the contract has been awarded if it was not specifically required in the contract, except as may be determined necessary for a contract modification.

28.103-2 Performance bonds.

(a) Performance bonds may be required for contracts exceeding the simplified acquisition threshold when necessary to protect the Government's interest. The following situations may warrant a performance bond:

(1) Government property or funds are to be provided to the contractor for use in performing the contract or as partial compensation (as in retention of salvaged material).

(2) A contractor sells assets to or merges with another concern, and the Government, after recognizing the latter concern as the successor in interest, desires assurance that it is financially capable.

(3) Substantial progress payments are made before delivery of end items starts.

(4) Contracts are for dismantling, demolition, or removal of improvements.

(b) The Government may require additional performance bond protection when a contract price is increased.

(c) The contracting officer must determine the contractor's responsibility (see part 9) even though a bond has been or can be obtained.

28.103-3 Payment bonds.

(a) A payment bond is required only when a performance bond is required, and if the use of payment bond is in the Government's interest.

(b) When a contract price is increased, the Government may require additional bond protection in an amount adequate to protect suppliers of labor and material.

28.103-4 Contract clause.

The contracting officer must insert a clause substantially the same as the clause at 52.228-16, Performance and Payment Bonds—Other than Construction, in solicitations and contracts that contain a requirement for both payment and performance bonds. The contracting officer must determine the amount of each bond for insertion in the clause. The amount must be adequate to protect the interest of the Government. The contracting officer must also set a period of time (normally 10 days) for return of executed bonds. *Alternate I* must be used when only performance bonds are required.

28.104 Annual performance bonds.

(a) Annual performance bonds only apply to nonconstruction contracts. They must provide a gross penal sum applicable to the total amount of all covered contracts.

(b) When the penal sums obligated by contracts are approximately equal to or exceed the penal sum of the annual performance bond, an additional bond will be required to cover additional contracts.

28.105 Other types of bonds.

The head of the contracting activity may approve using other types of bonds in connection with acquiring particular supplies or services. These types include advance payment bonds and patent infringement bonds.

28.105-1 Advance payment bonds.

Advance payment bonds may be required only when the contract contains an advance payment provision and a performance bond is not furnished. The contracting officer must determine the amount of the advance payment bond necessary to protect the Government.

28.105-2 Patent infringement bonds.

(a) Contracts providing for patent indemnity may require these bonds only if-

(1) A performance bond is not furnished; and

(2) The financial responsibility of the contractor is unknown or doubtful.

(b) The contracting officer must determine the penal sum.

28.106 Administration.

28.106-1 Bonds and bond-related forms.

The following Standard Forms (SF's) and Optional Forms (OF's), must be used, except in foreign countries, when a bid bond, performance or payment bond, or an individual surety is required. The bond forms must be used as indicated in the instruction portion of each form:

(a) SF 24, Bid Bond (see 28.101).
(b) SF 25, Performance Bond (see 28.102-1 and 28.106-3(b)).
(c) SF 25A, Payment Bond (see 28.102-1 and 28.106-3(b)).
(d) SF 25B, Continuation Sheet (for SF's 24, 25, and 25A).
(e) SF 28, Affidavit of Individual Surety (see 28.203).
(f) SF 34, Annual Bid Bond (see 28.001).
(g) SF 35, Annual Performance Bond (see 28.104).
(h) SF 273, Reinsurance Agreement for a Bonds Statute Performance Bond (see 28.202(a)(4)).
(i) SF 274, Reinsurance Agreement for a Bonds Statute Payment Bond (see 28.202(a)(4)).
(j) SF 275, Reinsurance Agreement in Favor of the United States (see 28.202(a)(4)).
(k) SF 1414, Consent of Surety (see 28.106-5).
(l) SF 1415, Consent of Surety and Increase of Penalty (see 28.106-3).
(m) SF 1416, Payment Bond for Other Than Construction Contracts (see 28.103-3 and 28.106-3(b)).

(n) SF 1418, Performance Bond for Other Than Construction Contracts (see 28.103-2 and 28.106-3(b)).
(o) OF 91, Release of Personal Property from Escrow (see 28.203-3).

28.106-2 Substitution of surety bonds.

(a) A new surety bond covering all or part of the obligations on a bond previously approved may be substituted for the original bond if approved by the head of the contracting activity, or as otherwise specified in agency regulation.

(b) When a new surety bond is approved, the contracting officer must notify the principal and surety of the original bond of the effective date of the new bond.

28.106-3 Additional bond and security.

(a) When additional bond coverage is required and is secured in whole or in part by the original surety or sureties, agencies must use Standard Form1415, Consent of Surety and Increase of Penalty. Standard Form1415 is authorized for local reproduction.

(b) When additional bond coverage is required and is secured in whole or in part by a new surety or by one of the alternatives described in 28.204 in lieu of corporate or individual surety, agencies must use Standard Form25, Performance Bond; Standard Form1418, Performance Bond for Other Than Construction Contracts; Standard Form25A, Payment Bond; or Standard Form1416, Payment Bond for Other Than Construction Contracts.

28.106-4 Contract clause.

(a) The contracting officer must insert the clause at 52.228-2, Additional Bond Security, in solicitations and contracts when bonds are required.

(b) In accordance with section 806(a)(3) of Public Law 102-190, as amended by sections 2091 and 8105 of Public Law 103-355 (10 U.S.C. 4601 note prec.), the contracting officer must insert the clause at 52.228-12, Prospective Subcontractor Requests for Bonds, in solicitations and contracts with respect to which a payment bond will be furnished pursuant to 40 U.S.C. chapter 31, subchapter III, Bonds (see 28.102-1), except for contracts for the acquisition of commercial products or commercial services as defined in part 2.

28.106-5 Consent of surety.

(a) When any contract is modified, the contracting officer must obtain the consent of surety if-
(1) An additional bond is obtained from other than the original surety;
(2) No additional bond is required and-
(i) The modification is for new work beyond the scope of the original contract; or
(ii) The modification does not change the contract scope but changes the contract price (upward or downward) by more than 25 percent or $50,000; or
(3) Consent of surety is required for a novation agreement (see part 42).

(b) When a contract for which performance or payment is secured by any of the types of security listed in 28.204 is modified as described in paragraph (a) of this subsection, no consent of surety is required.

(c) Agencies must use Standard Form 1414, Consent of Surety, for all types of contracts.

28.106-6 Furnishing information.

(a) The surety on the bond, upon its written request, may be furnished information on the progress of the work, payments, and the estimated percentage of completion, concerning the contract for which the bond was furnished.

(b) When a payment bond has been provided, the contracting officer must, upon request, furnish the name and address of the surety or sureties to any subcontractor or supplier who has furnished or been requested to furnish labor or material for the contract. In addition, general information concerning the work progress, payments, and the estimated percentage of completion may be furnished to persons who have provided labor or materials and have not been paid.

(c) When a payment bond has been provided for a contract, the head of the agency or designee must furnish a certified copy of the bond and the contract for which it was given to any person who makes a request therefor and who furnishes an affidavit that the requestor has supplied labor or materials for such work and payment therefor has not been made or that the requestor is being sued on such bond. The person who makes the request must be required to pay such costs of preparation as determined by the head of the agency or designee to be reasonable and appropriate (see 40 U.S.C. 3133).

(d) Section 806(a)(2) of Public Law 102-190, as amended by sections 2091 and 8105 of Public Law 103-355 (10 U.S.C. 4601 note prec.), requires that the Federal Government provide information to subcontractors on payment bonds under

contracts for other than commercial products or commercial services as defined in part 2. Upon the written or oral request of a subcontractor/supplier, or prospective subcontractor/supplier, under a contract with respect to which a payment bond has been furnished pursuant to the Bonds statute, the contracting officer must promptly provide to the requester, either orally or in writing, as appropriate, any of the following:

(1) Name and address of the surety or sureties on the payment bond.

(2) Penal amount of the payment bond.

(3) Copy of the payment bond. The contracting officer may impose reasonable fees to cover the cost of copying and providing a copy of the payment bond.

28.106-7 Withholding contract payments.

(a) During contract performance, agencies must not withhold payments due contractors or assignees because subcontractors or suppliers have not been paid.

(b) If, after completion of the contract work, the Government receives written notice from the surety regarding the contractor's failure to meet its obligation to its subcontractors or suppliers, the contracting officer must withhold final payment. However, the surety must agree to hold the Government harmless from any liability resulting from withholding the final payment. The contracting officer will authorize final payment upon agreement between the contractor and surety or upon a judicial determination of the rights of the parties.

(c) For any withholding incident to the labor standards provisions of the contract, see part 22.

28.106-8 Payment to subcontractors or suppliers.

The contracting officer will only authorize payment to subcontractors or suppliers from an ILC (or any other cash equivalent security) upon a judicial determination of the rights of the parties, a signed notarized statement by the contractor that the payment is due and owed, or a signed agreement between the parties as to amount due and owed.

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Subpart 28.2 - Sureties and Other Security for Bonds

28.200 Scope of subpart.

This subpart prescribes procedures for the use of sureties and other security to protect the Government from financial losses.

28.201 Requirements for security.

(a) Agencies must obtain adequate security for bonds (including coinsurance and reinsurance agreements) required or used with a contract for supplies or services (including construction). Acceptable forms of security include-

(1) Corporate or individual sureties; or

(2) Any of the types of security authorized in lieu of sureties by 28.204.

(b) Solicitations must not preclude offerors from using the types of surety or other security permitted by this subpart, unless prohibited by law or regulation.

28.202 Acceptability of corporate sureties.

(a) (1) Corporate sureties offered for bonds furnished with contracts performed in the United States or its outlying areas must appear on the list contained in the Department of the Treasury's Listing of Approved Sureties (Treasury Department Circular 570), "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies."

(2) The penal amount of the bond should not exceed the surety's underwriting limit stated in the Treasury Department Circular 570. If the penal amount exceeds the underwriting limit, the bond will be acceptable only if-

(i) The amount which exceeds the specified limit is coinsured or reinsured; and

(ii) The amount of coinsurance or reinsurance does not exceed the underwriting limit of each coinsurer or reinsurer.

(3) Coinsurance or reinsurance agreements must conform to the Department of the Treasury (Treasury) regulations in 31 CFR 223.10 and 223.11. When reinsurance is contemplated, the contracting office generally must require reinsurance agreements to be executed and submitted with the bonds before making a final determination on the bonds.

(4) When specified in the solicitation, the contracting officer may accept a bond from the direct writing company in satisfaction of the total bond requirement of the contract. This is permissible until necessary reinsurance agreements are executed, even though the total bond requirement may exceed the insurer's underwriting limitation. The contractor must execute and submit necessary reinsurance agreements to the contracting officer within the time specified on the bid form, which may not exceed 45 calendar days after the execution of the bond. The contractor must use Standard Form (SF) 273, Reinsurance Agreement for a Bonds Statute Performance Bond, and SF 274, Reinsurance Agreement for a Bonds Statute Payment Bond, when reinsurance is furnished with the required performance or payment bonds. SF 275, Reinsurance Agreement in Favor of the United States, is used when reinsurance is furnished with bonds for other purposes.

(b) For contracts performed in a foreign country, sureties not appearing on Treasury Department Circular 570 are acceptable if the contracting officer determines that it is impracticable for the contractor to use Treasury listed sureties.

(c) Treasury issues supplements to Treasury Department Circular 570, notifying all Federal agencies of new approved corporate surety companies and the termination of the authority of any specific corporate surety to qualify as a surety on Federal bonds. Upon receipt of notification of termination of a company's authority to qualify as a surety on Federal bonds, the contracting officer must review the outstanding contracts and take action necessary to protect the Government, including, where appropriate, securing new bonds with acceptable sureties in lieu of outstanding bonds with the named company.

(d) Treasury Department Circular 570 may be obtained from the U.S. Department of the Treasury, Bureau of the Fiscal Service, Surety Bond Branch, 3201 Pennsy Drive, Building E, Landover, MD 20785 or at https://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/c570.htm.

28.203 Individual sureties.

28.203-1 Acceptability of individual sureties.

(a) An individual surety is acceptable for all types of bonds except position schedule bonds. Assets pledged by an individual surety must meet the eligibility requirements of Treasury's Bureau of the Fiscal Service. Per 31 U.S.C. 9310, individual sureties must pledge eligible obligations, which Treasury refers to as acceptable collateral or eligible collateral. A list of acceptable assets, entitled "Acceptable Collateral for 31 CFR part 225," may be accessed by going to https://fiscal.treasury.gov/tcmm/resources.html and clicking on "31 CFR Part 225".

(b) (1) An individual surety must execute the bond (*e.g.*, bid bond (SF 24), performance bond (SF 25), payment bond (SF 25A)).

(2) The net adjusted value of unencumbered assets is their market value minus the margin. The margin tables are available at www.treasurydirect.gov. The net adjusted value of unencumbered assets pledged by the individual surety must equal or exceed the penal amount (*i.e.*, face value) of each bond.

(3) The individual surety must execute the SF 28, Affidavit of Individual Surety, and provide a security interest. One individual surety is adequate support for a bond, provided the net adjusted value of unencumbered assets pledged by that individual surety equals or exceeds the amount of the bond.

(4) An offeror or contractor may submit up to three individual sureties for each bond, in which case the net adjusted value of the pledged unencumbered assets, when combined, must equal or exceed the penal amount of the bond. Each individual surety is jointly and severally liable to the extent of the penal amount of the bond.

(c) Using the information from the SF 28 submitted by the offeror or contractor, the contracting officer must notify the Treasury's collateral operations support team by email at BMT@fiscal.treasury.gov or by phone at 888-568-7343, of the individual surety, the assets to be pledged, and the amount necessary to cover the individual surety bond, *i.e.*, the required amount to be collateralized. Treasury will advise the contracting officer whether the assets are eligible to be pledged, consistent with 28.203-1(a), and of the valuation of the assets offered to be pledged, consistent with the valuation standards in 28.203-1(b)(2). If after 3 business days the contracting officer has not received a response from Treasury, the contracting officer may seek assistance from the Director, Bank Policy and Oversight, at 202-504-3502. The contracting officer must determine whether the individual surety bond is acceptable as to the amount necessary to cover the individual surety bond based on the asset eligibility and valuation assessment from Treasury. The contracting officer must notify both the offeror or contractor and the individual surety of this determination.

(d) If the contracting officer determines the individual surety is acceptable, the contracting officer must request the Treasury's collateral operations support team set up the necessary individual surety pledged asset collateral account.

(e) If the contracting officer determines that no individual surety in support of a bid guarantee is acceptable, the offeror utilizing the individual surety must be rejected as nonresponsible, except as provided in 28.101-4. A finding of nonresponsibility based on unacceptability of an individual surety, need not be referred to the Small Business Administration for a Certificate of Competency. (See part 19 and 61 Comp. Gen. 456 (1982).)

(f) If a contractor submits an unacceptable individual surety, or one that Treasury could not assess the asset eligibility and valuation within a reasonable time, then the contracting officer may permit the contractor to substitute an acceptable surety within a reasonable time.

(g) Evidence of possible criminal or fraudulent activities by an individual surety must be referred to the appropriate agency official in accordance with agency procedures.

28.203-2 Substitution of assets.

An individual surety may request the Government to accept a substitute asset for that currently pledged by submitting a written request, including a revised SF 28, to the responsible contracting officer. Following the requirements set forth in 28.203-1, the contracting officer may agree to the substitution of assets upon determining that the substitute assets to be pledged are adequate to protect the outstanding bond or guarantee obligations.

28.203-3 Release of security interest.

(a) After consultation with legal counsel, the contracting officer must release the security interest on the individual surety's assets using the Optional Form 91, Release of Personal Property from Escrow, or a similar release as soon as possible consistent with the conditions in subparagraphs (a)(1) and (2) of this section. A surety's assets pledged in support of a payment bond may be released to a subcontractor or supplier upon Government receipt of a Federal district court judgment, or a sworn statement by the subcontractor or supplier that the claim is correct along with a notarized authorization of the release by the surety stating that it approves of such release.

(1) *Contracts subject to the Bonds statute.* See section 1.110 and section 28.102-1, paragraph (a). The security interest must be maintained for the later of—

(i) 1 year following final payment;

(ii) Until completion of any warranty period (applicable only to performance bonds); or

(iii) Pending resolution of all claims filed against the payment bond during the 1 year period following final payment.

(2) *Contracts subject to alternative payment protection.* See section 28.102-1, paragraph (b)(1). The security interest must be maintained for the full contract performance period plus 1 year.

(3) *Other contracts not subject to the Bonds statute.* The security interest must be maintained for 90 days following final payment or until completion of any warranty period (applicable only to performance bonds), whichever is later.

(b) Upon written request by the individual surety, the contracting officer may release the security interest on the individual surety's assets in support of a bid guarantee based upon evidence that the offer supported by the individual surety will not result in contract award.

(c) Upon written request by the individual surety, the contracting officer may release a portion of the security interest on the individual surety's assets based upon substantial performance of the contractor's obligations under its performance bond. Release of the security interest in support of a payment bond must comply with the subparagraphs (a)(1) through (3) of this section. In making this determination, the contracting officer will give consideration as to whether the unreleased portion of the security is sufficient to cover the remaining contract obligations, including payments to subcontractors and other potential liabilities. The individual surety must, as a condition of the partial release, furnish an affidavit agreeing that the release of such assets does not relieve the individual surety of its obligations under the bond(s).

28.203-4 Solicitation provision and contract clause.

(a) Insert the provision at 52.228-17, Individual Surety—Pledge of Assets (Bid Guarantee), in solicitations that require the submission of a bid guarantee.

(b) Insert the clause at 52.228-11, Individual Surety—Pledge of Assets, in solicitations and contracts that require the submission of performance or payment bonds.

28.203-5 Exclusion of individual sureties.

(a) An individual may be excluded from acting as a surety on bonds submitted by offerors on procurement by the executive branch of the Federal Government, by the acquiring agency's head or designee utilizing the procedures in part 9. The exclusion must be for the purpose of protecting the Government.

(b) An individual may be excluded for any of the following causes:

(1) Failure to fulfill the obligations under any bond.

(2) Failure to disclose all bond obligations.

(3) Misrepresentation of the value of available assets or outstanding liabilities.

(4) Any false or misleading statement, signature or representation on a bond or affidavit of individual suretyship.

(5) Any other cause affecting responsibility as a surety of such serious and compelling nature as may be determined to warrant exclusion.

(c) An individual surety excluded pursuant to this section must be entered as an exclusion in the System for Award Management (SAM) (see part 9).

(d) Contracting officers must not accept the bonds of individual sureties whose names appear in an active exclusion record in SAM unless the acquiring agency's head or a designee state in writing the compelling reasons justifying acceptance.

(e) An exclusion of an individual surety under this section will also preclude such party from acting as a contractor in accordance with part 9.

28.204 Alternatives in lieu of corporate or individual sureties.

(a) Any person required to furnish a bond to the Government may furnish any of the types of security listed in 28.204-1 through 28.204-3 instead of a corporate or individual surety for the bond. When any of those types of security are deposited, a statement must be incorporated in the bond form pledging the security in lieu of execution of the bond form by corporate or individual sureties. The contractor must execute the bond forms as the principal. Agencies must establish safeguards to protect against loss of the security and must return the security or its equivalent to the contractor when the bond obligation has ceased.

(b) Upon written request by any contractor securing a performance or payment bond by any of the types of security listed in 28.204-1 through 28.204-3, the contracting officer may release a portion of the security only when the conditions allowing the partial release of security in 28.203-3(c) are met. The contractor must, as a condition of the partial release, furnish an affidavit agreeing that the release of such security does not relieve the contractor of its obligations under the bond(s).

(c) The contractor may satisfy a requirement for bond security by furnishing a combination of the types of security listed in 28.204-1 through 28.204-3 or a combination of bonds supported by these types of security and additional surety bonds under 28.202 or 28.203. During the period for which a bond supported by security is required, the contractor may substitute

one type of security listed in 28.204-1 through 28.204-3 for another, or may substitute, in whole or combination, additional surety bonds under 28.202 or 28.203.

28.204-1 United States bonds or notes.

Any person required to furnish a bond to the Government has the option, instead of furnishing a surety or sureties on the bond, of depositing certain United States bonds or notes in an amount equal at their par value to the penal sum of the bond (the Act of February 24,1919 (31 U.S.C. 9303) and Treasury Department Circular No.154 (31 CFR part 225)). In addition, a duly executed power of attorney and agreement authorizing the collection or sale of such United States bonds or notes in the event of default of the principal on the bond must accompany the deposited bonds or notes. The contracting officer may-

(a) Turn securities over to the finance or other authorized agency official; or

(b) Deposit them with the Treasurer of the United States, a Federal Reserve Bank (or branch with requisite facilities), or other depository designated for that purpose by the Secretary of the Treasury, under procedures prescribed by the agency concerned and Treasury Department CircularNo.154 (exception: The contracting officer must deposit all bonds and notes received in the District of Columbia with the Treasurer of the United States).

28.204-2 Certified or cashier's checks, bank drafts, money orders, or currency.

Any person required to furnish a bond has an option to furnish a certified or cashier's check, bank draft, Post Office money order, or currency, in an amount equal to the penal sum of the bond, instead of furnishing surety or sureties on the bonds. Those furnishing checks, drafts, or money orders must draw them to the order of the appropriate Federal agency.

28.204-3 Irrevocable letter of credit.

(a) Any person required to furnish a bond has the option to furnish a bond secured by an irrevocable letter of credit (ILC) in an amount equal to the penal sum required to be secured (see 28.204). A separate ILC is required for each bond.

(b) The ILC must be irrevocable, require presentation of no document other than a written demand and the ILC (and letter of confirmation, if any), expire only as provided in paragraph (f) of this subsection, and be issued/confirmed by an acceptable federally insured financial institution as provided in paragraph (g) of this subsection.

(c) To draw on the ILC, the contracting officer must use the sight draft set forth in the clause at 52.228-14, and present it with the ILC (including letter of confirmation, if any) to the issuing financial institution or the confirming financial institution (if any).

(d) If the contractor does not furnish an acceptable replacement ILC, or other acceptable substitute, at least 30 days before an ILC's scheduled expiration, the contracting officer must immediately draw on the ILC.

(e) If, after the period of performance of a contract where ILCs are used to support payment bonds, there are outstanding claims against the payment bond, the contracting officer must draw on the ILC prior to the expiration date of the ILC to cover these claims.

(f) The period for which financial security is required must be as follows:

(1) If used as a bid guarantee, the ILC should expire no earlier than 60 days after the close of the bid acceptance period.

(2) If used as an alternative to corporate or individual sureties as security for a performance or payment bond, the offeror/contractor may submit an ILC with an initial expiration date estimated to cover the entire period for which financial security is required or an ILC with an initial expiration date that is a minimum period of one year from the date of issuance. The ILC must provide that, unless the issuer provides the beneficiary written notice of non-renewal at least 60 days in advance of the current expiration date, the ILC is automatically extended without amendment for one year from the expiration date, or any future expiration date, until the period of required coverage is completed and the contracting officer provides the financial institution with a written statement waiving the right to payment. The period of required coverage must be:

(i) For contracts subject to the Bonds statute, the later of-

(A) one year following the expected date of final payment;

(B) For performance bonds only, until completion of any warranty period; or

(C) For payment bonds only, until resolution of all claims filed against the payment bond during the one-year period following final payment.

(ii) For contracts not subject to the Bonds statute, the later of-

(A) 90 days following final payment; or

(B) For performance bonds only, until completion of any warranty period.

(g) Only federally insured financial institutions rated investment grade must issue or confirm the ILC. Unless the financial institution issuing the ILC had letter of credit business of at least $25 million in the past year, ILCs over $5 million must be confirmed by another acceptable financial institution that had letter of credit business of at least $25 million in the past year.

(1) The offeror/contractor is required by paragraph (d) of the clause at 52.228-14. Irrevocable Letter of Credit, to provide the contracting officer a credit rating from a recognized commercial rating service that indicates the financial institution has the required rating(s) as of the date of issuance of the ILC.

(2) To support the credit rating of the financial institution(s) issuing or confirming the ILC, the contracting officer must verify the following information:

(i) Federal insurance: Each financial institution is federally insured. Verification of federal insurance is available through the Federal Deposit Insurance Corporation (FDIC) institution directory at the website http://www2.fdic.gov/idasp/index.asp.

(ii) Current credit rating. The current credit rating for each financial institution is investment grade and that the credit rating is from a Nationally Recognized Statistical Rating Organization (NRSRO). NRSROs can be located at the website http://www.sec.gov/answers/nrsro.htm maintained by the SEC.

(3) The rating services listed in the website http://www.sec.gov/answers/nrsro.htm use different rating scales (e.g., AAA, AA, A, BBB, BB, B, CCC, CC, C, and D; or Aaa, Aa, A, Baa, Ba, B, Caa, Ca, and C) to provide evaluations of institutional credit risk; however, all such systems specify the range of investment grade ratings (e.g., BBB-AAA or Baa-Aaa in the examples in this section) and permit evaluation of the relative risk associated with a specific institution. If the contracting officer learns that a financial institution's rating has dropped below investment grade level, the contracting officer must give the contractor 30 days to substitute an acceptable ILC or must draw on the ILC using the sight draft in paragraph (g) of the clause at 52.228-14.

(h) A copy of the Uniform Customs and Practice for Documentary Credits, 2007 Edition, International Chamber of Commerce Publication No. 600, is available from:

ICC Books USA, 1212 Avenue of the Americas, 21 st Floor, New York, NY 10036;

Phone: 212-703-5078; Fax: 212-391-6568; E-mail: iccbooks@uscib.org; Via the Internet at:http://www.uscib.org/ucp-600-ud-4465/.

28.204-4 Contract clause.

Insert the clause at 52.228-14, Irrevocable Letter of Credit, in solicitations and contracts for services, supplies, or construction, when a bid guarantee, or performance bonds, or performance and payment bonds are required.

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Subpart 28.3 - Insurance

28.301 Policy.

Contractors must carry insurance under the following circumstances:

(a) (1) The Government requires any contractor subject to Cost Accounting Standard (CAS) 416 (48 CFR 9904.416) to obtain insurance, by purchase or self-coverage, for the perils to which the contractor is exposed, except when-

(i) The Government, by providing in the contract in accordance with law, agrees to indemnify the contractor under specified circumstances; or

(ii) The contract specifically relieves the contractor of liability for loss of or damage to Government property.

(2) The Government reserves the right to disapprove the purchase of any insurance coverage not in the Government's interest.

(3) Allowability of the insurance program's cost must be determined in accordance with the criteria in 31.205-19.

(b) Contractors, whether or not their contracts are subject to CAS 416, are required by law and this regulation to provide insurance for certain types of perils (*e.g.,* workers' compensation). Insurance is mandatory also when commingling of property, type of operation, circumstances of ownership, or condition of the contract make it necessary for the protection of the Government. The minimum amounts of insurance required by this regulation (see 28.307-2) may be reduced when a contract is to be performed outside the United States and its outlying areas. When more than one agency is involved, the agency responsible for review and approval of a contractor's insurance program must coordinate with other interested agencies before acting on significant insurance matters.

(c) Contractors awarded nonpersonal services contracts for health care services are required to maintain medical liability insurance and indemnify the Government for liability producing acts or omissions by the contractor, its employees and agents (see part 37).

28.302 Notice of cancellation or change.

When the Government requires the contractor to provide insurance coverage, the policies must contain an endorsement that any cancellation or material change in the coverage adversely affecting the Government's interest must not be effective unless the insurer or the contractor gives written notice of cancellation or change as required by the contracting officer. When the coverage is provided by self-insurance, the contractor must not change or decrease the coverage without the administrative contracting officer's prior approval (see 28.308(c)).

28.303 Insurance against loss of or damage to Government property.

When the Government requires or approves insurance to cover loss of or damage to Government property (see part 45), it may be provided by specific insurance policies or by inclusion of the risks in the contractor's existing policies. The policies must disclose the Government's interest in the property.

28.304 Risk-pooling arrangements.

Agencies may establish risk-pooling arrangements. These arrangements are designed to use the services of the insurance industry for safety engineering and the handling of claims at minimum cost to the Government. The agency responsible must appoint a single manager or point of contact for each arrangement.

28.305 Overseas workers' compensation and war-hazard insurance.

(a) "Public-work contract," as used in this subpart, means any contract for a fixed improvement or for any other project, fixed or not, for the public use of the United States or its allies, involving construction, alteration, removal, or repair, including projects or operations under service contracts and projects in connection with the national defense or with war activities, dredging, harbor improvements, dams, roadways, and housing, as well as preparatory and ancillary work in connection therewith at the site or on the project.

(b) The Defense Base Act (42 U.S.C.1651, *et seq*.) extends the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901) to various classes of employees working outside the United States, including those engaged in performing-

(1) Public-work contracts; or

(2) Contracts approved or financed under the Foreign Assistance Act of1961 (Pub.L.87-195) other than-

(i) Contracts approved or financed by the Development Loan Fund (unless the Secretary of Labor, acting upon the recommendation of a department or agency, determines that such contracts should be covered); or

(ii) Contracts exclusively for materials or supplies.

(c) When the Defense Base Act applies (see 42 U.S.C.1651, *et seq*.) to these employees, the benefits of the Longshoremen's and Harbor Workers' Compensation Act are extended through operation of the War Hazards Compensation Act (42 U.S.C.1701, *et seq*.) to protect the employees against the risk of war hazards (injury, death, capture, or detention). When, by means of an insurance policy or a self-insurance program, the contractor provides the workers' compensation coverage required by the Defense Base Act, the contractor's employees automatically receive war-hazard risk protection.

(d) When the agency head recommends a waiver to the Secretary of Labor, the Secretary may waive the applicability of the Defense Base Act to any contract, subcontract, work location, or classification of employees.

(e) If the Defense Base Act is waived for some or all of the contractor's employees, the benefits of the War Hazards Compensation Act are automatically waived with respect to those employees for whom the Defense Base Act is waived. For those employees, the contractor must provide workers' compensation coverage 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. The contract must provide either that the costs of this liability or the reasonable costs of insurance against this liability must be allowed as a cost under the contract.

28.306 Insurance under fixed-price contracts.

(a) *General*. Although the Government is not ordinarily concerned with the contractor's insurance coverage if the contract is a fixed-price contract, in special circumstances agencies may specify insurance requirements under fixed-price contracts. Examples of such circumstances include the following:

(1) The contractor is, or has a separate operation, engaged principally in Government work.

(2) Government property is involved.

(3) The work is to be performed on a Government installation.

(4) The Government elects to assume risks for which the contractor ordinarily obtains commercial insurance.

(b) Work on a Government installation. (1) When the clause at 52.228-5, Insurance—Work on a Government Installation, is required to be included in a fixed-price contract by 28.310, the coverage specified in 28.307 is the minimum insurance required and must be included in the contract Schedule or elsewhere in the contract. The contracting officer may require additional coverage and higher limits.

(2) When the clause at 52.228-5, Insurance—Work on a Government Installation, is not required by 28.310 but is included because the contracting officer considers it to be in the Government's interest to do so, any of the types of insurance specified in 28.307 may be omitted or the limits may be lowered, if appropriate.

28.307 Insurance under cost-reimbursement contracts.

Cost-reimbursement contracts (and subcontracts, if the terms of the prime contract are extended to the subcontract) ordinarily require the types of insurance listed in 28.307-2, with the minimum amounts of liability indicated. (See 28.308 for self-insurance.)

28.307-1 Group insurance plans.

(a) *Prior approval requirement*. Under cost-reimbursement contracts, before buying insurance under a group insurance plan, the contractor must submit the plan for approval, in accordance with agency regulations. Any change in benefits provided under an approved plan that can reasonably be expected to increase significantly the cost to the Government requires similar approval.

(b) *Premium refunds or credits*. The plan must provide for the Government to share in any premium refunds or credits paid or otherwise allowed to the contractor. In determining the extent of the Government's share in any premium refunds or credits, any special reserves and other refunds to which the contractor may be entitled in the future must be taken into account.

28.307-2 Liability.

(a) *Workers' compensation and employer's liability*. Contractors are required to comply with applicable Federal and State workers' compensation and occupational disease statutes. If occupational diseases are not compensable under those statutes, they must 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 must be required, except in States with exclusive or monopolistic funds that do not permit workers' compensation to be written by private carriers. (See 28.305(c) for treatment of contracts subject to the Defense Base Act.)

(b) General liability. (1) The contracting officer must require bodily injury liability insurance coverage written on the comprehensive form of policy of at least $500,000 per occurrence.

(2) Property damage liability insurance must be required only in special circumstances as determined by the agency.

(c) *Automobile liability*. The contracting officer must require automobile liability insurance written on the comprehensive form of policy. The policy must 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 must 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. The amount of liability coverage on other policies must be commensurate with any legal requirements of the locality and sufficient to meet normal and customary claims.

(d) *Aircraft public and passenger liability*. When aircraft are used in connection with performing the contract, the contracting officer must require aircraft public and passenger liability insurance. Coverage must be at least $200,000 per person and $500,000 per occurrence for bodily injury, other than passenger liability, and $200,000 per occurrence for property damage. Coverage for passenger liability bodily injury must be at least $200,000 multiplied by the number of seats or passengers, whichever is greater.

(e) *Vessel liability*. When contract performance involves use of vessels, the contracting officer must require, as determined by the agency, vessel collision liability and protection and indemnity liability insurance.

28.308 Self-insurance.

(a) When it is anticipated that 50 percent or more of the self-insurance costs to be incurred at a segment of a contractor's business will be allocable to negotiated Government contracts, and the self-insurance costs at the segment for the contractor's fiscal year are expected to be $200,000 or more, the contractor must submit, in writing, information on its proposed self-insurance program to the administrative contracting officer and obtain that official's approval of the program. The submission must be by segment or segments of the contractor's business to which the program applies and must include-

(1) A complete description of the program, including any resolution of the board of directors authorizing and adopting coverage, including types of risks, limits of coverage, assignments of safety and loss control, and legal service responsibilities;

(2) If available, the corporate insurance manual and organization chart detailing fiscal responsibilities for insurance;

(3) The terms regarding insurance coverage for any Government property;

(4) The contractor's latest financial statements;

(5) Any self-insurance feasibility studies or insurance market surveys reporting comparative alternatives;

(6) Loss history, premiums history, and industry ratios;

(7) A formula for establishing reserves, including percentage variations between losses paid and losses reserved;

(8) Claims administration policy, practices, and procedures;

(9) The method of calculating the projected average loss; and

(10) A disclosure of all captive insurance company and reinsurance agreements, including methods of computing cost.

(b) Programs of self-insurance covering a contractor's insurable risks, including the deductible portion of purchased insurance, may be approved when examination of a program indicates that its application is in the Government's interest. Agencies must not approve a program of self-insurance for workers' compensation in a jurisdiction where workers' compensation does not completely cover the employer's liability to employees, unless the contractor-

(1) Maintains an approved program of self-insurance for any employer's liability not so covered; or

(2) Shows that the combined cost to the Government of self-insurance for workers' compensation and commercial insurance for employer's liability will not exceed the cost of covering both kinds of risk by commercial insurance.

(c) Once the administrative contracting officer has approved a program, the contractor must submit to that official for approval any major proposed changes to the program. Any program approval may be withdrawn if a contracting officer finds that either-

(1) Any part of a program does not comply with the requirements of this subpart and/or the criteria at 31.205-19; or

(2) Conditions or situations existing at the time of approval that were a basis for original approval of the program have changed to the extent that a program change is necessary.

(d) To qualify for a self-insurance program, a contractor must demonstrate ability to sustain the potential losses involved. In making the determination, the contracting officer must consider the following factors:

(1) The soundness of the contractor's financial condition, including available lines of credit.

(2) The geographic dispersion of assets, so that the potential of a single loss depleting all the assets is unlikely.

(3) The history of previous losses, including frequency of occurrence and the financial impact of each loss.

(4) The type and magnitude of risk, such as minor coverage for the deductible portion of purchased insurance or major coverage for hazardous risks.

(5) The contractor's compliance with Federal and State laws and regulations.

(e) Agencies must not approve a program of self-insurance for catastrophic risks (*e.g.,* see part 50 for special procedures for unusually hazardous or nuclear risks). Should performance of Government contracts create the risk of catastrophic losses, the Government may, to the extent authorized by law, agree to indemnify the contractor or recognize an appropriate share of premiums for purchased insurance, or both.

(f) Self-insurance programs to protect a contractor against the costs of correcting its own defects in materials or workmanship must not be approved. For these purposes, normal rework estimates and warranty costs will not be considered self-insurance.

28.309 Contract clauses for workers' compensation insurance.

(a) The contracting officer must insert the clause at 52.228-3, Workers' Compensation Insurance (Defense Base Act), in solicitations and contracts when the Defense Base Act applies (see 28.305) and—

(1) The contract will be a public-work contract performed outside the United States; or

(2) The contract will be approved or financed under the Foreign Assistance Act of1961 (Pub.L.87-195) and is not excluded by 28.305(b)(2).

(b) The contracting officer must insert the clause at 52.228-4, Workers' Compensation and War-Hazard Insurance Overseas, in solicitations and contracts when the contract will be a public-work contract performed outside the United States and the Secretary of Labor waives the applicability of the Defense Base Act (see 28.305(d)).

28.310 Contract clause for work on a Government installation.

(a) Insert the clause at 52.228-5, Insurance—Work on a Government Installation, in solicitations and contracts if a fixed-price contract is contemplated, the contract amount is expected to exceed the simplified acquisition threshold, and the contract will require work on a Government installation, unless—

(1) Only a small amount of work is required on the Government installation (*e.g.,*a few brief visits per month); or

(2) All work on the Government installation will be performed outside the United States and its outlying areas.

(b) The contracting officer may insert the clause at 52.228-5 in solicitations and contracts described in paragraphs (a)(1) and (2) of this section if it is in the Government's interest to do so.

28.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.

28.311-1 Contract clause.

In accordance with agency acquisition regulations, the contracting officer must insert the clause at 52.228-7, Insurance—Liability to Third Persons, in solicitations and contracts, other than those for construction contracts and those for architect-engineer services, when a cost-reimbursement contract is contemplated.

28.311-2 Agency solicitation provisions and contract clauses.

Agencies may prescribe their own solicitation provisions and contract clauses to implement the basic policies contained in this subpart 28.3.

28.312 Contract clause for insurance of leased motor vehicles.

The contracting officer must insert the clause at 52.228-8, Liability and Insurance—Leased Motor Vehicles, in solicitations and contracts for the leasing of motor vehicles (see part 8).

28.313 Contract clauses for insurance of transportation or transportation-related services.

(a) The contracting officer must insert the clause at 52.228-9, Cargo Insurance, in solicitations and contracts for transportation or for transportation-related services, except when freight is shipped under rates subject to released or declared value.

(b) The contracting officer must insert a clause substantially the same as that at 52.228-10, Vehicular and General Public Liability Insurance, in solicitations and contracts for transportation or for transportation-related services when the contracting officer determines that vehicular liability or general public liability insurance required by law is not sufficient.

PART 29 - TAXES

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29.000 Scope of part.

This part provides policies and procedures for using tax clauses in contracts (including foreign contracts), claiming immunity or exemption from taxes, and getting tax refunds. It explains Federal, State, and local taxes on certain supplies and services that executive agencies buy and how these taxes apply to the Federal Government. This information is general guidance for Government personnel and does not cover all tax laws and regulations.

Subpart 29.1 - General

29.101 Resolving tax problems.

Contract tax problems are primarily legal issues and vary widely. Contracting officers must consult the agency's legal counsel when tax issues arise, especially before negotiating with any taxing authority.

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Subpart 29.2 - Federal Excise Taxes

29.201 General.

(a) Federal excise taxes are taxes on the sale or use of specific supplies or services. Subtitle D of the Internal Revenue Code, Miscellaneous Excise Taxes 26 U.S.C.4041, *et seq*., and its regulations (26 CFR parts 40 through 299) cover Federal excise tax requirements. Direct questions in this area to legal counsel. The most common excise taxes are—

(1) Manufacturers' excise taxes on certain motor-vehicle articles, tires and inner tubes, gasoline, lubricating oils, coal, fishing equipment, firearms, shells, and cartridges sold by manufacturers, producers, or importers; and

(2) Special-fuels excise taxes charged at retail on diesel fuel and special motor fuels.

(b) Executive agencies must take advantage of available Federal excise tax exemptions. When the law exempts the Federal Government from these taxes, the contracting officer must, unless inappropriate for the circumstances, request offers on a tax-exclusive basis. When no exemption exists, request offers on a tax-inclusive basis.

29.202 General exemptions.

Federal manufacturers' or special-fuels excise taxes do not apply in many contracting situations. This includes supplies for any of the following purposes:

(a) The exclusive use of any State or political subdivision, including the District of Columbia (26 U.S.C. 4041 and 4221).

(b) Export shipment to a foreign country or an outlying area of the United States. Shipment must occur within 6 months after title passes to the Government. When claiming this exemption, the words "for export" must appear on the contract or purchase document. The contracting officer must give the seller proof of export (see 26 CFR 48.4221-3).

(c) Further manufacture, or resale for further manufacture (this exemption does not include tires and inner tubes) (26 CFR 48.4221-2).

(d) Use as fuel supplies, ships or sea stores, or legitimate equipment on vessels of war, including—

(1) Aircraft owned by the United States and constituting part of the armed forces; and

(2) Guided missiles and pilotless aircraft owned or chartered by the United States. When claiming this exemption, make the purchase on a tax-exclusive basis. The contracting officer must give the seller an exemption certificate for Supplies for Vessels of War (an example appears in 26 CFR 48.4221-4(d)(2). The IRS will accept one certificate covering all orders under a single contract for up to 12 calendar quarters) (26 U.S.C. 4041 and 4221).

(e) A nonprofit educational organization (26 U.S.C. 4041 and 4221).

(f) Emergency vehicles (26 U.S.C. 4053 and 4064(b)(1)(c)).

29.203 Other Federal tax exemptions.

(a) Under 26 U.S.C.4293, the Secretary of the Treasury has exempted the United States from the communications excise tax imposed in 26 U.S.C.4251, when the supplies and services are for the exclusive use of the United States. (Secretarial Authorization, June 20,1947, Internal Revenue Cumulative Bulletin,1947-1, 205.)

(b) Under 26 U.S.C. 4483(b), the Secretary of the Treasury has exempted the United States from the federal highway vehicle users tax imposed in 26 U.S.C. 4481. The exemption applies whether the United States owns or leases the vehicle. (Secretarial Authorization, Internal Revenue Cumulative Bulletin, 1956-2, 1369.)

29.204 Federal excise tax on specific foreign contract payments.

(a) Title 26 U.S.C. 5000C and its implementing regulations at 26 CFR 1.5000C-1 through 1.5000C-7 require acquiring agencies to collect this excise tax (section 5000C tax) through withholding on applicable contract payments (see 29.402-3, 31.205-41(b)(8)). Agencies merely withhold the tax for the Internal Revenue Service (IRS). All substantive issues regarding the underlying section 5000C tax, such as the imposition of or exemption from the tax, are matters under IRS jurisdiction. For questions about interpreting IRS regulations, refer to https://www.irs.gov/help/tax-law-questions.

(b) According to clause 52.229-12, Tax on Certain Foreign Procurements, contractors subject to the section 5000C tax will complete IRS Form W-14, Certificate of Foreign Contracting Party Receiving Federal Procurement Payments, and submit this form with each voucher or invoice. If a completed IRS Form W-14 is not submitted with a payment request, the default withholding percentage is 2 percent for that payment request. Information about IRS Form W-14 is available at www.irs.gov/w14.

(c) (1) Exemptions from withholding in IRS regulations at 26 CFR 1.5000C-1(d)(1) through (4) are covered in the prescription at 29.402-3(a), which means the contracting officer will not include the provision when one of the 29.402-3(a) exceptions applies.

(2) The offeror will claim exemptions under 26 CFR 1.5000C-1(d)(5) through (7) by submitting an IRS Form W-14 with their offer. If not submitted with the offer, exemptions will not apply to the contract.

(3) Any exemption claimed and self-certified on the IRS Form W-14 is subject to IRS audit. Any disputes about imposing and collecting the section 5000C tax are handled by the IRS because this is a tax matter, not a contract issue.

(d) The exemptions in 29.201 through 29.301 do not apply to this section 5000C tax.

(e) Additional information about this excise tax on specific foreign contract payments is available at https://www.irs.gov/government-entities/excise-tax-on-specified-federal-foreign-procurement-payments.

Subpart 29.3 - State and Local Taxes

29.300 Scope of subpart.

This subpart provides the policies and procedures regarding the exemption or immunity of Federal Government purchases and property from State and local taxation.

29.302 Application of State and local taxes to the Government.

(a) Generally, purchases and leases made by the Federal Government are immune from State and local taxation. However, whether a specific purchase or lease is immune is a legal question requiring advice from the agency's legal counsel.

(b) When economically feasible, executive agencies must take full advantage of all exemptions from State and local taxation. When appropriate, the contracting officer must provide a Standard Form 1094, U.S. Tax Exemption Form (see part 53), or other evidence listed in 29.304(a) to establish that the Government is making the purchase.

29.302 Application of State and local taxes to Government contractors and subcontractors.

(a) The Government does not normally designate prime contractors and subcontractors as agents of the Government for claiming immunity from State or local sales or use taxes. Before any activity claims that a contractor is a Government agent, refer the matter to the agency head for review. Include all relevant data and a thorough analysis of all relevant legal precedents with the referral.

(b) When purchases are made by a prime contractor or subcontractor rather than directly by the Government, the right to exemption from sales or use tax may not depend on the Government's immunity from direct taxation by States and localities. Instead, it may depend on provisions of the specific State or local law, or in some cases, the transaction may not be expressly exempt from the tax. Protect the Government's interest by following the procedures in 29.101.

(c) Often, property owned by the Government (including property acquired under progress payments or the Government property clause) is in a contractor's or subcontractor's possession. States or localities may claim the right to tax Government property directly or to tax the contractor's or subcontractor's possession of, interest in, or use of that property. In such cases, the contracting officer must seek review and advice from the agency's legal counsel on the appropriate action.

(d) Indefinite-delivery contracts for equipment rental may require the contractor to provide equipment in any state. States and local governments impose various taxes on equipment leased to the Government, and the tax amounts can vary significantly among jurisdictions.

29.303 North Carolina Sales and Use Tax Act.

(a) The North Carolina Sales and Use Tax Act allows counties and incorporated cities and towns to receive an annual refund from the Secretary of Revenue for sales and use taxes indirectly paid on building materials, supplies, fixtures, and equipment that become part of or are attached to any building or structure built, altered, or repaired for these counties and incorporated cities and towns in North Carolina. In United States v. Clayton, 250 F. Supp. 827 (1965), the court ruled that the United States is entitled to the refund but must follow the Act's refund procedure and regulations to recover what it is due.

(b) To receive the refund, the Act requires claimants to file a written request within 6 months after the end of their fiscal year, supported by records, receipts, and information that the Secretary of Revenue requires. Claimants will not receive a refund for applications filed late or not meeting the Secretary of Revenue's requirements. These requirements appear in regulations stating that to support a refund claim for sales or use taxes paid on purchases of building materials, supplies, fixtures, or equipment by a contractor, the Government must get certified statements from the contractor showing the cost of property purchased from each vendor and the amount of sales or use taxes paid. If a contractor makes several purchases from the same vendor, the certified statement must show the invoice numbers, invoice dates, total invoice amount, and sales and use taxes paid. The statement must also include the cost of any tangible personal property the contractor took from warehouse stock and the amount of sales or use tax paid. The general contractor must obtain and provide to the claimant similar certified statements from subcontractors. The contractor's statement must show any local sales or use taxes separately from State sales or use taxes.

(c) The clause prescribed at 29.401-2 requires contractors to submit certified statements disclosing North Carolina State and local sales and use taxes paid during the 12-month period ending the previous September 30 to contracting officers by November 30 each year. The contracting officer must ensure contractors comply with this requirement and obtain the annual refund to which the Government is entitled. The refund application must be filed annually before March 31 in the manner and form the Secretary of Revenue requires. Get copies of the form from—

State of North Carolina

Department of Revenue
PO Box 25000
Raleigh, NC 27640

29.304 State and local tax exemptions.

(a) *General*. The contract may require the contractor to take specific actions regarding payment, nonpayment, refund, protest, or other handling of a specified tax. Such special treatment may be appropriate when there is doubt about the applicability or allocability of the tax, or when the tax's applicability is being challenged in court.

(b) *Evidence of exemption.* Evidence is needed to establish an exemption from State or local taxes. The type of evidence depends on the grounds for the exemption claimed, the parties involved, and the requirements of the taxing jurisdiction. Examples of evidence include but are not limited to documents that identify a U.S. agency as the buyer, a U.S. tax exemption form (SF 1094), or documents establishing a State or local exemption.

(c) *Furnishing proof of exemption*. If there is a reasonable basis to claim an exemption, provide the seller with evidence of exemption, as follows:

(1) Under a contract containing the clause 52.229-3, Federal, State, and Local Taxes, if requested by the contractor and there is a reasonable basis to support the exemption.

(2) Under a contract containing the clause 52.229-4, Federal, State, and Local Taxes (State and Local Adjustments), if the contractor requests evidence that applies to a tax excluded from the contract price and there is a reasonable basis to support the exemption.

(3) Under a cost-reimbursement contract, if requested by the contractor and approved by the contracting officer or at the contracting officer's discretion.

(4) Under a contract or purchase order with no tax provision, if—

(i) Requested by the contractor and approved by the contracting officer or at the contracting officer's discretion; and

(ii) Either the contract price does not include the tax or, if the transaction or property is tax exempt, the contractor agrees to a reduction in the contract price.

Subpart 29.4 - Contract Clauses

29.401 Domestic contracts.

29.401-1 Indefinite-delivery contracts for leased equipment.

Insert the clause at 52.229-1, State and Local Taxes, in solicitations and contracts for leased equipment when—

(a) Planning a fixed-price indefinite-delivery contract;

(b) The contract will be performed wholly or partly in the United States or its outlying areas; and

(c) The delivery places are not known at the time of contracting.

29.401-2 Construction contracts performed in North Carolina.

Insert the clause at 52.229-2, North Carolina State and Local Sales and Use Tax, in solicitations and contracts for construction to be performed in North Carolina. If the requirement is for vessel repair in North Carolina, use the clause with its Alternate I.

29.401-3 Federal, State, and local taxes.

(a) Except as provided in paragraph (b) of this section, insert the clause at 52.229-3, Federal, State, and Local Taxes, in solicitations and contracts if—

(1) The contract will be performed wholly or partly in the United States or its outlying areas;

(2) Planning a fixed-price contract; and

(3) The contract is expected to exceed the simplified acquisition threshold.

(b) In a noncompetitive contract that meets all conditions in paragraph (a) of this section, the contracting officer may insert the clause at 52.229-4, Federal, State, and Local Taxes (State and Local Adjustments), instead of the clause at 52.229-3, if the price would otherwise include an inappropriate contingency for potential postaward changes in State or local taxes.

29.401-4 New Mexico gross receipts and compensating tax.

(a) *Definition*.

Service, as used in this section, is defined in the Gross Receipts and Compensating Tax Act of the State of New Mexico, Sec 7-9-3(S) NMSA 1978, and means all activities engaged in for other persons for a consideration, which activities involve predominantly the performance of a service as distinguished from selling or leasing property. "Service" includes activities performed by a person for its members or shareholders. In determining what is a service, the intended use, principal objective, or ultimate objective of the contracting parties shall not be controlling. "Service" includes construction activities and all tangible personal property that will become an ingredient or component part of a construction project. That tangible personal property retains its character as tangible personal property until it is installed as an ingredient or component part of a construction project in New Mexico. Sales of tangible personal property that will become an ingredient or component part of a construction project to persons engaged in the construction business are sales of tangible personal property.

(b) *Contract clause*. Insert the clause at 52.229-10, State of New Mexico Gross Receipts and Compensating Tax, in solicitations and contracts issued by the agencies identified in paragraph (c) of this section when all three of these conditions exist:

(1) The contractor will be performing a cost-reimbursement contract.

(2) The contract directs or authorizes the contractor to acquire tangible personal property as a direct cost under the contract and title to such property passes directly to and vests in the United States upon delivery by the vendor.

(3) The contract will be for services to be performed wholly or partly within New Mexico.

(c) *Participating agencies*. (1) The agencies listed below have an agreement with the State of New Mexico to eliminate double taxation of Government cost-reimbursement contracts when contractors and their subcontractors purchase tangible personal property to be used in performing services wholly or partly in New Mexico, and when title to such property will pass to the United States upon delivery of the property to the contractor and its subcontractors by the vendor. Therefore, the clause applies only to solicitations and contracts issued by the—

United States Defense Advanced Research Projects Agency;

United States Defense Threat Reduction Agency;

United States Department of Agriculture;

United States Department of the Air Force;

United States Department of the Army;

United States Department of Energy;
United States Department of Health and Human Services;
United States Department of the Interior;
United States Department of Labor;
United States Department of the Navy;
United States Department of Transportation;
United States General Services Administration;
United States Missile Defense Agency; and
United States National Aeronautics and Space Administration.

(2) Any other Federal agency expecting to award cost-reimbursement contracts to be performed in New Mexico should contact the New Mexico Taxation and Revenue Department to execute a similar agreement.

29.402 Foreign contracts.

29.402-1 Foreign fixed-price contracts.

(a) Insert the clause at 52.229-6, Taxes-Foreign Fixed-Price Contracts, in solicitations and contracts expected to exceed the simplified acquisition threshold when planning a fixed-price contract to be performed wholly or partly in a foreign country, unless the contract will be with a foreign government.

(b) Insert the clause at 52.229-7, Taxes-Fixed-Price Contracts with Foreign Governments, in solicitations and contracts that exceed the simplified acquisition threshold when planning a fixed-price contract with a foreign government.

29.402-2 Foreign cost-reimbursement contracts.

(a) Insert the clause at 52.229-8, Taxes-Foreign Cost-Reimbursement Contracts, in solicitations and contracts when planning a cost-reimbursement contract to be performed wholly or partly in a foreign country, unless the contract will be with a foreign government.

(b) Insert the clause at 52.229-9, Taxes-Cost-Reimbursement Contracts with Foreign Governments, in solicitations and contracts when planning a cost-reimbursement contract with a foreign government.

29.402-3 Tax on certain foreign procurements.

(a) Insert the provision at 52.229-11, Tax on Certain Foreign Procurements—Notice and Representation, in solicitations, including solicitations using part 12 procedures for acquiring commercial products and commercial services, except for—

(1) Acquisitions using simplified acquisition procedures that do not exceed the simplified acquisition threshold;

(2) Emergency acquisitions using the emergency acquisition flexibilities defined in part 18;

(3) Acquisitions using the unusual and compelling urgency authority in part 6;

(4) Contracts with a single individual for personal services that will not exceed the simplified acquisition threshold on an annual calendar year basis for all years of the contract; and

(5) Acquisitions the requiring activity identifies as requirements for certain foreign humanitarian assistance contracts that are payments made by U.S. Government agencies under a contract with a foreign contracting party to obtain goods or services described in or authorized under 7 U.S.C. 1691, et seq., 22 U.S.C. 2151, et seq., 22 U.S.C 2601 et seq., 22 U.S.C. 5801 et seq., 22 U.S.C. 5401 et seq., 10 U.S.C. 402, 10 U.S.C. 404, 10 U.S.C. 407, 10 U.S.C. 2557, and 10 U.S.C. 2561.

(b) Insert the clause at 52.229-12, Tax on Certain Foreign Procurements, in—

(1) Solicitations that contain the provision at 52.229-11, Tax on Certain Foreign Procurements—Notice and Representation; and

(2) Resulting contracts for which the contractor indicated it was a foreign person in solicitation provision 52.229-11, Tax on Certain Foreign Procurements—Notice and Representation.

PART 30 - COST ACCOUNTING STANDARDS ADMINISTRATION

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30.000 Scope of part.

This part describes policies and procedures for applying the Cost Accounting Standards Board (CASB) rules and regulations (48 CFR chapter 99) to negotiated contracts and subcontracts.

30.001 Definitions.

As used in this part-

Affected CAS-covered contract or subcontract means a contract or subcontract subject to Cost Accounting Standards (CAS) rules and regulations for which a contractor or subcontractor-

(1) Used one cost accounting practice to estimate costs and a changed cost accounting practice to accumulate and report costs under the contract or subcontract; or

(2) Used a noncompliant practice for purposes of estimating or accumulating and reporting costs under the contract or subcontract.

Cognizant Federal agency official (CFAO) means the contracting officer assigned by the cognizant Federal agency to administer the CAS.

Desirable change means a compliant change to a contractor's established or disclosed cost accounting practices that the CFAO finds is desirable and not detrimental to the Government and is, therefore, not subject to the no increased cost prohibition provisions of CAS-covered contracts and subcontracts affected by the change.

Fixed-price contracts and subcontracts means-

(1) The following fixed-price contracts and subcontracts—

(i) Firm-fixed price contracts;

(ii) Fixed-price contracts with economic price adjustment (except when price adjustments are based on actual costs of labor or material); and

(iii) Firm-fixed-price, level-of-effort contracts.

(2) Fixed-price incentive contracts and subcontracts where the price is not adjusted based on actual costs incurred (part 16);

(3) Orders issued under indefinite-delivery contracts and subcontracts where final payment is not based on actual costs incurred (part 16); and

(4) The fixed-hourly rate portion of time-and-materials and labor-hours contracts and subcontracts (part 16).

Flexibly-priced contracts and subcontracts means-

(1) The following types of fixed-price contracts and subcontracts—

(i) Fixed-price contracts with economic price adjustment based on actual costs of labor or material;

(ii) Fixed-price incentive contract;

(iii) Fixed-price contracts with prospective price redetermination.; and

(iv) Fixed-ceiling-price contracts with retroactive price redetermination.

(2) Cost-reimbursement contracts and subcontracts;

(3) Incentive contracts and subcontracts where the price may be adjusted based on actual costs incurred;

(4) Orders issued under indefinite-delivery contracts and subcontracts where final payment is based on actual costs incurred; and

(5) The materials portion of time-and-materials contracts and subcontracts.

Noncompliance means a failure in estimating, accumulating, or reporting costs to-

(1) Comply with applicable CAS; or

(2) Consistently follow disclosed or established cost accounting practices.

Required change means-

(1) A change in cost accounting practice that a contractor is required to make in order to comply with applicable Standards, modifications or interpretations thereto, that subsequently becomes applicable to an existing CAS-covered contract or subcontract due to the receipt of another CAS-covered contract or subcontract; or

(2) A prospective change to a disclosed or established cost accounting practice when the CFAO determines that the former practice was in compliance with applicable CAS and the change is necessary for the contractor to remain in compliance.

Unilateral change means a change in cost accounting practice from one compliant practice to another compliant practice that a contractor with a CAS-covered contract(s) or subcontract(s) elects to make that has not been deemed a desirable change by the CFAO and for which the Government will pay no aggregate increased costs.

Subpart 30.1 - General

30.101 Cost Accounting Standards.

(a) 41 U.S.C. chapter 15, Cost Accounting Standards, requires certain contractors and subcontractors to comply with Cost Accounting Standards (CAS) and to disclose in writing and follow consistently their cost accounting practices.

(b) Contracts that refer to part 30 for the purpose of applying the policies, procedures, standards, and regulations promulgated by the CASB pursuant to 41 U.S.C. chapter 15, must be deemed to refer to the CAS, and any other regulations promulgated by the CASB (see 48 CFR chapter 99, https://www.ecfr.gov/current/title-48/chapter-99), all of which are hereby incorporated in this part 30.

(c) (1) See 48 CFR 9903.201-7 for cognizant Federal agency responsibilities.

(2) The CFAO is responsible for issuing determinations of adequacy and compliance of the Disclosure Statement

(d) (1) See 48 CFR 9903.202-1 to 9903.202-7 for disclosure requirements.

(2) The cognizant auditor is responsible for conducting reviews of Disclosure Statements for adequacy and compliance.

(e) See 48 CFR 9903.3 for CAS rules and regulations.

(f) See 48 CFR 9904 for cost accounting standards.

(g) See 48 CFR 9905 for cost accounting standards for educational institutions.

Subpart 30.2 - Presolicitation

30.201 Applicability.

During acquisition planning the contracting officer must determine if the contract will be a CAS covered contract.

(a) Rules for determining applicability of CAS are found at 48 CFR 9903.201-1.

(b) CAS-covered contracts may be subject to either full or modified coverage. See 48 CFR 9903.201-2 for guidance on determining whether full or modified coverage applies.

(c) Negotiated contracts must be subject to CAS, unless exempt in accordance with 48 CFR 9903.201-1(b).

(d) In accordance with 41 U.S.C. 1502(b)(1)(B), the threshold for determining the tentative applicability of CAS at the contract level is the amount set forth in 10 U.S.C. 3702(a)(1)(A), as adjusted for inflation in accordance with 41 U.S.C. 1908. (See 48 CFR 9903.201-1)

30.202 Waiver.

(a) The head of the agency-

(1) May waive the applicability of CAS for a particular contract or subcontract under the conditions listed in paragraph (b) below; and

(2) Must not delegate this waiver authority to any official in the agency below the senior contract policymaking level.

(b) The head of the agency may grant a waiver when one of the following conditions exists:

(1) The contract or subcontract value is less than 15 million, and the head of the agency determines, in writing, that the segment of the contractor or subcontractor that will perform the contract or subcontract-

(i) Is primarily engaged in the sale of commercial products or commercial services; and

(ii) Has no contracts or subcontracts that are subject to CAS.

(2) The head of the agency determines that exceptional circumstances exist whereby a waiver of CAS is necessary to meet the needs of the agency. Exceptional circumstances exist only when the benefits to be derived from waiving the CAS outweigh the risk associated with the waiver. The determination that exceptional circumstances exist must-

(i) Be in writing; and

(ii) Include a statement of the specific circumstances that justify granting the waiver.

(c) When one of the conditions in paragraph (b) of this section exists, the request for waiver must include the following:

(1) The amount of the proposed award.

(2) The contract or subcontract type.

(3) Whether the segment(s) that will perform the contract or subcontract has CAS-covered contracts or subcontracts.

(4) A description of the item(s) being procured.

(5) A statement why the contractor or subcontractor will not accept the contract or subcontract if CAS applies.

(6) Whether certified cost or pricing data will be obtained, and if so, a discussion of how the data will be used in negotiating the contract or subcontract price.

(7) The benefits to the Government of waiving CAS.

(8) The potential risk to the Government of waiving CAS.

(9) The date by which the waiver is needed.

(10) Any other information that may be useful in evaluating the request.

(d) When neither of the conditions in paragraph (b) of this section exists, the waiver request must be prepared in accordance with 48 CFR 9903.201-5(e) and submitted to the CAS Board.

(e) Each agency must report any waivers granted under paragraph (a) of this subsection to the CAS Board, on a fiscal year basis, not later than 90 days after the close of the Government's fiscal year.

30.203 Exemption.

This part does not apply to sealed bid contracts or to contracts with a small business concern (see 48 CFR 9903.201-1(b) for these and other exemptions).

30.204 Solicitation provisions.

(a) Insert the provision at 52.230-1, Cost Accounting Standards Notices and Certification, in solicitations for proposed contracts subject to CAS as specified in 48 CFR 9903.201.

(b) Insert the provision at 52.230-7, Proposal Disclosure—Cost Accounting Practice Changes, in solicitations for contracts subject to CAS as specified in 48 CFR 9903.201.

30.205 Contract clauses.

(a) *Cost Accounting Standards*.

(1) Insert the clause at 52.230-2, Cost Accounting Standards, in negotiated contracts, unless the contract is exempted (see 48 CFR 9903.201-1), the contract is subject to modified coverage (see 48 CFR 9903.201-2), or the clause prescribed in paragraph (c) of this subsection is used.

(2) The clause at 52.230-2 requires the contractor to comply with all CAS specified in 48 CFR part 9904, to disclose actual cost accounting practices (applicable to CAS-covered contracts only), and to follow disclosed and established cost accounting practices consistently.

(b) *Disclosure and consistency of cost accounting practices*.

(1) Insert the clause at 52.230-3, Disclosure and Consistency of Cost Accounting Practices, in negotiated contracts when the contract amount is over $2.5 million but less than $50 million, and the offeror certifies it is eligible for and elects to use modified CAS coverage (see 48 CFR 9903.201-2), unless the clause prescribed in paragraph (c) of this subsection is used.

(2) The clause at 52.230-3 requires the contractor to comply with 48 CFR 9904.401, 9904.402, 9904.405, and 9904.406 to disclose (if it meets certain requirements) actual cost accounting practices, and to follow consistently its established cost accounting practices.

(c) *Disclosure and Consistency of Cost Accounting Practices—Foreign Concerns*.

(1) Insert the clause at 52.230-4, Disclosure and Consistency of Cost Accounting Practices—Foreign Concerns, in negotiated contracts with foreign concerns, unless the contract is otherwise exempt from CAS (see 48 CFR 9903.201-1). Foreign concerns do not include foreign governments or their agents or instrumentalities.

(2) The clause at 52.230-4 requires the contractor to comply with 48 CFR 9904.401 and 48 CFR 9904.402 to disclose (if it meets certain requirements) actual cost accounting practices, and to follow consistently its disclosed and established cost accounting practices.

(d) *Administration of Cost Accounting Standards*.

(1) Insert the clause at 52.230-6, Administration of Cost Accounting Standards, in contracts containing any of the clauses prescribed in paragraphs (a), (b), (c), or (e) of this subsection.

(2) The clause at 52.230-6 specifies rules for administering CAS requirements and procedures to be followed in cases of failure to comply.

(e) *Cost Accounting Standards—Educational Institutions*.

(1) Insert the clause at 52.230-5, Cost Accounting Standards—Educational Institution, in negotiated contracts awarded to educational institutions, unless the contract is exempted (see 48 CFR 9903.201-1), the contract is to be performed by an FFRDC (see 48 CFR 9903.201-2(c)(5)), or the provision at 48 CFR 9903.201-2(c)(6) applies.

(2) The clause at 52.230-5 requires the educational institution to comply with all CAS specified in 48 CFR part 9905, to disclose actual cost accounting practices as required by 48 CFR 9903.202-1(f), and to follow disclosed and established cost accounting practices consistently.

Subpart 30.3 - Evaluation and Award

30.301 Contractor disclosure statements.

Prior to awarding a CAS covered contract, the contracting officer must—

(a) Ensure that the offeror has made the required solicitation certifications and that the required Disclosure Statements are submitted (also see 48 CFR 9903.201-3 and 9903.202); and

(b) Have received from the CFAO a written determination that the submitted Disclosure Statement is adequate, subject to the exception below.

(1) In order to protect the Government's interest, the head of the agency, without power of delegation, may authorize proceeding with award prior to receiving submission of the required Disclosure Statement (see 48 CFR 9903.202-2).

(2) In this event, the contracting officer must ensure the contractor submits the required Disclosure Statement and the CFAO must make a determination of adequacy as soon as possible after the award.

30.302 Changes to disclosed or established cost accounting practices.

30.302-1 Required changes.

(a) *General*. Offerors must state whether or not the award of a contract would require a change to an established cost accounting practice affecting existing contracts and subcontracts (see 52.230-1). The contracting officer must notify the CFAO if the offeror states that a change in cost accounting practice would be required.

(b) *CFAO responsibilities*. Prior to making an equitable adjustment under the applicable paragraph(s) that address a required change at 52.230-2, Cost Accounting Standards; 52.230-3, Disclosure and Consistency of Cost Accounting Practices; or 52.230-5, Cost Accounting Standards—Educational Institution, the CFAO must determine that—

(1) The cost accounting practice change is required to comply with a CAS, or a modification or interpretation thereof, that subsequently became applicable to one or more contracts or subcontracts; or

(2) The former cost accounting practice was in compliance with applicable CAS and the change is necessary to remain in compliance.

(c) *Notice and proposal preparation*.

(1) When the award of a contract would require a change to an established cost accounting practice, the provision at 52.230-7, Proposal Disclosure—Cost Accounting Practice Changes, requires the offeror to—

(i) Prepare the contract pricing proposal in response to the solicitation using the changed cost accounting practice for the period of performance for which the practice will be used; and

(ii) Submit a description of the changed cost accounting practice to the contracting officer and the CFAO as pricing support for the proposal.

(2) When a change is required to remain in compliance (for reasons other than a contract award) or to comply with a new or modified standard, the clause at 52.230-6, Administration of Cost Accounting Standards, requires the contractor to—

(i) Submit a description of the change to the CFAO not less than 60 days (or other mutually agreeable date) before implementation of the change; and

(ii) Submit rationale to support any contractor written statement that the cost impact of the change is immaterial.

(d) *Equitable adjustments for new or modified standards*.

(1) Required changes made to comply with new or modified standards may require equitable adjustments, but only to those contracts awarded before the effective date of the new or modified standard (see 52.230-2, 52.230-3, or 52.230-5).

(2) When a contractor elects to implement a required change to comply with a new or modified standard prior to the applicability date of the standard, the CFAO must administer the change as a unilateral change (see 30.302-2). Contractors must not receive an equitable adjustment that will result in increased costs in the aggregate to the Government prior to the applicability date unless the CFAO determines that the unilateral change is a desirable change.

30.302-2 Unilateral and desirable changes.

(a) *Unilateral changes*.

(1) The contractor may unilaterally change its disclosed or established cost accounting practices, but the Government must not pay any increased cost, in the aggregate, as a result of the unilateral change.

(2) Prior to making any contract price or cost adjustments under the applicable paragraph(s) addressing a unilateral change at 52.230-2, 52.230-3, or 52.230-5, the CFAO must determine that—

(i) The contemplated contract price or cost adjustments will protect the Government from the payment of the estimated increased costs, in the aggregate; and

(ii) The net effect of the contemplated adjustments will not result in the recovery of more than the increased costs to the Government, in the aggregate.

(b) *Desirable changes*.

(1) Prior to taking action under the applicable paragraph(s) addressing a desirable change at 52.230-2, 52.230-3, or 52.230-5, the CFAO must determine the change is a desirable change and not detrimental to the interests of the Government.

(2) Until the CFAO has determined a change to a cost accounting practice is a desirable change, the change is a unilateral change.

(3) Some factors to consider in determining if a change is desirable include, but are not limited to, whether—

(i) The contractor must change the cost accounting practices it uses for Government contract and subcontract costing purposes to remain in compliance with the provisions of part 31;

(ii) The contractor is initiating management actions directly associated with the change that will result in cost savings for segments with CAS-covered contracts and subcontracts over a period for which forward pricing rates are developed or 5 years, whichever is shorter, and the cost savings are reflected in the forward pricing rates; and

(iii) Funds are available if the determination would necessitate an upward adjustment of contract cost or price.

(c) *Notice and proposal preparation*.

(1) When a contractor makes a unilateral change, the clause at 52.230-6, Administration of Cost Accounting Standards, requires the contractor to—

(i) Submit a description of the change to the CFAO not less than 60 days (or other mutually agreeable date) before implementation of the change; and

(ii) Submit rationale to support any contractor written statement that the cost impact of the change is immaterial.

(2) If a contractor implements the change in cost accounting practice without submitting the notice as required in paragraph (c)(1) of this subsection, the CFAO may determine the change a failure to follow a cost accounting practice consistently and process it as a noncompliance in accordance with 30.404.

(d) *Retroactive changes*.

(1) If a contractor requests that a unilateral change be retroactive, the contractor must submit supporting rationale.

(2) The CFAO must promptly evaluate the contractor's request and must, as soon as practical, notify the contractor in writing whether the request is or is not approved.

(3) The CFAO must not approve a date for the retroactive change that is before the beginning of the contractor's fiscal year in which the request is made.

(e) Contractor accounting changes due to external restructuring activities. The requirements for contract price and cost adjustments do not apply to compliant cost accounting practice changes that are directly associated with external restructuring activities that are subject to and meet the requirements of 10 U.S.C. 3761. However, the disclosure requirements in 52.230-6(b) must be followed.

30.302-3 Processing changes to disclosed or established cost accounting practices.

(a) Scope. This section applies to required, unilateral, and desirable changes in cost accounting practices.

(b) Procedures. Upon receipt of the contractor's notification and description of the change in cost accounting practice, the CFAO should review the proposed change concurrently for adequacy and compliance. The CFAO must—

(1) If the description of the change is both adequate and compliant, notify the contractor in writing and—

(i) For required or unilateral changes (except those requested to be determined desirable changes), request the contractor submit a general dollar magnitude (GDM) proposal by a specified date, unless the CFAO determines the cost impact is immaterial; or

(ii) For unilateral changes that the contractor requests to be determined desirable changes, inform the contractor that the request must include supporting rationale and—

(A) For any request based on the criteria in 30.302-2(b)(3)(ii), the data necessary to demonstrate the required cost savings; or

(B) For any request other than those based on the criteria in 30.302-2(b)(3)(ii), a GDM proposal and any other data necessary for the CFAO to determine if the change is a desirable change.

(2) If the description of the change is inadequate, request a revised description of the new cost accounting practice; and

(3) If the disclosed practice is noncompliant, notify the contractor in writing that, if implemented, the CFAO will determine the cost accounting practice to be noncompliant and process it accordingly.

(c) *Evaluating requests for desirable changes*.

(1) When a contractor requests a unilateral change be determined a desirable change, the CFAO must promptly evaluate the contractor's request and, as soon as practical, notify the contractor in writing whether the change is a desirable change or the request is denied.

(2) If the CFAO determines the change is a desirable change, the CFAO must negotiate any cost or price adjustments that may be needed to resolve the cost impact (see 30.405).

(3) If the request is denied, the change is a unilateral change and must be processed accordingly.

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Subpart 30.4 - Postaward

30.401 CAS administration.

(a) The CFAO must perform CAS administration for all contracts and subcontracts in a business unit, even when the contracting officer retains other administration functions. The CFAO must make all CAS-related required determinations and findings for all CAS-covered contracts and subcontracts, including—

(1) Whether a change in cost accounting practice or noncompliance has occurred; and

(2) If a change in cost accounting practice or noncompliance has occurred, how any resulting cost impacts are resolved.

(b) Within 30 days after the award of any new contract subject to CAS, the contracting officer making the award must request the CFAO to perform administration for CAS matters (see subpart 42). For subcontract awards, the contractor awarding the subcontract must follow the procedures at 52.230-6(l), (m), and (n).

(c) In performing CAS administration, the CFAO must request and consider the advice of the auditor as appropriate.

30.402 Materiality.

(a) In determining materiality, the CFAO must use the criteria in 48 CFR 9903.305.

(b) A CFAO determination of materiality—

(1) May be made before or after a general dollar magnitude proposal has been submitted, depending on the particular facts and circumstances; and

(2) Shall be based on adequate documentation.

(c) When the CFAO determines the cost impact is immaterial, the CFAO shall-

(1) Make no contract adjustments and conclude the cost impact process;

(2) Document the rationale for the determination; and

(3) In the case of noncompliance issues, inform the contractor that—

(i) The noncompliance should be corrected; and

(ii) If the noncompliance is not corrected, the Government reserves the right to make appropriate contract adjustments should the cost impact become material in the future.

(d) For required, unilateral, and desirable changes, and CAS noncompliances, when the amount involved is material, the CFAO must follow the applicable provisions in this part.

30.403 Changes to disclosed or established cost accounting practices.

(a) See subpart 30.3 above for required, unilateral, and desirable changes.

(b) *GDM proposal*.

(1) The GDM proposal—

(i) Provides information to the CFAO on the estimated overall impact of a change in cost accounting practice on affected CAS-covered contracts and subcontracts that were awarded based on the previous cost accounting practice;

(ii) Assists the CFAO in determining whether individual contract price or cost adjustments are required;

(iii) The contractor may submit a detailed cost-impact (DCI) proposal in lieu of a GDM proposal provided the DCI proposal is in accordance with paragraph (d) of this section;

(iv) Must calculate the cost impact in accordance with paragraph (e) of this section;

(v) May use one or more of the following methods to determine the increase or decrease in cost accumulations:

(A) A representative sample of affected CAS-covered contracts and subcontracts.

(B) The change in indirect rates multiplied by the total estimated base computed for each of the following groups:

(1) Fixed-price contracts and subcontracts.

(2) Flexibly-priced contracts and subcontracts.

(C) Any other method that provides a reasonable approximation of the total increase or decrease in cost accumulations for all affected fixed-price and flexibly-priced contracts and subcontracts.

(vi) May be in any format acceptable to the CFAO but, as a minimum, must include the following data: and

(A) A GDM estimate of the total increase or decrease in cost accumulations by Executive agency, including any impact the change may have on contract and subcontract incentives, fees, and profits, for each of the following groups:

(1) Fixed-price contracts and subcontracts.

(2) Flexibly-priced contracts and subcontracts.

(B) For unilateral changes, the increased or decreased costs to the Government for each of the following groups:

(1) Fixed-price contracts and subcontracts.

(2) Flexibly-priced contracts and subcontracts.

(vii) When requested by the CFAO, must identify all affected CAS-covered contracts and subcontracts.

(c) *GDM proposal evaluation*. The CFAO must promptly evaluate the GDM proposal. If the cost impact is immaterial, the CFAO must notify the contractor in writing and conclude the cost-impact process with no contract adjustments. Otherwise, the CFAO must—

(1) Negotiate and resolve the cost impact (see 30.405). If necessary, the CFAO may request that the contractor submit a revised GDM proposal by a specified date with specific additional data needed to resolve the cost impact; or

(2) Request that the contractor submit a DCI proposal by a specified date if the CFAO determines that the GDM proposal is not sufficient to resolve the cost impact.

(d) Detailed cost-impact proposal. If the contractor is required to submit a DCI proposal, the CFAO must promptly evaluate the DCI proposal and follow the procedures at 30.405 to negotiate and resolve the cost impact. The DCI proposal—

(1) Must calculate the cost impact in accordance with paragraph (e) of this section;

(2) Must show the estimated increase or decrease in cost accumulations for each affected CAS-covered contract and subcontract unless the CFAO and contractor agree to—

(i) Include only those affected CAS-covered contracts and subcontracts exceeding a specified amount; and

(ii) Estimate the total increase or decrease in cost accumulations for all affected CAS-covered contracts and subcontracts.

(3) May be in any format acceptable to the CFAO but, as a minimum, must include the requirements at paragraphs (b)(1)(vi) of this section; and

(4) When requested by the CFAO, must identify all affected contracts and subcontracts.

(e) Calculating cost impacts. The cost impact calculation must—

(1) Include all affected CAS-covered contracts and subcontracts regardless of their status or the fiscal year(s) in which the costs are incurred;

(2) Combine the cost impact for all affected CAS-covered contracts and subcontracts for all segments if the effect of a change results in costs flowing between those segments;

(3) For unilateral changes—

(i) Determine the increased or decreased cost to the Government for flexibly-priced contracts and subcontracts as follows:

(A) When the estimated cost to complete using the changed practice exceeds the estimated cost to complete using the current practice, the difference is increased cost to the Government.

(B) When the estimated costs to complete using the changed practice is less than the estimated cost to complete using the current practice, the difference is decreased cost to the Government.

(ii) Determine the increased or decreased cost to the Government for fixed-price contracts and subcontracts as follows:

(A) When the estimated cost to complete using the changed practice is less than the estimated cost to complete using the current practice, the difference is increased cost to the Government.

(B) When the estimated cost to complete using the changed practice exceeds the estimated cost to complete using the current practice, the difference is decreased cost to the Government.

(iii) Calculate the total increase or decrease in contract and subcontract incentives, fees, and profits associated with the increased or decreased cost to the Government in accordance with 48 CFR 9903.306(c). The associated increase or decrease is based on the difference between the negotiated incentives, fees, and profits and the amounts that would have been negotiated had the cost impact been known at the time the contracts and subcontracts were negotiated; and

(iv) Calculate the increased cost to the Government in the aggregate.

(4) For required or desirable changes, negotiate an equitable adjustment as provided in the Changes clause of the contract.

(f) Remedies. If the contractor does not submit the accounting change description or the proposals required in paragraph (b) or (d) of this section within the specified time, or any extension granted by the CFAO, the CFAO must—

(1) Estimate the GDM of the cost impact on affected CAS-covered contracts and subcontracts; and

(2) Take one or both of the following actions:

(i) Withhold an amount not to exceed 10 percent of each subsequent payment related to the contractor's CAS-covered contracts (up to the estimated GDM of the cost impact), until the contractor furnishes the required information.

(ii) Issue a final decision in accordance with part 33 and unilaterally adjust the contract(s) by the estimated amount of the cost impact.

30.404 Processing noncompliances.

(a) *General.* Prior to making any contract price or cost adjustments under the applicable paragraph(s) addressing noncompliance at 52.230-2, 52.230-3, or 52.230-5, the CFAO must determine that—

(1) The contemplated contract price or cost adjustments will protect the Government from the payment of increased costs, in the aggregate;

(2) The net effect of the contemplated contract price or cost adjustments will not result in the recovery of more than the increased costs to the Government, in the aggregate;

(3) The net effect of any invoice adjustments made to correct an estimating noncompliance will not result in the recovery of more than the increased costs paid by the Government, in the aggregate; and

(4) The net effect of any interim and final voucher billing adjustments made to correct a cost accumulation noncompliance will not result in the recovery of more than the increased cost paid by the Government, in the aggregate.

(b) Notice and determination. (1) Within 15 days of receiving a report of alleged noncompliance from the auditor, the CFAO must—

(i) Notify the auditor that the CFAO disagrees with the alleged noncompliance; or

(ii) Issue a notice of potential noncompliance to the contractor and provide a copy to the auditor.

(2) The notice of potential noncompliance must—

(i) Notify the contractor in writing of the exact nature of the noncompliance; and

(ii) Allow the contractor 60 days or other mutually agreeable date to-

(A) Agree or submit reasons why the contractor considers the existing practices to be in compliance; and

(B) Submit rationale to support any written statement that the cost impact of the noncompliance is immaterial.

(3) The CFAO must—

(i) If applicable, review the reasons why the contractor considers the existing practices to be compliant or the cost impact to be immaterial;

(ii) Make a determination of compliance or noncompliance consistent with part 1; and

(iii) Notify the contractor and the auditor in writing of the determination of compliance or noncompliance and the basis for the determination.

(4) If the CFAO makes a determination of noncompliance, the CFAO must follow the procedures in paragraphs (c) through (h) of this section, as appropriate, unless the CFAO also determines the cost impact is immaterial. If immaterial, the CFAO must—

(i) Inform the contractor in writing that-

(A) The noncompliance should be corrected; and

(B) If the noncompliance is not corrected, the Government reserves the right to make appropriate contract adjustments should the noncompliance become material in the future; and

(ii) Conclude the cost-impact process with no contract adjustments.

(c) Correcting noncompliances. (1) The clause at 52.230-6 requires the contractor to submit a description of any cost accounting practice change needed to correct a noncompliance within 60 days after the earlier of-

(i) Agreement with the CFAO that there is a noncompliance; or

(ii) Notification by the CFAO of a determination of noncompliance.

(2) The CFAO should review the proposed change to correct the noncompliance concurrently for adequacy and compliance. The CFAO must—

(i) When the description of the change is both adequate and compliant-

(A) Notify the contractor in writing;

(B) Request that the contractor submit by a specified date a GDM proposal, unless the CFAO determines the cost impact is immaterial; and

(C) Follow the procedures at paragraph (b)(4) of this section if the CFAO determines the cost impact is immaterial.

(ii) If the description of the change is inadequate, request a revised description of the new cost accounting practice; or

(iii) If the disclosed practice is noncompliant, notify the contractor in writing that, if implemented, the CFAO will determine the cost accounting practice to be noncompliant and process it accordingly.

(d) *GDM proposal content*. The GDM proposal-

(1) Must calculate the cost impact in accordance with paragraph (h) of this section;

(2) May use one or more of the following methods to determine the increase or decrease in contract and subcontract price or cost accumulations, as applicable:

(i) A representative sample of affected CAS-covered contracts and subcontracts affected by the noncompliance.

(ii) When the noncompliance involves cost accumulation, the change in indirect rates multiplied by the applicable base for flexibly-priced contracts and subcontracts.

(iii) Any other method that provides a reasonable approximation of the total increase or decrease in contract and subcontract prices and cost accumulations.

(3) The contractor may submit a DCI proposal in lieu of a GDM proposal provided the DCI proposal is in accordance with paragraph (f) of this section;

(4) May be in any format acceptable to the CFAO but, as a minimum, must include the following data: and

(i) The total increase or decrease in contract and subcontract prices and cost accumulations, as applicable, by Executive agency, including any impact the noncompliance may have on contract and subcontract incentives, fees, and profits, for each of the following groups:

(A) Fixed-price contracts and subcontracts.

(B) Flexibly-priced contracts and subcontracts.

(ii) The increased or decreased costs to the Government for each of the following groups:

(A) Fixed-price contracts and subcontracts.

(B) Flexibly-priced contracts and subcontracts.

(iii) The total overpayments and underpayments for fixed-price and flexibly-priced contracts made by the Government during the period of noncompliance.

(5) When requested by the CFAO, must identify all affected CAS-covered contracts and subcontracts.

(e) *GDM proposal evaluation.* The CFAO must promptly evaluate the GDM proposal. If the cost impact is immaterial, the CFAO must follow the requirements in paragraph (b)(4) of this section. Otherwise, the CFAO must—

(1) Negotiate and resolve the cost impact (see 30.405). If necessary, the CFAO may request the contractor submit a revised GDM proposal by a specified date, with specific additional data needed to resolve the cost impact; or

(2) Request that the contractor submit a DCI proposal by a specified date if the CFAO determines that the GDM proposal is not sufficient to resolve the cost impact.

(f) *Detailed cost-impact proposal.* If the contractor is required to submit a DCI proposal, the CFAO must promptly evaluate the DCI proposal and follow the procedures at 30.405 to negotiate and resolve the cost impact. The DCI proposal—

(1) Must calculate the cost impact in accordance with paragraph (h) of this section; and

(2) Must show the increase or decrease in price and cost accumulations, as applicable for each affected CAS-covered contract and subcontract unless the CFAO and contractor agree to—

(i) Include only those affected CAS-covered contracts and subcontracts having-

(A) Contract and subcontract values exceeding a specified amount when the noncompliance involves estimating costs; and

(B) Incurred costs exceeding a specified amount when the noncompliance involves accumulating costs; and

(ii) Estimate the total increase or decrease in price and cost accumulations for all affected CAS-covered contracts and subcontracts using the results in paragraph (f)(2)(i) of this section;

(3) May be in any format acceptable to the CFAO but, at a minimum, must include the information in paragraph (d)(4) of this section; and

(4) When requested by the CFAO, must identify all affected CAS-covered contracts and subcontracts.

(g) *Interest.* The CFAO must—

(1) Separately identify interest on any increased cost paid, in the aggregate, as a result of the noncompliance;

(2) Compute interest from the date of overpayment to the date of repayment using the rate specified in 26 U.S.C. 6621(a)(2).

(h) *Calculating cost impacts.* The cost impact calculation must—

(1) Include all affected CAS-covered contracts and subcontracts regardless of their status or the fiscal year in which the costs are incurred;

(2) Combine the cost impact for all affected CAS-covered contracts and subcontracts for all segments if the effect of a change results in costs flowing between those segments;

(3) For noncompliances that involve estimating costs, determine the increased or decreased cost to the Government for fixed-price contracts and subcontracts as follows:

(i) When the negotiated contract or subcontract price exceeds what the negotiated price would have been had the contractor used a compliant practice, the difference is increased cost to the Government.

(ii) When the negotiated contract or subcontract price is less than what the negotiated price would have been had the contractor used a compliant practice, the difference is decreased cost to the Government.

(4) For noncompliances that involve accumulating costs, determine the increased or decreased cost to the Government for flexibly-priced contracts and subcontracts as follows:

(i) Determine when the noncompliant practice was first implemented.

(ii) Determine when the noncompliant practice was replaced with a compliant practice.

(iii) Calculate the cost using the compliant practice for the same time period.

(iv) Calculate the difference between the noncompliant practice costs and the calculated compliant practice costs.

(5) Calculate the total increase or decrease in contract and subcontract incentives, fees, and profits associated with the increased or decreased costs to the Government in accordance with 48 CFR 9903.306(c). The associated increase or decrease is based on the difference between the negotiated incentives, fees, and profits and the amounts that would have been negotiated had the contractor used a compliant practice;

(6) Determine the cost impact of each noncompliance that affects both cost estimating and cost accumulation by combining the cost impacts in paragraphs (h)(3), (h)(4), and (h)(5) of this section;

(7) Calculate the increased cost to the Government in the aggregate; and

(8) If the contractor does not correct the noncompliance or submit the proposal required in paragraph (d) or (f) of this section within the specified time, or any extension granted by the CFAO, the CFAO must follow the procedures at section 30.302-3.

30.405 Resolving cost impacts.

(a) General. (1) The CFAO must coordinate with the affected contracting officers before negotiating and resolving the cost impact when the estimated cost impact is at least $100,000. The CFAO has the sole authority for negotiating and resolving the cost impact.

(2) The CFAO may resolve a cost impact attributed to a change in cost accounting practice or a noncompliance by adjusting a contract, some contracts, all contracts, or by any other allowed method.

(3) In resolving the cost impact, the CFAO—

(i) Must not combine the cost impacts of any of the following:

(A) A required change and a unilateral change.

(B) A required change and a noncompliance.

(C) A desirable change and a unilateral change.

(D) A desirable change and a noncompliance.

(ii) Must not combine the cost impacts of any of the following unless all of the cost impacts are increased costs to Government:

(A) One or more unilateral changes.

(B) One or more noncompliances.

(C) Unilateral changes and noncompliances.

(iii) May consider the cost impacts of a unilateral change affecting two or more segments to be a single change if—

(A) The change affects the flow of costs between segments; or

(B) It implements a common cost accounting practice for two or more segments.

(4) For desirable changes, the CFAO should consider the estimated cost impact of associated management actions on contract costs in resolving the cost impact.

(b) *Negotiations.* The CFAO must—

(1) Negotiate and resolve the cost impact on behalf of all Government agencies; and

(2) At the conclusion of negotiations, prepare a negotiation memorandum and send copies to the auditor and affected contracting officers.

(c) *Contract adjustments.* (1) The CFAO may adjust some or all contracts with a material cost impact, subject to the provisions in paragraphs (c)(2) through (c)(6) of this section.

(2) In selecting the contract or contracts to be adjusted, the CFAO should assure, to the maximum extent practical and subject to the provisions in paragraphs (c)(3) through (c)(6) of this section, that the adjustments reflect a *pro rata* share of the cost impact based on the ratio of the cost impact of each Executive agency to the total cost impact.

(3) For unilateral changes and noncompliances, the CFAO must—

(i) To the maximum extent practical, not adjust the price upward for fixed-price contracts;

(ii) If contract adjustments are made, prevent payment of aggregate increased costs by taking one or both of the following actions:

(A) Reduce the contract price on fixed-price contracts.

(B) Disallow costs on flexibly-priced contracts.

(iii) The CFAO may, after coordination with the affected contracting officers, increase or decrease individual contract prices, including contract cost ceilings or target costs on flexibly-priced contracts. In such cases, the CFAO must limit any upward contract price adjustments on affected contracts to the amount of downward price adjustments to other affected contracts (48 CFR 9903.201-6(b)).

(4) For noncompliances that involve estimating costs, the CFAO-

(i) Must, to the maximum extent practical, not adjust the price upward for fixed-price contracts;

(ii) Must, if contract adjustments are made, prevent payment of aggregate increased costs by reducing the contract price on fixed-price contracts;

(iii) May, after coordination with the affected contracting officers, increase or decrease individual contract prices, including cost ceilings or target costs on flexibly-priced contracts. In such cases, the CFAO must limit any upward contract price adjustments to affected contracts to the amount of downward price adjustments to other affected contracts, (48 CFR 9903.201-6(d));

(iv) Must require the contractor to correct the noncompliance, i.e., ensure that compliant cost accounting practices will now be utilized to estimate proposed contract costs; and

(v) Must require the contractor to adjust any invoices that were paid based on noncompliant contract prices to reflect the adjusted contract prices, after any contract price adjustments are made to resolve the noncompliance.

(5) For noncompliances that involve cost accumulation, the CFAO-

(i) Must require the contractor to—

(A) Correct noncompliant contract cost accumulations in the contractor's cost accounting records for affected contracts to reflect compliant contract cost accumulations; and

(B) Adjust interim payment requests and final vouchers to reflect the difference between the costs paid using the noncompliant practice and the costs that should have been paid using the compliant practice.

(ii) Must adjust contract prices. In adjusting contract prices, the CFAO must prevent payment of aggregate increased costs by disallowing costs on flexibly-priced contracts.

(A) The CFAO may, after coordination with the affected contracting officers, increase or decrease individual contract prices, including cost ceilings or target costs on flexibly-priced contracts. In such cases, the CFAO must limit any upward contract price adjustments to affected contracts to the amount of downward price adjustments to other affected contracts (48 CFR 9903.201-6(d)).

(B) Must require the contractor to—

(1) Correct contract cost accumulations in the contractor's cost accounting records to reflect the contract price adjustments; and

(2) Adjust interim payment requests and final vouchers to reflect the contract price adjustments.

(6) When contract adjustments are made, the CFAO must—

(i) Execute the bilateral modifications if the CFAO and contractor agree on the amount of the cost impact and the adjustments (see part 42); or

(ii) When the CFAO and contractor do not agree on the amount of the cost impact or the contract adjustments, issue a final decision in accordance with part 33 and unilaterally adjust the contract(s).

(d) *Alternate methods*. (1) The CFAO may use an alternate method instead of adjusting contracts to resolve the cost impact if the Government and contractor agree on the use of an alternate method.

(2) The CFAO may not use an alternate method when application of the alternate method would result in—

(i) The Government paying more, in the aggregate, than would be paid if the CFAO did not use the alternate method;

(ii) An under recovery of monies by the Government; or

(iii) Distortions of incentive provisions and relationships between target costs, ceiling costs, and actual costs for incentive type contracts.

(3) When using an alternate method that excludes the costs from an indirect cost pool, the CFAO must—
(i) Apply such exclusion only to the determination of final indirect cost rates (see part 42); and
(ii) Adjust the exclusion to reflect the Government participation rate for flexibly-priced contracts and subcontracts.

30.406 Subcontract administration.

When a negotiated CAS price adjustment or a determination of noncompliance is required at the subcontract level, the CFAO for the subcontractor must furnish a copy of the negotiation memorandum or the determination to the CFAO for the contractor of the next higher-tier subcontractor. The CFAO of the contractor or the next higher-tier subcontractor is not permitted to change such negotiation memorandum or determination. If the subcontractor refuses to submit a GDM or DCI proposal, contract remedies are made at the prime contractor level.

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PART 31 - CONTRACT COST PRINCIPLES AND PROCEDURES

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31.000 Scope of part.

This part contains cost principles and procedures for—

(a) The pricing of contracts, subcontracts, and modifications to contracts and subcontracts whenever cost analysis is performed (see 15.404-1(c)); and

(b) The determination, negotiation, or allowance of costs when required by a contract clause.

31.001 Applicability.

The cost principles and procedures in this part apply to contracts with—

(a) Commercial organizations;

(b) Educational institutions;

(c) Construction and architect-engineering;

(d) State, local, and federally recognized Indian tribal governments; and

(e) Nonprofit organizations.

31.002 Definitions.

As used in this part—

Accrued benefit cost method means an actuarial cost method under which units of benefits are assigned to each cost accounting period and are valued as they accrue; i.e., based on the services performed by each employee in the period involved. The measure of normal cost under this method for each cost accounting period is the present value of the units of benefit deemed to be credited to employees for service in that period. The measure of the actuarial accrued liability at a plan's inception date is the present value of the units of benefit credited to employees for service prior to that date. (This method is also known as the unit credit cost method without salary projection.)

Actual costs means (except for subpart 31.6) amounts determined on the basis of costs incurred, as distinguished from forecasted costs. Actual costs include standard costs properly adjusted for applicable variances.

Actuarial accrued liability means pension cost attributable, under the actuarial cost method in use, to years prior to the current period considered by a particular actuarial valuation. As of such date, the actuarial accrued liability represents the excess of the present value of future benefits and administrative expenses over the present value of future normal costs for all plan participants and beneficiaries. The excess of the actuarial accrued liability over the actuarial value of the assets of a pension plan is the unfunded actuarial liability. The excess of the actuarial value of the assets of a pension plan over the actuarial accrued liability is an actuarial surplus and is treated as a negative unfunded actuarial liability.

Actuarial assumption means an estimate of future conditions affecting pension cost; *e.g.,* mortality rate, employee turnover, compensation levels, earnings on pension plan assets, and changes in values of pension plan assets.

Actuarial cost method means a technique which uses actuarial assumptions to measure the present value of future pension benefits and pension plan administrative expenses, and that assigns the cost of such benefits and expenses to cost accounting periods. The actuarial cost method includes the asset valuation method used to determine the actuarial value of the assets of a pension plan.

Actuarial gain and loss means the effect on pension cost resulting from differences between actuarial assumptions and actual experience.

Actuarial valuation means the determination, as of a specified date, of the normal cost, actuarial accrued liability, actuarial value of the assets of a pension plan, and other relevant values for the pension plan.

Allocate means to assign an item of cost, or a group of items of cost, to one or more cost objectives. This term includes both direct assignment of cost and the reassignment of a share from an indirect cost pool.

Compensation for personal services means all remuneration paid currently or accrued, in whatever form and whether paid immediately or deferred, for services rendered by employees to the contractor.

Cost input means the cost, except general and administrative (G&A) expenses, which for contract costing purposes is allocable to the production of goods and services during a cost accounting period.

Cost objective means (except for subpart 31.6) a function, organizational subdivision, contract, or other work unit for which cost data are desired and for which provision is made to accumulate and measure the cost of processes, products, jobs, capitalized projects, etc.

Deferred compensation means an award made by an employer to compensate an employee in a future cost accounting period or periods for services rendered in one or more cost accounting periods before the date of the receipt of compensation by the employee. This definition must not include the amount of year end accruals for salaries, wages, or bonuses that are to be paid within a reasonable period of time after the end of a cost accounting period.

Defined-benefit pension plan means a pension plan in which the benefits to be paid, or the basis for determining such benefits, are established in advance and the contributions are intended to provide the stated benefits.

Defined-contribution pension plan means a pension plan in which the contributions to be made are established in advance and the benefits are determined thereby.

Directly associated cost means any cost which is generated solely as a result of the incurrence of another cost, and which would not have been incurred had the other cost not been incurred.

Estimating costs means the process of forecasting a future result in terms of cost, based upon information available at the time.

Expressly unallowable cost means a particular item or type of cost which, under the express provisions of an applicable law, regulation, or contract, is specifically named and stated to be unallowable.

Final cost objective means (except for subparts 31.3 and 31.6) a cost objective that has allocated to it both direct and indirect costs and, in the contractor's accumulation system, is one of the final accumulation points.

Fiscal year means the accounting period for which annual financial statements are regularly prepared, generally a period of 12 months, 52 weeks, or 53 weeks.

Funded in regard to a pension cost means the portion of pension cost for a current or prior cost accounting period that has been paid to a funding agency.

Home office means an office responsible for directing or managing two or more, but not necessarily all, segments of an organization. It typically establishes policy for, and provides guidance to, the segments in their operations. It usually performs management, supervisory, or administrative functions, and may also perform service functions in support of the operations of the various segments. An organization which has intermediate levels, such as groups, may have several home offices which report to a common home office. An intermediate organization may be both a segment and a home office.

Immediate-gain actuarial cost method means any of the several actuarial cost methods under which actuarial gains and losses are included as part of the unfunded actuarial liability of the pension plan, rather than as part of the normal cost of the plan.

Independent research and development (IR&D) cost means the cost of effort which is neither sponsored by a grant, nor required in performing a contract, and which falls within any of the following four areas:

(1) Basic research;

(2) Applied research;

(3) Development; and

(4) Systems and other concept formulation studies.

Indirect cost pools means (except for subparts 31.3 and 31.6) groupings of incurred costs identified with two or more cost objectives but not identified specifically with any final cost objective.

Insurance administration expenses means the contractor's costs of administering an insurance program; *e.g.,* the costs of operating an insurance or risk-management department, processing claims, actuarial fees, and service fees paid to insurance companies, trustees, or technical consultants.

Intangible capital asset means an asset that has no physical substance, has more than minimal value, and is expected to be held by an enterprise for continued use or possession beyond the current accounting period for the benefits it yields.

Job means a homogeneous cluster of work tasks, the completion of which serves an enduring purpose for the organization. Taken as a whole, the collection of tasks, duties, and responsibilities constitutes the assignment for one or more individuals whose work is of the same nature and is performed at the same skill/responsibility level-as opposed to a position, which is a collection of tasks assigned to a specific individual. Within a job, there may be pay categories which are dependent on the degree of supervision required by the employee while performing assigned tasks which are performed by all persons with the same job.

Job class of employees means employees performing in positions within the same job.

Nonqualified pension plan means any pension plan other than a qualified pension plan as defined in this part.

Normal cost means the annual cost attributable, under the actuarial cost method in use, to current and future years as of a particular valuation date excluding any payment in respect of an unfunded actuarial liability.

Pay-as-you-go cost method means a method of recognizing pension cost only when benefits are paid to retired employees or their beneficiaries.

Pension plan means a deferred compensation plan established and maintained by one or more employers to provide systematically for the payment of benefits to plan participants after their retirements, provided that the benefits are paid for life or are payable for life at the option of the employees. Additional benefits such as permanent and total disability and death payments, and survivorship payments to beneficiaries of deceased employees, may be an integral part of a pension plan.

Pension plan participant means any employee or former employee of an employer or any member or former member of an employee organization, who is or may become eligible to receive a benefit from a pension plan which covers employees of such employer or members of such organization who have satisfied the plan's participation requirements, or whose beneficiaries are receiving or may be eligible to receive any such benefit. A participant whose employment status with the employer has not been terminated is an active participant of the employer's pension plan.

Profit center means (except for subparts 31.3 and 31.6) the smallest organizationally independent segment of a company charged by management with profit and loss responsibilities.

Projected benefit cost method means either-

(1) Any of the several actuarial cost methods that distribute the estimated total cost of all of the employees' prospective benefits over a period of years, usually their working careers; or

(2) A modification of the accrued benefit cost method that considers projected compensation levels.

Proposal means any offer or other submission used as a basis for pricing a contract, contract modification, or termination settlement or for securing payments thereunder.

Qualified pension plan means a pension plan comprising a definite written program communicated to and for the exclusive benefit of employees that meets the criteria deemed essential by the Internal Revenue Service as set forth in the Internal Revenue Code for preferential tax treatment regarding contributions, investments, and distributions. Any other plan is a nonqualified pension plan.

Self-insurance charge means a cost which represents the projected average loss under a self-insurance plan.

Service life means the period of usefulness of a tangible capital asset (or group of assets) to its current owner. The period may be expressed in units of time or output. The estimated service life of a tangible capital asset (or group of assets) is a current forecast of its service life and is the period over which depreciation cost is to be assigned.

Spread-gain actuarial cost method means any of the several projected benefit actuarial cost methods under which actuarial gains and losses are included as part of the current and future normal costs of the pension plan.

Standard cost means any cost computed with the use of preestablished measures.

Tangible capital asset means an asset that has physical substance, more than minimal value, and is expected to be held by an enterprise for continued use or possession beyond the current accounting period for the services it yields.

Variance means the difference between a preestablished measure and an actual measure.

Welfare benefit fund means a trust or organization which receives and accumulates assets to be used either for the payment of postretirement benefits, or for the purchase of such benefits, provided such accumulated assets form a part of a postretirement benefit plan.

31.003 Availability of accounting guide.

Contractors needing assistance in developing or improving their accounting systems and procedures may request a copy of the Defense Contract Audit Agency Pamphlet No. 7641.90, Information for Contractors at http://www.dcaa.mil.

31.004 Deviations.

(a) *Civilian agencies*.

(1) Individual deviations from the cost principles in this part require approval by the agency head.

(2) Class deviations from the cost principles in this part require approval by the Civilian Agency Acquisition Council.

(b) *DoD and NASA*. See agency supplements for the approval of deviations from the cost principles in this part.

Subpart 31.1 - Applicability

31.100 Scope of subpart.

(a) This subpart describes the applicability of cost principles and procedures to various types of contracts and subcontracts and are grouped by organization type (e.g., commercial, nonprofit, and educational institutions).

(b) This subpart also describes advance agreements, the requirement for certification of indirect cost rates, and penalties on certain unallowable costs.

31.101 [Reserved]

31.102 Fixed-price contracts.

(a) The applicable subparts of part 31 must be used in the pricing of fixed-price contracts, subcontracts, and modifications to contracts and subcontracts whenever—

(1) Cost analysis is performed, or

(2) A fixed-price contract clause requires the determination or negotiation of costs.

(b) (1) The application of cost principles to fixed-price contracts and subcontracts must not be construed as a requirement to negotiate agreements on individual elements of cost in arriving at agreement on the total price.

(2) The final price accepted by the parties reflects agreement only on the total price.

31.103 Contracts with commercial organizations.

This category includes contracts, subcontracts, and modifications to contracts and subcontracts negotiated with organizations other than educational institutions (see 31.104), construction and architect-engineer contracts (see 31.105), State and local governments (see 31.107) and nonprofit organizations (see 31.108) on the basis of cost.

(a) The cost principles and procedures in subpart 31.2 must be used in pricing negotiated contracts and contract modifications with commercial organizations whenever cost analysis is performed as required by 15.404-1(c).

(b) The contracting officer must incorporate the cost principles and procedures in subpart 31.2 by reference in contracts with commercial organizations as the basis for—

(1) Determining reimbursable costs under—-

(i) Cost-reimbursement contracts and cost-reimbursement subcontracts under contracts performed by commercial organizations; and

(ii) The cost-reimbursement portion of time-and-materials contracts except when material is priced on a basis other than at cost (see 16.601(c)(3));

(2) Negotiating indirect cost rates (see subpart 42.7);

(3) Proposing, negotiating, or determining costs under terminated contracts (see 49.103 and 49.113);

(4) Price revision of fixed-price incentive contracts (see 16.204 and 16.403);

(5) Price redetermination of price redetermination contracts (see 16.205 and 16.206); and

(6) Pricing changes and other contract modifications.

31.104 Contracts with educational institutions.

This category includes contracts, subcontracts, and modifications to contracts and subcontracts performed by educational institutions (defined as institutions of higher educations in the OMB Uniform Guidance at 2 CFR part 200, subpart A, and 20 U.S.C. 1001).

(a) The contracting officer must incorporate the cost principles and procedures in subpart 31.3 by reference in cost-reimbursement contracts with educational institutions as the basis for—

(1) Determining reimbursable costs under cost-reimbursement contracts and cost-reimbursement subcontracts performed by educational institutions;

(2) Negotiating indirect cost rates; and

(3) Settling costs of cost-reimbursement terminated contracts (see subpart 49.3 and 49.109-7).

(b) The cost principles in this subpart are to be used as a guide in evaluating costs in connection with negotiating fixed-price contracts and termination settlements.

31.105 Construction and architect-engineer contracts.

(a) This category includes all contracts and contract modifications negotiated on the basis of cost with organizations other than educational institutions (see 31.104), State and local governments (see 31.107), and nonprofit organizations except those exempted under OMB Uniform Guidance at 2 CFR part 200, appendix VIII (see 31.108) for construction management or construction, alteration or repair of buildings, bridges, roads, or other kinds of real property. It also includes architect-engineer contracts related to construction projects. It does not include contracts for vessels, aircraft, or other kinds of personal property.

(b) *Definition*.

Construction equipment, as used in this section, means equipment (including marine equipment) in sound workable condition, either owned or controlled by the contractor or the subcontractor at any tier, or obtained from a commercial rental source, and furnished for use under Government contracts.

(c) Except as specified in paragraph (d) of this section, the cost principles and procedures in subpart 31.2 must be used in the pricing of contracts and contract modifications in this category if cost analysis is performed as required by 15.404-1(c).

(d) The contracting officer must incorporate by reference the cost principles and procedures in subpart 31.2 (as modified by paragraph (d) of this section) in contracts in this category as the basis for—

(1) Determining reimbursable costs under cost-reimbursement contracts and subcontracts;

(2) Negotiating indirect cost rates;

(3) Proposing, negotiating, or determining costs under terminated contracts;

(4) Price revision of fixed-price incentive contracts; and

(5) Pricing changes and other contract modifications.

(e) (1) The allowability of costs for construction and architect-engineer contracts must be determined in accordance with subpart 31.2 except as follows:

(i) When an advance agreement is used to address costs, such as home office overhead, partner's compensation, employment of consultants, and equipment usage costs due to varying factors of construction projects (see 31.110).

(ii) Allowable ownership and operating costs of construction equipment must be determined as follows:

(A) Actual cost data must be used when such data can be determined for both ownership and operating costs for each piece of equipment, or groups of similar serial or series equipment, from the contractor's accounting records.

(B) When actual cost data cannot be determined, the contracting officer may specify the use of a particular schedule of predetermined rates or any part thereof to determine ownership and operating costs of construction equipment.

(C) Costs otherwise unallowable under this part must not become allowable through the use of an advance agreement (see 31.110(c)) (e.g., schedules need to be adjusted for Government contract costing purposes if they are based on replacement cost, include unallowable interest costs, or use improper cost of money rates or computations).

(D) Contracting officers should review the computations and factors included within the specified schedule and ensure that unallowable or unacceptably computed factors are not allowed in cost submissions.

(E) Predetermined schedules of construction equipment use rates (e.g., the Construction Equipment Ownership and Operating Expense Schedule published by the U.S. Army Corps of Engineers, industry sponsored construction equipment cost guides, or commercially published schedules of construction equipment use cost) provide average ownership and operating rates for construction equipment.

(1) The allowance for ownership costs should include the cost of depreciation and may include facilities capital cost of money.

(2) The allowance for operating costs may include costs for such items as fuel, filters, oil, and grease; servicing, repairs, and maintenance; and tire wear and repair.

(3) Costs of labor, mobilization, demobilization, overhead, and profit are generally not reflected in schedules, and separate consideration may be necessary.

(F) When a schedule of predetermined use rates for construction equipment is used to determine direct costs, all costs of equipment that are included in the cost allowances provided by the schedule must be identified and eliminated from the contractor's other direct and indirect costs charged to the contract.

(1) If the contractor's accounting system provides for site or home office overhead allocations, all costs which are included in the equipment allowances may need to be included in any cost input base before computing the contractor's overhead rate.

(2) In periods of suspension of work pursuant to a contract clause, the allowance for equipment ownership must not exceed an amount for standby cost as determined by the schedule or contract provision.

(iii) The following costs of renting construction equipment must be treated as follows:

(A) Costs, such as maintenance and minor or running repairs incident to operating such rented equipment, that are not included in the rental rate are allowable.

(B) Costs incident to major repair and overhaul of rental equipment are unallowable.

(C) The allowability of charges for construction equipment rented from any division, subsidiary, or organization under common control, will be determined in accordance with 31.205-36(b)(3) and (b)(4).

(2) Costs incurred, at the job site, in performance of the work, such as the cost of superintendence, timekeeping and clerical work, engineering, utility costs, supplies, material handling, restoration and cleanup, etc., are allowable as direct or indirect costs, provided the accounting practice used is in accordance with the contractor's established and consistently followed cost accounting practices for all work.

(3) Rental and any other costs, less any applicable credits, incurred in acquiring the temporary use of land, structures, and facilities are allowable.

(4) Costs, less any applicable credits, incurred in constructing or fabricating structures and facilities of a temporary nature are allowable.

31.106 [Reserved]

31.107 Contracts with State, local, and federally recognized Indian tribal governments.

(a) Subpart 31.6 provides principles and standards for determining costs applicable to contracts, subcontracts, and modifications to contracts and subcontracts with State, local, and federally recognized Indian tribal governments. They apply to contracts with State, local, and federally recognized Indian tribal governments, except contracts with—

(1) Publicly financed educational institutions subject to subpart 31.3; and

(2) Publicly owned hospitals and other providers of medical care subject to requirements promulgated by the sponsoring Government agencies.

(b) The Office of Management and Budget (OMB) will approve any other exceptions in particular cases when adequate justification is presented.

31.108 Contracts with nonprofit organizations.

Subpart 31.7 provides principles and standards for determining costs applicable to contracts and contract modifications with nonprofit organizations other than educational institutions (see subpart 31.3), State and local governments (see subpart 31.6), and those nonprofit organizations exempted under the OMB Uniform Guidance at 2 CFR part 200, appendix VIII (see subpart 31.2 for the cost principles applicable to nonprofit organizations exempt from the cost principles in the OMB Uniform Guidance at 2 CFR part 200).

31.109 Indirect cost rate certification and penalties on unallowable costs.

(a) Certain contracts require certification of the indirect cost rates proposed for final payment purposes (see 42.703-2).

(b) If unallowable costs are included in final indirect cost settlement proposals, penalties may be assessed (see 42.703-2 and 42.709).

31.110 Advance agreements.

(a) To avoid possible subsequent disallowance or dispute based on reasonableness, allocability, or allowability of costs under the specific cost principles at subparts 31.2, 31.3, 31.6, and 31.7, contracting officers should seek an advance agreement on the treatment of special or unusual costs and on statistical sampling methodologies at 31.201-6(c).

(b) Advance agreements may be useful for—

(1) Compensation for personal services, including but not limited to allowances for off-site pay, incentive pay, location allowances, hardship pay, cost of living differential, and termination of defined benefit pension plans;

(2) Use charges for fully depreciated assets;

(3) Deferred maintenance costs;

(4) Precontract costs;

(5) Independent research and development and bid and proposal costs;

(6) Royalties and other costs for use of patents;

(7) Selling and distribution costs;

(8) Travel and relocation costs, as related to special or mass personnel movements, as related to travel via contractor-owned, -leased, or -chartered aircraft, or as related to maximum per diem rates;

(9) Costs of idle facilities and idle capacity;

(10) Severance pay to employees on support service contracts;

(11) Plant reconversion;

(12) Professional services (e.g., legal, accounting, and engineering);

(13) General and administrative costs (e.g., corporate, division, or branch allocations) attributable to the general management, supervision, and conduct of the contractor's business as a whole. These costs are particularly significant in construction, jobsite, architect-engineer, facilities, and Government-owned contractor operated (GOCO) plant contracts (see 31.203(h));

(14) Costs of construction plant and equipment (see 31.105);

(15) Costs of public relations and advertising; and

(16) Statistical sampling methods (see 31.201-6(c)(4)).

(c) The contracting officer is not authorized to agree to a treatment of costs inconsistent with this part. For example, an advance agreement may not provide that, notwithstanding 31.205-20, interest is allowable.

(d) Advance agreements may be negotiated before or after contract award but should be negotiated before the contractor incurs costs associated with the advance agreement.

(e) The cognizant ACO, or other contracting officer established in part 42, must negotiate advance agreements when—

(1) Negotiation authority is delegated to the administrative contracting officer (ACO); or

(2) The advance agreement affects more than one contracting office or more than one agency.

(f) The ACO must coordinate the proposed agreement with the contracting officer before executing the advance agreement.

(g) Unless delegated to the ACO, the contracting officer may negotiate an advance agreement affecting one or more contracts for a single contracting office.

(h) Before negotiating an advance agreement—

(1) Determine if other contracting offices have a significant unliquidated dollar balance in contracts with the same contractor;

(2) Inform any such office or agency of the matters under consideration for negotiation; and

(3) As appropriate, invite the office or agency and the responsible audit agency to participate in prenegotiation discussions and/or subsequent negotiations.

(i) Advance agreements must be in writing, include a statement regarding applicability and duration and be—

(1) Bilateral; and

(2) Incorporated into the applicable current and future contract(s).

(j) Advance agreements and a memorandum providing the information specified in 15.406-3 must be distributed to the cognizant audit agency, ACO, and other contracting officers, as applicable.

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Subpart 31.2 - Contracts with Commercial Organizations

31.201 General.

31.201-1 Composition of total cost.

(a) (1) The total cost, including standard costs properly adjusted for applicable variances, of a contract is the sum of the direct and indirect costs allocable to the contract, incurred or to be incurred, plus any allocable cost of money pursuant to 31.205-10, less any allocable credits.

(2) In determining what constitutes a cost, any generally accepted method of determining or estimating costs that is equitable and consistently applied may be used.

(b) While the total cost of a contract includes all costs properly allocable to the contract, the allowable costs to the Government are limited to those allocable costs that are allowable pursuant to this part.

31.201-2 Determining allowability.

(a) A cost is allowable only when the cost complies with all of the following requirements:

(1) Reasonableness.

(2) Allocability.

(3) Standards promulgated by the Cost Accounting Standards (CAS) Board, if applicable, otherwise, generally accepted accounting principles and practices appropriate to the circumstances.

(4) Terms of the contract.

(5) Any limitations set forth in this subpart.

(b) (1) Certain cost principles in this subpart incorporate the measurement, assignment, and allocability rules of selected CAS and limit the allowability of costs to the amounts determined using the criteria in those selected standards.

(2) Only those CAS or portions of standards specifically made applicable by the cost principles in this subpart are mandatory unless the contract is CAS-covered (see 48 CFR chapter 99).

(3) Business units that are not otherwise subject to these standards under a CAS clause are subject to the selected standards only for the purpose of determining allowability of costs on Government contracts.

(4) Including the selected standards in the cost principles does not subject the business unit to any other CAS regulations.

(5) The applicability of the CAS regulations is determined by the CAS clause, if any, in the contract and the requirements of the standards themselves.

(c) When contractor accounting practices are inconsistent with subpart 31.2, costs resulting from such inconsistent practices that exceed the amount that would have resulted from using practices consistent with this subpart are unallowable.

(d) (1) A contractor is responsible for accounting for costs appropriately and for maintaining records, including supporting documentation, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with applicable cost principles in this subpart.

(2) The contracting officer may disallow all or part of a claimed cost that is inadequately supported.

31.201-3 Determining reasonableness.

(a) A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a reasonable person in the conduct of competitive business.

(1) No presumption of reasonableness must be attached to the incurrence of costs.

(2) If the contracting officer, or the contracting officer’s representative, challenges a specific cost, the burden of proof is on the contractor to prove that the cost is reasonable.

(b) Determining cost reasonableness depends on a number of factors, including—

(1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or contract performance;

(2) Generally accepted sound business practices, arm's length bargaining, and Federal and State laws and regulations;

(3) The contractor's responsibilities to the Government, other customers, the owners of the business, employees, and the public at large; and

(4) Any significant deviations from the contractor's established practices.

(c) Reasonableness of specific costs must be examined with particular care in connection with firms or their separate divisions that may not be subject to effective competitive restraints.

31.201-4 Determining allocability.

A cost is allocable to a Government contract if it—

(a) Is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship;

(b) Is incurred specifically for the contract;

(c) Benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or

(d) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

31.201-5 Credits.

(a) A credit (e.g., income, rebate, or allowance) relating to an allowable cost under a cost contract, received by or accruing to the contractor, must be credited to the Government.

(b) The credit must be a cost reduction to the contract or a cash refund. (See 31.105-6(i)(3) for pension adjustments and asset reversions).

31.201-6 Accounting for unallowable costs.

(a) Expressly unallowable costs or mutually agreed to be unallowable costs (including mutually agreed to be unallowable directly associated costs) must be identified and excluded from any billing, claim, or proposal applicable to a Government contract.

(1) A directly associated cost is any cost that is generated solely as a result of incurring another cost, and that would not have been incurred had the other cost not been incurred.

(2) When an unallowable cost is incurred, its directly associated costs are also unallowable.

(b) (1) Costs that specifically become designated as unallowable or as unallowable directly associated costs of unallowable costs as a result of a written decision furnished by a contracting officer must be identified if included in or used in computing any billing, claim, or proposal applicable to a Government contract.

(2) This identification requirement also applies to any costs incurred for the same purpose under like circumstances as the costs specifically identified as unallowable under paragraph (a) or (b) of this section.

(c) (1) The practices for accounting for and the presentation of unallowable costs must be in accordance with those described in 48 CFR 9904.405.

(2) Statistical sampling is an acceptable practice for contractors to follow in accounting for and presenting unallowable costs, provided the following criteria are met:

(i) The statistical sampling results in an unbiased sample that is a reasonable representation of the sampling universe.

(ii) Any large dollar value or high risk transaction is separately reviewed for unallowable costs and excluded from the sampling process.

(iii) The statistical sampling permits audit verification.

(3) For any indirect cost in the selected sample that is subject to the penalty provisions at 42.709, the amount projected to the sampling universe from that sampled cost is also subject to the same penalty provisions.

(4) Use of statistical sampling methods for identifying and segregating unallowable costs should be the subject of an advance agreement (see 31.110).

(i) The advance agreement should specify the basic characteristics of the sampling process.

(ii) The cognizant administrative contracting officer (ACO) or Federal official must request input from the cognizant auditor before entering into any such agreements.

(5) In the absence of an advance agreement, if an initial review of the facts results in a challenge of the statistical sampling methods by the contracting officer or the contracting officer's representative, the burden of proof must be on the contractor to establish that such a method meets the criteria in paragraph (c)(2) of this section.

(d) If a directly associated cost is included in a cost pool that is allocated over a base that includes the unallowable cost with which it is associated, the directly associated cost must remain in the cost pool.

(1) Since the unallowable costs will attract their allocable share of costs from the cost pool, no further action is required to assure disallowance of the directly associated costs.

(2) In all other cases, the directly associated costs, if material in amount, must be purged from the cost pool as unallowable costs.

(e) (1) In determining the materiality of a directly associated cost, consideration should be given to the significance of the —

(i) Actual dollar amount,

(ii) Cumulative effect of all directly associated costs in a cost pool, and

(iii) Ultimate effect on the cost of Government contracts.

(2) Salary expenses of employees who participate in activities that generate unallowable costs must be treated as directly associated costs to the extent of the time spent on the proscribed activity, provided the costs are material in accordance with paragraph (e)(1) of this section (except when such salary expenses are unallowable).

(i) The time spent on proscribed activities should be compared to total time spent on company activities to determine if the costs are material.

(ii) Time spent by employees outside the normal working hours should not be considered except when it is evident that an employee engages so frequently in company activities during periods outside normal working hours as to indicate that such activities are a part of the employee's regular duties.

(3) When a selected item of cost at 31.205 provides that directly associated costs be unallowable, such directly associated costs are unallowable only if determined to be material in amount in accordance with the criteria provided in paragraphs (e)(1) and (e)(2) of this section, except in those situations where allowance of any of the directly associated costs involved would be considered to be contrary to public policy.

31.201-7 Construction and architect-engineer contracts.

Specific principles and procedures for evaluating and determining costs in connection with contracts and subcontracts for construction and architect-engineer contracts related to construction projects are in 31.105.

31.202 Direct costs.

(a) (1) No final cost objective must have allocated to it as a direct cost any cost, if other costs incurred for the same purpose in like circumstances have been included in any indirect cost pool to be allocated to that or any other final cost objective.

(2) Direct costs of the contract must be charged directly to the contract.

(3) All costs specifically identified with other final cost objectives of the contractor are direct costs of those cost objectives and are not to be charged to the contract directly or indirectly.

(b) For reasons of practicality, the contractor may treat any direct cost of a minor dollar amount as an indirect cost if the accounting treatment—

(1) Is consistently applied to all final cost objectives; and

(2) Produces substantially the same results as treating the cost as a direct cost.

31.203 Indirect costs.

(a) (1) For contracts subject to full CAS coverage, allocation of indirect costs must be based on the applicable CAS regulations.

(2) For all other contracts, paragraphs (b) through (h) of this section apply.

(b) (1) After direct costs have been determined and charged directly to the contract or other work, indirect costs are those remaining to be allocated to intermediate or two or more final cost objectives.

(2) No final cost objective must have allocated to it as an indirect cost any cost, if other costs incurred for the same purpose, in like circumstances, have been included as a direct cost of that or any other final cost objective.

(c) (1) The contractor must accumulate indirect costs by logical cost groupings with due consideration of the reasons for incurring such costs.

(2) The contractor must determine each grouping so as to permit use of an allocation base that is common to all cost objectives to which the grouping is to be allocated.

(3) The base selected must allocate the grouping on the basis of the benefits accruing to intermediate and final cost objectives.

(4) When substantially the same results can be achieved through less precise methods, the number and composition of cost groupings should be governed by practical considerations and should not unduly complicate the allocation.

(d) (1) Once an appropriate base for allocating indirect costs has been accepted, the contractor must not fragment the base by removing individual elements.

(2) All items properly includable in an indirect cost base must bear a pro rata share of indirect costs irrespective of their acceptance as Government contract costs (*e.g.*, when a cost input base is used for the allocation of general and administrative (G&A) costs, the contractor must include in the base all items that would properly be part of the cost input base, whether allowable or unallowable, and these items must bear their pro rata share of G&A costs).

(e) The method of allocating indirect costs may require revision when there is a significant change in the nature of the business, the extent of subcontracting, fixed-asset improvement programs, inventories, the volume of sales and production, manufacturing processes, the contractor's products, or other relevant circumstances.

(f) Separate cost groupings for costs allocable to offsite locations may be necessary to permit equitable distribution of costs on the basis of the benefits accruing to the several cost objectives.

(g) A base period for allocating indirect costs is the cost accounting period during which such costs are incurred and accumulated for allocation to work performed in that period.

(1) For contracts subject to full or modified CAS coverage, the contractor shall follow the criteria and guidance in 48 CFR 9904.406 for selecting the cost accounting periods to be used in allocating indirect costs.

(2) The base period for allocating indirect costs must be the contractor's fiscal year used for financial reporting purposes in accordance with generally accepted accounting principles.

(3) The fiscal year will normally be 12 months, but a different period may be appropriate (e.g., when a change in fiscal year occurs due to a business combination or other circumstances).

(h) Special care should be exercised in applying the principles of paragraphs (c), (d), and (e) of this section when Government-owned contractor-operated (GOCO) plants are involved. The distribution of corporate, division or branch office G&A expenses to such plants operating with little or no dependence on corporate administrative activities may require more precise cost groupings, detailed accounts screening, and carefully developed distribution bases.

(i) Indirect costs that meet the definition of excessive pass-through charge in 52.215-23, are unallowable.

31.204 Application of principles and procedures.

(a) Costs are allowable to the extent they are reasonable, allocable, and determined to be allowable under 31.201, 31.202, 31.203, 31.205.

(b) (1) For the following subcontract types, costs incurred as reimbursements or payments to a subcontractor are allowable to the extent the reimbursements or payments are for costs incurred by the subcontractor that are consistent with this part:

(i) Cost-reimbursement.

(ii) Fixed-price incentive.

(iii) Price redeterminable (*i.e.,* fixed-price contracts with prospective price redetermination and fixed-ceiling-price contracts with retroactive price redetermination).

(2) The requirements of paragraph (b)(1) of this section apply to any tier above the first firm-fixed-price subcontract or fixed-price subcontract with economic price adjustment provisions.

(c) Costs incurred as payments under firm-fixed-price subcontracts or fixed-price subcontracts with economic price adjustment provisions or modifications, for which subcontract cost analysis was performed are allowable if the price was negotiated in accordance with 31.102.

(d) Section 31.205 does not cover every element of cost.

(1) Failure to include any item of cost does not imply that it is either allowable or unallowable.

(2) The determination of allowability must be based on the principles and standards in this subpart and the treatment of similar or related selected items.

(3) When more than one section in 31.205 is relevant to a contractor cost, the cost must be apportioned among the applicable sections, and the determination of allowability of each portion must be based on the guidance contained in the applicable section.

(4) When a cost to which more than one section in 31.205 is relevant and cannot be apportioned, the determination of allowability must be based on the guidance contained in the section that addresses the specific cost.

31.205 Selected costs.

31.205-1 Public relations and advertising costs.

(a) *Definitions*. As used in this section—

Public relations means all functions and activities dedicated to-

(1) Maintaining, protecting, and enhancing the image of a concern or its products; or

(2) Maintaining or promoting reciprocal understanding and favorable relations with the public at large, or any segment of the public. Public relations includes activities associated with areas such as advertising, customer relations, etc.

Advertising means the use of media to promote the sale of products or services and to accomplish the activities referred to in paragraph (d) of this section, regardless of the medium employed, when the advertiser has control over the form and content of what will appear, the media in which it will appear, and when it will appear. Advertising media include but are not limited to conventions, exhibits, free goods, samples, magazines, newspapers, trade papers, direct mail, dealer cards, window displays, outdoor advertising, radio, and television.

(b) Public relations and advertising costs include the costs of media time and space, purchased services performed by outside organizations, as well as the applicable portion of salaries, travel, and fringe benefits of employees engaged in the functions and activities of public relations and advertising.

(c) The only allowable advertising costs are those that are—

(1) Specifically required by contract, or that arise from requirements of Government contracts, and that are exclusively for—

(i) Acquiring scarce items for contract performance; or

(ii) Disposing of scrap or surplus materials acquired for contract performance;

(2) Costs of activities to promote sales of products normally sold to the Government, including trade shows, which contain a significant effort to promote exports from the United States. Such costs are allowable, notwithstanding paragraphs (e)(1), (e)(3), (e)(4)(ii), and (e)(5) of this section. However, such costs do not include the costs of memorabilia (e.g., models, gifts, and souvenirs), alcoholic beverages, entertainment, and physical facilities that are used primarily for entertainment rather than product promotion; or

(3) Allowable in accordance with 31.205-34.

(d) Allowable public relations costs include the following:

(1) Costs specifically required by contract.

(2) Costs of—

(i) Responding to inquiries on company policies and activities;

(ii) Communicating with the public, press, stockholders, creditors, and customers; and

(iii) Conducting general liaison with news media and Government public relations officers, to the extent that such activities are limited to communication and liaison necessary to keep the public informed on matters of public concern such as notice of contract awards, plant closings or openings, employee layoffs or rehires, financial information, etc.

(3) Costs of participation in community service activities (e.g., blood bank drives, charity drives, savings bond drives, and disaster assistance)(except see paragraph (e)(8) of this section.)

(4) Costs of plant tours and open houses (except see paragraph (e)(5) of this section).

(5) Costs of keel laying, ship launching, commissioning, and roll-out ceremonies, to the extent specifically provided for by contract.

(e) Unallowable public relations and advertising costs include the following:

(1) All public relations and advertising costs whose primary purpose is to promote the sale of products or services by stimulating interest in a product or product line (except for those costs made allowable under 31.205-38(b)(5)), or by disseminating messages calling favorable attention to the contractor for purposes of enhancing the company image to sell the company's products or services.

(2) All costs of trade shows and other special events which do not contain a significant effort to promote the export sales of products normally sold to the Government.

(3) Costs of sponsoring meetings, conventions, symposia, seminars, and other special events when the principal purpose of the event is other than dissemination of technical information or stimulation of production.

(4) Costs of ceremonies such as corporate celebrations and new product announcements.

(5) Costs of promotional material, motion pictures, videotapes, brochures, handouts, magazines, and other media that are designed to call favorable attention to the contractor and its activities.

(6) Costs of souvenirs, models, imprinted clothing, buttons, and other mementos provided to customers or the public.

(7) Costs of memberships in civic and community organizations.

(8) Costs associated with the donation of excess food to nonprofit organizations in accordance with the 42 U.S.C. 1792 (see subpart 26.4).

31.205-2 [Reserved]

31.205-3 Bad debts.

Bad debts, including actual or estimated losses arising from uncollectible accounts receivable due from customers and other claims, and any directly associated costs such as collection costs, and legal costs are unallowable.

31.205-4 Bonding costs.

(a) Bonding costs arise when the Government requires assurance against financial loss to itself or others by reason of the act or default of the contractor or where the contractor requires similar assurance.

(b) Government and contractor assurance includes such bonds as bid, performance, payment, advance payment, infringement, and fidelity bonds.

(c) Costs of bonding required pursuant to the terms of the contract are allowable.

(d) Costs of bonding required by the contractor in the general conduct of its business are allowable to the extent that such bonding is in accordance with sound business practice and the rates and premiums are reasonable under the circumstances.

31.205-5 [Reserved]

31.205-6 Compensation for personal services.

(a) *General.* Compensation for personal services is allowable subject to the requirements of this cost principle in this section and the following:

(1) Compensation for personal services must be for work performed by the employee in the current year and must not represent a retroactive adjustment of prior years' salaries or wages (except see paragraphs (f), (g), (i), (j), (l), and (n) of this section).

(2) The total compensation for individual employees or job classes of employees must be reasonable for the work performed (except as otherwise specified in this section).

(3) The compensation must be based upon and conform to the terms and conditions of the contractor's established compensation plan or practice followed so consistently as to imply, in effect, an agreement to make the payment.

(4) No presumption of allowability will exist where the contractor introduces major revisions of existing compensation plans or new plans and the contractor has not provided the cognizant administrative contracting officer, either before implementation or within a reasonable period after it, an opportunity to review the allowability of the changes.

(5) Costs that are unallowable under other paragraphs of subpart 31.2 are not allowable under this section solely on the basis that they constitute compensation for personal services.

(6) (i) Compensation costs for certain individuals require special consideration, such individuals include—

(A) Owners of closely held corporations, members of limited liability companies, partners, sole proprietors, or members of their immediate families; and

(B) Persons who are contractually committed to acquire a substantial financial interest in the contractor's enterprise.

(ii) For these individuals, compensation must—

(A) Be reasonable for the personal services rendered; and

(B) Not be a distribution of profits (which is not an allowable contract cost).

(iii) For owners of closely held companies, compensation in excess of the costs that are deductible as compensation under the Internal Revenue Code (26 U.S.C.) and regulations under it is unallowable.

(b) *Reasonableness*. (1) *Compensation pursuant to labor-management agreements*. Costs of compensation established under arm's length labor-management agreements negotiated under the terms of the National Labor Relations Act or similar state statutes are allowable and reasonable unless the costs are unwarranted by the character and circumstances of the work or discriminatory against the Government.

(i) The terms of a labor-management agreement designed to apply to a given set of circumstances and conditions of employment (e.g., work involving extremely hazardous activities or work not requiring recurrent use of overtime) is unwarranted when applied to a Government contract involving significantly different circumstances and conditions of employment (e.g., work involving less hazardous activities or work continually requiring use of overtime).

(ii) A cost is discriminatory against the Government if it results in employee compensation, in whatever form, in excess of that being paid for similar non-Government work under comparable circumstances.

(2) *Compensation not covered by labor-management agreements*.

(i) Compensation for each employee or job class of employees must be reasonable for the work performed. Compensation is reasonable if the aggregate of each measurable and allowable element amounts to a reasonable total. In determining the reasonableness of total compensation, consider only allowable individual elements of compensation.

(ii) In addition to the requirements of section 31.201-3, in determining the reasonableness of compensation for particular employees or job classes of employees, consider factors that may be relevant including, but not limited to, conformity with compensation practices of other firms—

(A) Of the same size;

(B) In the same industry;

(C) In the same geographic area; and

(D) Engaged in similar non-Government work under comparable circumstances.

(c) *Form of payment*. (1) Compensation for personal services includes compensation paid, or to be paid, to employees in the form of—

(i) Cash;

(ii) Corporate securities, such as stocks, bonds, and other financial instruments (see paragraph (c)(2) of this section regarding valuation); or

(iii) Other assets, products, or services.

(2) When compensation is paid with securities of the contractor or of an affiliate, the following additional restrictions apply:

(i) Valuation placed on the securities is the fair market value on the first date the number of shares awarded is known, determined upon the most objective basis available.

(ii) Accruals for the cost of securities before issuing the securities to the employees are subject to adjustment according to the possibilities that the employees will not receive the securities and that their interest in the accruals will be forfeited.

(d) *Income tax differential pay*. (1) Differential allowances for additional income taxes resulting from foreign assignments are allowable.

(2) Differential allowances for additional income taxes resulting from domestic assignments are unallowable.

(3) Payments for increased employee income or Federal Insurance Contributions Act taxes incident to allowable reimbursed relocation costs are allowable under 31.205-35(a)(10).

(e) *Bonuses and incentive compensation*. (1) Bonuses and incentive compensation are allowable if the—

(i) Awards are paid or accrued under an agreement entered into in good faith between the contractor and the employees before the services are rendered or pursuant to an established plan or policy followed by the contractor so consistently as to imply an agreement to make such payment; and

(ii) Basis for the award is supported.

(2) When the bonus and incentive compensation payments are deferred, the costs are subject to the requirements of paragraphs (e)(1) and (j) of this section.

(f) *Severance pay*. (1) Severance pay is a payment, in addition to regular salaries and wages, by contractors to workers whose employment is being involuntarily terminated. (See paragraph (i)(6) of this section for payments for early retirement incentive plans).

(2) Severance pay is allowable only if it is required by—

(i) Law;

(ii) Employer-employee agreement;

(iii) Established policy that constitutes an implied agreement on the contractor’s part; or

(iv) Circumstances of the particular employment.

(3) Payments made in the event of employment with a replacement contractor where continuity of employment with credit for prior length of service is preserved under substantially equal conditions of employment, or continued employment by the contractor at another facility, subsidiary, affiliate, or parent company of the contractor are not severance pay and are unallowable.

(4) (i) Actual normal turnover severance payments must be allocated to all work performed in the contractor's plant.

(ii) If the contractor uses the accrual method to account for normal turnover severance payments, that method will be acceptable if the amount of the accrual is—

(A) Reasonable in light of payments actually made for normal severances over a representative past period; and

(B) Allocated to all work performed in the contractor's plant.

(5) Abnormal or mass severance pay is of such a hypothetical nature that accruals for this purpose are not allowable; however, the Government will consider allowability on a case-by-case basis.

(6) (i) In accordance with 10 U.S.C. 3744(a)(13) and 41 U.S.C. 4304(a)(13) the costs of severance payments to foreign nationals employed under a service contract performed outside the United States are unallowable to the extent that such payments exceed amounts typically paid to employees providing similar services in the same industry in the United States. Further, in accordance with 10 U.S.C. 3744(a)(14), 41 U.S.C. 4304(a)(14) and 10 U.S.C. 1592, all such costs of severance payments that are otherwise allowable are unallowable if the termination of employment of the foreign national is the result of the closing of, or the curtailment of activities at, a United States facility in that country at the request of the government of that country; this does not apply if the closing of a facility or curtailment of activities is made pursuant to a status-of-forces or other country-to-country agreement.

(ii) 10 U.S.C. 3744(b) and 41 U.S.C. 4304(b) permit the head of the agency to waive these cost allowability limitations under certain circumstances (see 37.113 and the solicitation provision at 52.237-8).

(g) *Backpay*. Backpay is a retroactive adjustment of prior years' salaries or wages and is unallowable except payments to the following:

(1) Employees resulting from underpaid work actually performed are allowable, if required by a negotiated settlement, order, or court decree.

(2) Union employees for the difference in their past and current wage rates for working without a contract or labor agreement during labor management negotiation are allowable.

(3) Nonunion employees based upon results of union agreement negotiation are allowable only if—

(i) A formal agreement or understanding exists between management and the employees concerning these payments; or

(ii) An established policy or practice exists and is followed by the contractor so consistently as to imply an agreement to make such payments.

(h) Compensation based on changes in the prices of corporate securities or corporate security ownership, such as stock options, stock appreciation rights, phantom stock plans, and junior stock conversions is unallowable as follows:

(1) Any compensation which is calculated, or valued, based on changes in the price of corporate securities.

(2) Any compensation represented by dividend payments or which is calculated based on dividend payments.

(3) Contractor payments to an employee in lieu of the employee receiving or exercising a right, option, or benefit that would have been unallowable under this paragraph (h).

(i) *Pension costs*. (1) Pension plans are normally segregated into two types of plans: defined-benefit and defined-contribution pension plans.

(i) The contractor must measure, assign, and allocate the costs of defined-benefit pension plans and the costs of defined-contribution pension plans in accordance with 48 CFR 9904.412 and 48 CFR 9904.413.

(ii) Pension costs are allowable subject to the referenced standards and the cost limitations and exclusions in this section.

(A) Except for nonqualified pension plans using the pay-as-you-go cost method, to be allowable in the current year, the contractor must fund pension costs by the time set for filing of the Federal income tax return or any extension. Pension costs assigned to the current year, but not funded by the tax return time, are not allowable in any subsequent year. For nonqualified pension plans using the pay-as-you-go method, to be allowable in the current year, the contractor must allocate pension costs in the cost accounting period that the pension costs are assigned.

(B) Pension payments must be paid pursuant to an agreement entered into in good faith between the contractor and employees before the work or services are performed and to the terms and conditions of the established plan. The cost of changes in pension plans are not allowable if the changes are discriminatory to the Government or are not intended to be applied consistently for all employees under similar circumstances in the future.

(C) Except as provided for early retirement benefits in paragraph (i)(6) of this section, one-time-only pension supplements not available to all participants of the basic plan are not allowable as pension costs, unless the supplemental benefits represent a separate pension plan and the benefits are payable for life at the option of the employee.

(D) Increases in payments to previously retired plan participants covering cost-of-living adjustments are allowable if paid in accordance with a policy or practice consistently followed.

(2) *Defined-benefit pension plans*. The cost limitations and exclusions pertaining to defined-benefit plans are as follows:

(i) (A) *(1)* Except for nonqualified pension plans, pension costs (see 48 CFR 9904.412-40(a)(1)) assigned to the current accounting period, but not funded during it, are not allowable in subsequent years (except that a payment made to a

fund by the time set for filing the Federal income tax return or any extension thereof is considered to have been made during such taxable year).

(2) Any portion of pension costs computed for a cost accounting period, that exceeds the amount required to be funded pursuant to a waiver granted under the provisions of the Employee Retirement Income Security Act (ERISA) (Chapter 18 of title 29, U.S.C.), will be allowable in those future accounting periods in which the funding of such excess amounts occurs (see 48 CFR 9904.412-50(c)(5)).

(B) For nonqualified pension plans, except those using the pay-as-you-go cost method, allowable costs are limited to the amount allocable in accordance with 48 CFR 9904.412-50(d)(2).

(C) For nonqualified pension plans using the pay-as-you-go cost method, allowable costs are limited to the amounts allocable in accordance with 48 CFR 9904.412-50(d)(3).

(ii) (A) Any amount funded in excess of the pension cost assigned to a cost accounting period is not allowable in that period and must be accounted for as set forth at 48 CFR 9904.412-50(a)(4).

(B) The excess amount is allowable in the future period to which it is assigned, to the extent it is not otherwise unallowable.

(iii) (A) Increased pension costs are unallowable if the increase is caused by a delay in funding beyond 30 days after each quarter of the year to which they are assignable.

(B) If a composite rate is used for allocating pension costs between the segments of a company and if, because of differences in the timing of the funding by the segments, an inequity exists, allowable pension costs for each segment will be limited to that particular segment's calculation of pension costs as provided for in 48 CFR 9904.413-50(c).

(C) The contractor must make determinations of unallowable costs in accordance with the actuarial method used in calculating pension costs.

(iv) (A) The contracting officer will consider the allowability of the cost of indemnifying the Pension Benefit Guaranty Corporation (PBGC) under ERISA section 4062 or 4064 arising from terminating an employee deferred compensation plan on a case-by-case basis if—

(1) Insurance was required by the PBGC under ERISA section 4023; and

(2) It was obtained and the indemnification payment is not recoverable under the insurance.

(B) Consideration will be primarily for the purpose of appraising the extent to which the indemnification payment is allocable to Government work.

(C) If a beneficial or other equitable relationship exists, the Government will participate, despite the requirements of 31.205-19(c)(3) and (d)(3), in the indemnification payment to the extent of its fair share.

(v) (A) Increased pension costs resulting from the withdrawal of assets from a pension fund and the transfer of those assets to another employee benefit plan fund (or the transfer of those assets to another account within the same fund) are unallowable except to the extent authorized by an advance agreement (see paragraph (i)(3) if the withdrawal of assets from a pension fund is a plan termination under ERISA).

(B) The advance agreement must—

(1) State the amount of the Government's equitable share in the gross amount withdrawn or transferred; and

(2) Provide that the Government receives a credit equal to the amount of the Government's equitable share of the gross withdrawal or transfer.

(3) *Pension adjustments and asset reversions*. (i) For segment closings, pension plan terminations, or curtailment of benefits, the amount of the adjustment must be—

(A) For contracts and subcontracts that are subject to full CAS coverage, the amount measured, assigned, and allocated in accordance with 48 CFR 9904.413-50(c)(12); and

(B) For contracts and subcontracts that are not subject to full CAS coverage, the amount measured, assigned, and allocated in accordance with 48 CFR 9904.413-50(c)(12), except the numerator of the fraction at 48 CFR 9904.413-50(c)(12)(vi) is the sum of the pension plan costs allocated to all non-CAS-covered contracts and subcontracts that are subject to subpart 31.2 or for which certified cost or pricing data were submitted.

(ii) (A) For all other situations where assets revert to the contractor, or such assets are constructively received by it for any reason, the contractor must, at the Government's option, make a refund or give a credit to the Government for its equitable share of the gross amount withdrawn.

(B) The Government's equitable share must reflect the Government's participation in pension costs through those contracts for which certified cost or pricing data were submitted or that are subject to subpart 31.2.

(C) Excise taxes on pension plan asset reversions or withdrawals under this paragraph (i)(3)(ii) are unallowable in accordance with 31.205-41(c)(6).

(4) *Defined-contribution pension plans.* In addition to defined-contribution pension plans, this paragraph also covers profit sharing, savings plans, and other such plans, provided the plans fall within the definition of a pension plan.

(i) (A) Allowable pension cost is limited to the net contribution required to be made for a cost accounting period after taking into account dividends and other credits, where applicable.

(B) Any portion of pension cost computed for a cost accounting period that exceeds the amount required to be funded pursuant to a waiver granted under the provisions of ERISA will be allowable in those future accounting periods in which the funding of such excess amounts occurs (see 48 CFR 9904.412-50(c)(5)).

(ii) The provisions of paragraphs (i)(2)(ii) and (i)(2)(iv) of this section apply to defined-contribution plans.

(5) *Pension plans using the pay-as-you-go cost method*.

(i) Pension costs for a pension plan using the pay-as-you-go cost method are allowable to the extent they are not otherwise unallowable.

(ii) When using the pay-as-you-go cost method, the contractor must measure, assign, and allocate the cost of pension plans in accordance with 48 CFR 9904.412 and 9904.413.

(6) *Early retirement incentives*. (i) An early retirement incentive is an incentive given to an employee to retire early.

(ii) (A) For contract costing purposes, costs of early retirement incentives are allowable subject to the pension cost criteria in paragraphs (i)(2)(i) through (i)(2)(iv) of this section if the—

(1) Contractor measures, assigns, and allocates the costs in accordance with the contractor's accounting practices for pension costs;

(2) Incentives are in accordance with the terms and conditions of an early retirement incentive plan; and

(3) Contractor applies the plan only to active employees (i.e., the cost of extending the plan to employees who retired or were terminated before the adoption of the plan is unallowable).

(B) The present value of the total incentives given to any employee in excess of the amount of the employee's annual salary for the previous fiscal year before the employee's retirement is unallowable.

(1) The contractor must compute the present value in accordance with its accounting practices for pension costs.

(2) The contractor must account for any unallowable costs in accordance with 48 CFR 9904.412-50(a)(2).

(j) *Deferred compensation other than pensions.* The costs of deferred compensation awards are allowable subject to the following:

(1) The costs must be measured, assigned, and allocated in accordance with 48 CFR 9904.415.

(2) The costs of deferred compensation awards are unallowable if the awards are made in periods subsequent to the period when the work being remunerated was performed.

(k) *Compensation incidental to business acquisitions*. The following costs are unallowable: (1) Payments to employees under agreements in which they receive special compensation, in excess of the contractor's normal severance pay practice, if their employment terminates following a change in the management control over, or ownership of, the contractor or a substantial portion of its assets.

(2) Payments to employees under plans introduced in connection with a change, whether actual or prospective, in the management control over, or ownership of, the contractor or a substantial portion of its assets in which those employees receive special compensation, which is contingent upon the employee remaining with the contractor for a specified period of time.

(l) *Fringe benefits*. (1) Fringe benefits are in addition to regular wages and salaries and are allowances and services provided by the contractor to its employees as compensation (e.g., the cost of vacations, sick leave, holidays, military leave, employee insurance, and supplemental unemployment benefit plans).

(2) Except as provided in subpart 31.2, the costs of fringe benefits are allowable if they are reasonable and required by law, employer-employee agreement, or an established policy of the contractor.

(m) *Employee rebate and purchase discount plans.* Rebates and purchase discounts provided to employees on products or services produced by the contractor or affiliates are unallowable.

(n) *Postretirement benefits (PRB) other than pensions* . (1) PRB covers all benefits, other than cash benefits and life insurance benefits paid by pension plans, provided to employees, their beneficiaries, and covered dependents during the period following the employees' retirement (e.g., postretirement health care; life insurance provided outside a pension plan; and other welfare benefits, such as tuition assistance, day care, legal services, and housing subsidies provided after retirement).

(2) To be allowable, PRB costs must be incurred pursuant to law, employer-employee agreement, or an established policy of the contractor, and must comply with the following:

(i) *Pay-as-you-go*. PRB costs are not accrued during the working lives of employees. Costs are assigned to the period in which—

(A) Benefits are actually provided; or

(B) The costs are paid to an insurer, provider, or other recipient for current year benefits or premiums.

(ii) *Terminal funding.* PRB costs are not accrued during the working lives of the employees.

(A) Terminal funding occurs when the entire PRB liability is paid in a lump sum upon the termination of employees (or upon conversion to such a terminal-funded plan) to an insurer or trustee to establish and maintain a fund or reserve for the sole purpose of providing PRB to retirees.

(B) Terminal funded costs must be amortized over a period of 15 years.

(iii) *Accrual basis*. PRB costs are accrued during the working lives of employees. Accrued PRB costs must—

(A) Be measured and assigned in accordance with one of the following two methods:

(1) Generally accepted accounting principles. However, transitions from the pay-as-you-go method to the accrual accounting method must be handled in accordance with the following:

(i) In the year of transition from the pay-as-you-go method to accrual accounting for purposes of Government contract cost accounting, the transition obligation must be the excess of the accumulated PRB obligation over the fair value of plan assets determined in accordance with paragraph (n)(2)(iii)(E) of this section; the fair value must be reduced by the prepayment credit as determined in accordance with paragraph (n)(2)(iii)(F) of this section.

(ii) PRB cost attributable to the transition obligation assigned to the current year that is in excess of the amount assignable to accounting periods on the basis of a straight line amortization of the transition obligation over the average remaining working lives of active employees covered by the PRB plan or a 20-year period, whichever period is longer, is unallowable. However, if the plan is comprised of inactive participants only, the PRB cost attributable to the transition obligation assigned to the current year that is in excess of the amount assignable to accounting periods on a straight line amortization of the transition obligation over the average future life expectancy of the participants is unallowable.

(iii) For a plan that transitioned from pay-as-you-go to accrual accounting for Government contract cost accounting prior to July 22, 2013, the unallowable amount of PRB cost attributable to the transition obligation amortization must continue to be based on the cost principle in effect at the time of the transition until the original transition obligation schedule is fully amortized.

(2) Contributions to a welfare benefit fund determined in accordance with applicable Internal Revenue Code. Allowable PRB costs based on such contributions must—

(i) Be measured using reasonable actuarial assumptions, which must include a health care inflation assumption unless prohibited by the Internal Revenue Code provisions governing welfare benefit funds;

(ii) Be assigned to accounting periods on the basis of the average working lives of active employees covered by the PRB plan or a 15-year period, whichever period is longer. However, if the plan is comprised of inactive participants only, the cost must be spread over the average future life expectancy of the participants; and

(iii) Exclude Federal income taxes, whether incurred by the fund or the contractor (including any increase in PRB costs associated with such taxes), unless the fund holding the plan assets is tax-exempt under the provisions of 26 U.S.C. 501(c).

(B) Be paid to an insurer or trustee to establish and maintain a fund or reserve for the sole purpose of providing PRB to retirees. The assets must be segregated in the trust, or otherwise effectively restricted, so that they cannot be used by the employer for other purposes.

(C) Be calculated in accordance with generally accepted actuarial principles and practices as promulgated by the Actuarial Standards Board.

(D) Eliminate from costs of current and future periods the accumulated value of any prior period costs that were unallowable in accordance with paragraph (n)(3) of this section, adjusted for interest under paragraph (n)(4) of this section.

(E) Calculate the unfunded actuarial liability (unfunded accumulated postretirement benefit obligation) using the market (fair) value of assets that have been accumulated by funding costs assigned to prior periods for contract accounting purposes.

(F) Recognize as a prepayment credit the fair market value of assets that were accumulated by deposits or contributions that were not used to fund costs assigned to previous periods for contract accounting purposes.

(G) Comply with the following when changing from one accrual accounting method to another: the contractor must—

(1) Treat the change in the unfunded actuarial liability (unfunded accumulated postretirement benefit obligation) as a gain or loss; and

(2) Present an analysis demonstrating that all costs assigned to prior periods have been accounted for in accordance with paragraphs (n)(2)(iii)(D), (E), and (F) of this section to ensure that no duplicate recovery of costs exists. Any duplicate recovery of costs due to the change from one method to another is unallowable. The analysis and new accrual accounting method may be a subject appropriate for an advance agreement in accordance with 31.110.

(3) To be allowable, PRB costs must be funded by the time set for filing the Federal income tax return or any extension thereof, or paid to an insurer, provider, or other recipient by the time set for filing the Federal income tax return or extension thereof. PRB costs assigned to the current year, but not funded, paid or otherwise liquidated by the tax return due date as extended are not allowable in any subsequent year.

(4) Increased PRB costs caused by delay in funding beyond 30 days after each quarter of the year to which they are assignable are unallowable.

(5) The Government must receive an equitable share of any amount of previously funded PRB costs which revert or inure to the contractor. Such equitable share must reflect the Government's previous participation in PRB costs through those contracts for which certified cost or pricing data were required or which were subject to subpart 31.2.

(o) *Limitation on allowability of compensation*.

Table 31-1 Employee Compensation Limits

Contract Award Date	Applicable Agencies	Covered Employees	31.205-6
Before June 24, 2014	Executive Agencies Other than DoD, NASA and Coast Guard	Senior Executive	(o)(2)
Before December 31, 2011	DoD, NASA and Coast Guard	Senior Executive	(o)(2)
On/after December 31, 2011, and before June 24, 2014	DoD, NASA, and Coast Guard	All Employees	(o)(3)
On/after June 24, 2014	All Executive Agencies	All Employees	(o)(4)

(1) *Definitions*. As used in this paragraph (o)—

Compensation means the total amount of wages, salary, bonuses, deferred compensation (see paragraph (j) of this section), and employer contributions to defined contribution pension plans (see paragraphs (i)(4) and (q) of this section), for the fiscal year, whether paid, earned, or otherwise accruing, as recorded in the contractor's cost accounting records for the fiscal year.

Senior executive means—

(A) Prior to January 2, 1999—

(1) The Chief Executive Officer (CEO) or any individual acting in a similar capacity at the contractor's headquarters;

(2) The four most highly compensated employees in management positions at the contractor's headquarters, other than the CEO; and

(3) If the contractor has intermediate home offices or segments that report directly to the contractor's headquarters, the five most highly compensated employees in management positions at each such intermediate home office or segment.

(B) Effective January 2, 1999, the five most highly compensated employees in management positions at each home office and each segment of the contractor, whether or not the home office or segment reports directly to the contractor's headquarters.

Fiscal year means the fiscal year established by the contractor for accounting purposes.

Contractor's headquarters means the highest organizational level from which executive compensation costs are allocated to Government contracts.

(2) *Senior executive compensation limit for contracts awarded before June 24, 2014*.

(i) *Applicability*. This paragraph (o)(2) applies to the following:

(A) To all executive agencies, other than DoD, NASA and the Coast Guard, for contracts awarded before June 24, 2014;

(B) To DoD, NASA, and the Coast Guard for contracts awarded before December 31, 2011;

(ii) Costs incurred after January 1, 1998, for the compensation of a senior executive in excess of the benchmark compensation amount determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy (OFPP), under 41 U.S.C. 1127 as in effect prior to June 24, 2014, are unallowable (10 U.S.C. 3744(a)(16) and 41 U.S.C. 4304(a)(16), as in effect prior to June 24, 2014). This limitation is the sole statutory limitation on

allowable senior executive compensation costs incurred after January 1, 1998, under contracts awarded before June 24, 2014, and applies whether or not the affected contracts were previously subject to a statutory limitation on such costs. (Note that pursuant to section 804 of Pub. L. 105-261, the definition of senior executive in paragraph (o)(1) of this section changed for compensation costs incurred after January 1, 1999.) See https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/11/ContractorCompensationCapContractsAwardedBeforeJune24.pdf.

(3) All employee compensation limit for contracts awarded before June 24, 2014.

(i) *Applicability.* This paragraph (o)(3) applies to DOD, NASA, and the Coast Guard for contracts awarded on or after December 31, 2011, and before June 24, 2014.

(ii) Costs incurred after January 1, 2012, for the compensation of any contractor employee in excess of the benchmark compensation amount, determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy (OFPP) under 41 U.S.C. 1127 as in effect prior to June 24, 2014, are unallowable (10 U.S.C. 3744(a)(16) as in effect prior to June 24, 2014.) This limitation is the sole statutory limitation on allowable employee compensation costs incurred after January 1, 2012, under contracts awarded on or after December 31, 2011, and before June 24, 2014. (Note that pursuant to section 803 of Pub. L. 112-81, 10 U.S.C. 3744, Allowable costs under defense contracts, was amended by striking "senior executives" and inserting "any contractor employee", making unallowable the excess compensation costs incurred after January 1, 2012, under affected contracts.) See https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/11/ContractorCompensationCapContractsAwardedBeforeJune24.pdf.

(4) All employee compensation limit for contracts awarded on or after June 24, 2014.

(i) *Applicability*. This paragraph (o)(4) applies to executive agency contracts awarded on or after June 24, 2014, and any subcontracts thereunder.

(ii) Costs incurred on or after June 24, 2014, for the compensation of employees in excess of the benchmark compensation amount determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy (OFPP) are unallowable under 10 U.S.C. 3744(a)(16) and 41 U.S.C. 4304(a)(16), as in effect on or after June 24, 2014, pursuant to section 702 of Public Law 113-67. This limitation is the sole statutory limitation on allowable employee compensation costs incurred on or after June 24, 2014, under contracts awarded on or after June 24, 2014. See https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/11/ContractorCompensationCapContractsAwardedBeforeJune24.pdf.

(iii) *Exceptions*. An agency head may establish one or more narrowly targeted exceptions for scientists, engineers, or other specialists upon a determination that such exceptions are needed to ensure that the executive agency has continued access to needed skills and capabilities. In making such a determination, the agency must consider, at a minimum, for each contractor employee in a narrowly targeted excepted position—

(A) The amount of taxpayer funded compensation to be received by each employee; and

(B) The duties and services performed by each employee.

(p) Employee stock ownership plans (ESOP). (1) An ESOP is a stock bonus plan designed to invest primarily in the stock of the employer corporation.

(2) The contractor's contributions to an Employee Stock Ownership Trust (ESOT) may be in the form of cash, stock, or property.

(3) Costs of ESOPs are allowable subject to the following conditions:

(i) The contractor measures, assigns, and allocates costs in accordance with 48 CFR 9904.415.

(ii) Contributions by the contractor in any one year that exceed the deductibility limits of the Internal Revenue Code for that year are unallowable.

(iii) When the contribution is in the form of stock, the value of the stock contribution is limited to the fair market value of the stock on the date that title is effectively transferred to the trust.

(iv) When the contribution is in the form of cash-

(A) Stock purchases by the ESOT in excess of fair market value are unallowable; and

(B) When stock purchases are in excess of fair market value, the contractor must credit the amount of the excess to the same indirect cost pools that were charged for the ESOP contributions in the year in which the stock purchase occurs. However, when the trust purchases the stock with borrowed funds which will be repaid over a period of years by cash contributions from the contractor to the trust, the contractor must credit the excess price over fair market value to the indirect cost pools pro rata over the period of years during which the contractor contributes the cash used by the trust to repay the loan.

(v) When the fair market value of unissued stock or stock of a closely held corporation is not readily determinable, the valuation will be made on a case-by-case basis taking into consideration the guidelines for valuation used by the IRS.

31.205-7 Contingencies.

(a) *Definition.*

Contingency, as used in this subpart, means a possible future event or condition arising from presently known or unknown causes, the outcome of which is indeterminable at the present time.

(b) (1) Costs for contingencies are generally unallowable for historical costing purposes because such costing deals with costs incurred and recorded on the contractor's books.

(2) A contingency factor may be recognized when it is applicable to a past period to give recognition to minor unsettled factors in the interest of expediting settlement (*e.g.*, terminations).

(c) In connection with estimates of future costs, contingencies fall into two categories:

(1) Those that may arise from presently known and existing conditions, the effects of which are foreseeable within reasonable limits of accuracy; *e.g.,* anticipated costs of rejects and defective work). Contingencies of this category are to be included in the estimates of future costs so as to provide the best estimate of performance cost.

(2) Those that may arise from presently known or unknown conditions, the effect of which cannot be measured so precisely as to provide equitable results to the contractor and to the Government (*e.g.*, results of pending litigation). Contingencies of this category are to be excluded from cost estimates under the several items of cost but should be disclosed separately (including the basis upon which the contingency is computed) to facilitate the negotiation of appropriate contractual coverage. (See 31.205-6(f) and 31.205-19.)

31.205-8 Contributions or donations.

Contributions or donations, including cash, property and services, regardless of recipient, are unallowable (except see 31.205-1(d)(3)).

31.205-9 [Reserved]

31.205-10 Cost of money.

(a) Cost of money-

(1) Is an imputed cost that is not a form of interest on borrowings (see 31.205-20);

(2) Is an incurred cost for—

(i) Cost-reimbursement purposes under applicable cost-reimbursement contracts; and

(ii) Progress payment purposes under fixed-price contracts; and

(3) Refers to—

(i) Facilities capital cost of money (see 48 CFR 9904.414); and

(ii) Cost of money as an element of the cost of capital assets under construction (see 48 CFR 9904.417).

(b) Cost of money is allowable when—

(1) It is measured, assigned, and allocated to contracts in accordance with 48 CFR 9904.414 or measured and added to the cost of capital assets under construction in accordance with 48 CFR 9904.417, as applicable;

(2) The requirements of 31.205-52, which limit the allowability of cost of money, are followed; and

(3) The estimated facilities capital cost of money is specifically identified and proposed in cost proposals relating to the contract under which the cost is to be claimed.

(c) Actual interest cost in lieu of the calculated imputed cost of money is unallowable.

31.205-11 Depreciation.

(a) (1) Depreciation on a contractor's plant, equipment, and other capital facilities is an allowable contract cost, subject to the limitations in this cost principle.

(2) For tangible personal property, only estimated residual values that exceed 10 percent of the capitalized cost of the asset need to be used in establishing depreciable costs.

(i) Where either the declining balance method of depreciation or the class life asset depreciation range system is used, the residual value does not need to be deducted from capitalized cost to determine depreciable costs.

(ii) Depreciation cost that would significantly reduce the book value of a tangible capital asset below its residual value is unallowable.

(b) (1) Contractors with contracts subject to 48 CFR 9904.409 must adhere to the requirement of that standard for all fully CAS-covered contracts and may elect to adopt the standard for all other contracts.

(2) All requirements of 48 CFR 9904.409 are applicable if the election in paragraph (b)(1) of this section is made, and contractors must continue to follow it until notification of final acceptance of all deliverable items under negotiated Government contracts.

(c) For contracts that are not subject to 48 CFR 9904.409, allowable depreciation must not exceed the amount used for financial accounting purposes and must be determined in a manner consistent with the depreciation policies and procedures followed in the same segment on non-Government business (except see paragraphs (g) and (h) of this section).

(d) Depreciation, rental, or use charges are unallowable on property acquired from the Government at no cost to the contractor or any division, subsidiary, or affiliate of the contractor under common control.

(e) The depreciation on an item that meets the criteria for allowance at price under 31.205-26(f) may be based on that price, provided the same policies and procedures are used for costing all business of the using division, subsidiary, or organization under common control.

(f) (1) No depreciation or rental is allowed on property that is fully depreciated by the contractor or by any division, subsidiary, or affiliate of the contractor under common control.

(2) A reasonable charge for using fully depreciated property may be agreed upon and allowed (except see 31.110(b)(2)).

(3) In determining the charge, consideration must be given to cost, total estimated useful life at the time of negotiations, effect of any increased maintenance charges or decreased efficiency due to age, and the amount of depreciation previously charged to Government contracts or subcontracts.

(g) Whether or not the contract is subject to CAS, the following apply:

(1) The requirements of 31.205-52.

(2) In the event of a write-down from carrying value to fair value as a result of impairments caused by events or changes in circumstances, allowable depreciation of the impaired assets is limited to the amounts that would have been allowed had the assets not been written down (see 31.205-16(g)). However, this does not preclude a change in depreciation resulting from other causes such as permissible changes in estimates of service life, consumption of services, or residual value.

(3) (i) In the event the contractor reacquires property involved in a sale and leaseback arrangement, allowable depreciation of reacquired property must be based on the net book value of the asset as of the date the contractor originally became a lessee of the property in the sale and leaseback arrangement—

(A) Adjusted for any allowable gain or loss determined in accordance with 31.205-16(b); and

(B) Less any amount of depreciation expense included in the calculation of the amount that would have been allowed had the contractor retained title under 31.205-11(h)(1) and 31.205-36(b)(2).

(ii) As used in this paragraph (g)(3), reacquired property is property that generated either any depreciation expense or any cost of money considered in the calculation of the limitations under 31.205-11(h)(1) and 31.205-36(b)(2) during the most recent accounting period prior to the date of reacquisition.

(h) A finance lease, as defined in Financial Accounting Standards Board's Accounting Standards Codification (FASB ASC) 842, Leases, is subject to the requirements of this cost principle. (See 31.205-36 for Operating Leases.)

(1) Lease costs under a sale and leaseback arrangement are allowable only up to the amount that would be allowed if the contractor retained title, computed based on the net book value of the asset on the date the contractor becomes a lessee of the property adjusted for any gain or loss recognized in accordance with 31.205-16(b); and

(2) If it is determined that the terms of the finance lease have been significantly affected by the fact that the lessee and lessor are related, depreciation charges are not allowable in excess of those that would have occurred if the lease contained terms consistent with those found in a lease between unrelated parties.

31.205-12 Economic planning costs.

(a) Economic planning costs are the costs of general long-range management planning that is concerned with the future overall development of the contractor's business and that may take into account the eventual possibility of economic dislocations or fundamental alterations in those markets in which the contractor currently does business.

(b) Economic planning costs do not include organization or reorganization costs covered by 31.205-27. (See 31.205-38 for market planning costs other than economic planning costs.)

(c) Economic planning costs are allowable.

31.205-13 Employee morale, health, welfare, food service, and dormitory costs and credits.

(a) Aggregate costs incurred on activities designed to improve working conditions, employer-employee relations, employee morale, and employee performance (less income generated by these activities) are allowable, subject to the limitations in this section. Examples of allowable activities are—

(1) House publications;

(2) Health clinics;

(3) Wellness/fitness centers;

(4) Employee counseling services; and

(5) Food and dormitory services for the contractor's employees at or near the contractor's facilities, including—

(i) Operating or furnishing facilities for cafeterias, dining rooms, canteens, lunch wagons, vending machines, living accommodations; and

(ii) Similar types of services.

(b) (1) Costs of gifts are unallowable.

(2) Gifts do not include awards for performance made pursuant to 31.205-6(e) or awards made in recognition of employee achievements pursuant to an established contractor plan or policy.)

(c) Costs of recreation are unallowable, except for the costs of employees' participation in company sponsored sports teams or employee organizations designed to improve company loyalty, teamwork, or physical fitness.

(d) (1) The allowability of food and dormitory losses are determined by the following:

(i) Losses from operating food and dormitory services are allowable only if the contractor's objective is to operate such services on a break-even basis.

(ii) Losses sustained because food services or lodging accommodations are furnished without charge or at prices or rates that would not be conducive to the accomplishment of the objective in paragraph (d)(1)(i) of this section are not allowable, except as described in paragraph (d)(1)(iii) of this section.

(iii) A loss may be allowed if the contractor can demonstrate that unusual circumstances exist such that even with efficient management, operating the services on a break-even basis would require charging inordinately high prices, or prices or rates higher than those charged by commercial establishments offering the same services in the same geographical areas. The following are examples of unusual circumstances:

(A) The contractor must provide food or dormitory services at remote locations where adequate commercial facilities are not reasonably available.

(B) The contractor's charged, but unproductive, labor costs would be excessive if the services were not available.

(C) If termination or reduction of food or dormitory operations will not otherwise yield net cost savings.

(2) Costs of food and dormitory services must include an allocable share of indirect expenses pertaining to these activities.

(e) When the contractor has an arrangement authorizing an employee association to provide or operate a service, such as vending machines in the contractor's plant, and retain the profits, such profits must be treated in the same manner as if the contractor were providing the service (except see paragraph (f) of this section).

(f) Contributions by the contractor to an employee organization, including funds from vending machine receipts or similar sources, are allowable only to the extent that the contractor demonstrates that an equivalent amount of the costs incurred by the employee organization would be allowable if directly incurred by the contractor.

31.205-14 Entertainment costs.

(a) Costs of amusement, diversions, social activities, and any directly associated costs, such as tickets to shows or sporting events, meals, lodging, rentals, transportation, and gratuities are unallowable.

(b) Costs of membership in social, dining, country clubs, or other organizations having the same purposes are also unallowable, regardless of whether the cost is reported as taxable income to the employees.

(c) Costs made specifically unallowable under this cost principle are not allowable under any other cost principle.

31.205-15 Fines, penalties, and mischarging costs.

(a) Costs of fines and penalties resulting from violations of, or failure of the contractor to comply with, Federal, State, local, or foreign laws and regulations, are unallowable except when incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the contracting officer.

(b) Costs incurred in connection with, or related to, the mischarging of costs on Government contracts are unallowable when the costs are caused by, or result from, alteration or destruction of records, or other false or improper charging or

recording of costs. Such costs include those incurred to measure or otherwise determine the magnitude of the improper charging, and costs incurred to remedy or correct the mischarging, such as costs to rescreen and reconstruct records.

31.205-16 Gains and losses on disposition or impairment of depreciable property or other capital assets.

(a) (1) Gains and losses from the sale, retirement, or other disposition (except see 31.205-19) of depreciable property must be included in the year in which they occur as credits or charges to the cost grouping(s) in which the depreciation or amortization applicable to those assets was included (except see paragraph (e) of this section).

(2) No gain or loss must be recognized as a result of the transfer of assets in a business combination (see 31.205-52).

(b) Notwithstanding paragraph (c) of this section, when costs of depreciable property are subject to the sale and leaseback limitations in 31.205-11(h)(1) or 31.205-36(b)(2)—

(1) The gain or loss is the difference between the net amount realized and the undepreciated balance of the asset on the date the contractor becomes a lessee; and

(2) When the application of paragraph (b)(1) of this section results in a loss—

(i) The allowable portion of the loss is zero if the fair market value exceeds the undepreciated balance of the asset on the date the contractor becomes a lessee; and

(ii) The allowable portion of the loss is limited to the difference between the fair market value and the undepreciated balance of the asset on the date the contractor becomes a lessee if the fair market value is less than the undepreciated balance of the asset on the date the contractor becomes a lessee.

(c) (1) Gains and losses on disposition of tangible capital assets, including those acquired under capital leases (also known as a finance lease) (see 31.205-11(h)), must be considered as adjustments of depreciation costs previously recognized.

(2) The gain or loss for each asset disposed of is the difference between the net amount realized, including insurance proceeds from involuntary conversions, and its undepreciated balance.

(d) The gain recognized for contract costing purposes must be limited to the difference between the acquisition cost (or for assets acquired under a finance lease, the value at which the leased asset is capitalized) of the asset and its undepreciated balance, except see paragraph (e) of this section,

(e) Special considerations apply to an involuntary conversion occurs when a contractor’s property is destroyed by events that are out of the owner's control, such as fire, windstorm, flood, accident, theft, etc., and an insurance award is recovered. The following apply to involuntary conversions:

(1) When there is an insurance award and the converted asset is not replaced, gain or loss must be recognized in the period of disposition. The gain recognized for contract costing purposes must be limited to the difference between the acquisition cost of the asset and its undepreciated balance.

(2) When the converted asset is replaced, the contractor must either—

(i) Adjust the depreciable basis of the new asset by the amount of the total realized gain or loss; or

(ii) Recognize the gain or loss in the period of disposition, in which case the Government must participate to the same extent as outlined in paragraph (f)(1) of this section.

(f) Gains and losses on the disposition of depreciable property must not be recognized as a separate charge or credit when —

(1) Gains and losses are processed through the depreciation reserve account and reflected in the depreciation allowable under 31.205-11; or

(2) The property is exchanged as part of the purchase price of a similar item, and the gain or loss is taken into consideration in the depreciation cost basis of the new item.

(g) Gains and losses arising from mass or extraordinary sales, retirements, or other disposition other than through business combinations must be considered on a case-by-case basis.

(h) Gains and losses of any nature arising from the sale or exchange of capital assets other than depreciable property must be excluded in computing contract costs.

(1) With respect to long-lived tangible and identifiable intangible assets held for use, no loss must be allowed for a write-down from carrying value to fair value as a result of impairments caused by events or changes in circumstances (*e.g.*, environmental damage, idle facilities arising from a declining business base, etc.).

(2) If depreciable property or other capital assets have been written down from carrying value to fair value due to impairments, gains or losses upon disposition must be the amounts that would have been allowed had the assets not been written down.

31.205-17 Idle facilities and idle capacity costs.

(a) *Definitions*. As used in this section—

Costs of idle facilities or idle capacity means costs such as maintenance, repair, housing, rent, and other related costs (*e.g.,* property taxes, insurance, and depreciation).

Facilities means plant or any portion thereof (including land integral to the operation), equipment, individually or collectively, or any other tangible capital asset, wherever located, and whether owned or leased by the contractor.

Idle capacity means the unused capacity of partially used facilities. It is the difference between that which a facility could achieve under 100 percent operating time on a one-shift basis, less operating interruptions resulting from time lost for repairs, setups, unsatisfactory materials, and other normal delays, and the extent to which the facility was actually used to meet demands during the accounting period. A multiple-shift basis may be used in the calculation instead of a one-shift basis if it can be shown that this amount of usage could normally be expected for the type of facility involved.

Idle facilities means completely unused facilities that are excess to the contractor's current needs.

(b) The costs of idle facilities are unallowable unless the facilities—

(1) Are necessary to meet fluctuations in workload; or

(2) Were necessary when acquired and are now idle because of changes in requirements, production economies, reorganization, termination, or other causes that could not have been reasonably foreseen. (Costs of idle facilities are allowable for a reasonable period, ordinarily not to exceed one year, depending upon the initiative taken to use, lease, or dispose of the idle facilities (except see 31.205-42)).

(c) Costs of idle capacity are costs of doing business and are a factor in the normal fluctuations of usage or overhead rates from period to period. Such costs are allowable when the capacity is necessary or was originally reasonable and is not subject to reduction or elimination by subletting, renting, or sale, in accordance with sound business, economics, or security practices. Widespread idle capacity throughout an entire plant or among a group of assets having substantially the same function may be idle facilities.

(d) Any costs to be paid directly by the Government for idle facilities, or idle capacity reserved for defense mobilization production must be the subject of a separate agreement (see 31.110(b)(9)).

31.205-18 Independent research and development and bid and proposal costs.

(a) *Definitions.* As used in this section—

Applied research means effort that—

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

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

(3) Attempts to advance the state of the art. Applied research does not include efforts whose principal aim is design, development, or test of specific items or services to be considered for sale; these efforts are within the definition of the term development, defined in this section.

Bid and proposal (B&P) costs means the costs incurred in preparing, submitting, and supporting bids and proposals (whether or not solicited) on potential Government or non-Government contracts. The term does not include the costs of effort sponsored by a grant or cooperative agreement or required in the performance of a contract.

Company means all divisions, subsidiaries, and affiliates of the contractor under common control.

Development means the systematic use, under whatever name, of scientific and technical knowledge in the design, development, test, or evaluation of a potential new product or service (or of an improvement in an existing product or service) for the purpose of meeting specific performance requirements or objectives. Development includes the functions of design engineering, prototyping, and engineering testing, but excludes—

(1) Subcontracted technical effort that is for the sole purpose of developing an additional source for an existing product; and

(2) Development effort for manufacturing or production materials, systems, processes, methods, equipment, tools, and techniques not intended for sale.

Independent research and development (IR&D) means a contractor's IR&D cost that consists of projects falling within the four following areas:

(1) Basic research,

(2) Applied research,

(3) Development, and

(4) Systems and other concept formulation studies. The term does not include the costs of effort sponsored by a grant or required in the performance of a contract. IR&D effort must not include technical effort expended in developing and preparing technical data specifically to support submitting a bid or proposal.

Systems and other concept formulation studies means analyses and study efforts either related to specific IR&D efforts or directed toward identifying desirable new systems, equipment or components, or modifications and improvements to existing systems, equipment, or components.

(b) *Composition and allocation of costs.* The requirements of 48 CFR 9904.420 are incorporated in their entirety and must apply as follows—

(1) *Fully-CAS-covered contracts.* Contracts that are fully-CAS-covered must be subject to all requirements of 48 CFR 9904.420.

(2) *Modified CAS-covered and non-CAS-covered contracts.*

(i) Non-CAS-covered contracts or contracts that contain terms or conditions requiring modified CAS coverage must be subject to all requirements of 48 CFR 9904.420 except 48 CFR 9904.420-50(e)(2) and 48 CFR 9904.420-50(f)(2).

(ii) Non-CAS-covered contracts or modified CAS-covered contracts awarded when the contractor has CAS-covered contracts requiring compliance with 48 CFR 9904.420, must be subject to all the requirements of 48 CFR 9904.420.

(iii) When the requirements of 48 CFR 9904.420-50(e)(2) and 48 CFR 9904.420-50(f)(2) are not applicable, the following apply:

(A) *(1)* IR&D and B&P costs must be allocated to final cost objectives on the same basis of allocation used for the general and administrative (G&A) expense grouping of the profit center (see 31.002) in which the costs are incurred.

(2) When IR&D and B&P costs clearly benefit other profit centers or benefit the entire company, those costs must be allocated through the G&A of the other profit centers or through the corporate G&A, as appropriate.

(B) If allocations of IR&D or B&P through the G&A base do not provide equitable cost allocation, the contracting officer may approve use of a different base.

(c) *Allowability.* Except as provided in paragraphs (d) and (e) of this section, costs for IR&D and B&P are allowable as indirect expenses on contracts if those costs are allocable and reasonable.

(d) *Deferred IR&D costs*. (1) IR&D costs incurred in previous accounting periods are unallowable, except when a contractor has developed a specific product at its own risk in anticipation of recovering the development costs in the sale price of the product and—

(i) The total amount of IR&D costs applicable to the product can be identified;

(ii) The proration of such costs to sales of the product is reasonable;

(iii) The contractor had no Government business during the time that the costs were incurred or did not allocate IR&D costs to Government contracts except to prorate the cost of developing a specific product to the sales of that product; and

(iv) No costs of current IR&D programs are allocated to Government work except to prorate the costs of developing a specific product to the sales of that product.

(2) (i) When deferred costs are recognized, the contract (except firm-fixed-price and fixed-price with economic price adjustment contracts) will include a specific provision setting forth the amount of deferred IR&D costs that are allocable to the contract.

(ii) The contracting officer must document the circumstances and reason for accepting the deferred costs in the negotiation memorandum.

(e) *Cooperative arrangements*. (1) IR&D costs may be incurred by contractors working jointly with one or more non-Federal entities pursuant to a cooperative arrangement (e.g., joint ventures, limited partnerships, teaming arrangements, and collaboration and consortium arrangements).

(2) IR&D costs may include costs contributed by contractors in performing cooperative research and development agreements, or similar arrangements, entered into under—

(i) 15 U.S.C. 3710(a);

(ii) 51 U.S.C. 20113(e) for the National Aeronautics and Space Administration;

(iii) 10 U.S.C. 4021 for DoD; or

(iv) Other equivalent authority.

(3) IR&D costs incurred by a contractor pursuant to these types of cooperative arrangements should be considered as allowable IR&D costs if the work performed would have been allowed as contractor IR&D had there been no cooperative arrangement.

(4) Costs incurred in preparing, submitting, and supporting offers on potential cooperative arrangements are allowable if they are allocable, reasonable, and not otherwise unallowable.

31.205-19 Insurance and indemnification.

(a) Insurance by purchase or by self-insuring includes—

(1) Coverage the contractor is required to carry or to have approved, under the terms of the contract; and

(2) Any other coverage the contractor maintains in connection with the general conduct of its business.

(b) (1) For purposes of applying the provisions of this section, the Government considers insurance provided by captive insurers (*i.e.*, insurers owned by or under control of the contractor) as self-insurance.

(2) If the captive insurer also sells insurance to the general public in substantial quantities and it can be demonstrated that the charge to the contractor is based on competition, the Government will consider the insurance as purchased insurance.

(c) Whether or not the contract is subject to CAS, self-insurance charges are allowable subject to paragraph (e) of this section and the following limitations:

(1) The contractor must measure, assign, and allocate costs in accordance with 48 CFR 9904.416.

(2) The contractor must comply with part 28; however, approval of a contractor's insurance program in accordance with part 28 does not constitute a determination as to the allowability of the program's cost.

(3) If purchased insurance is available, any self-insurance charge plus insurance administration expenses in excess of the cost of comparable purchased insurance plus associated insurance administration expenses is unallowable.

(4) Self-insurance charges for risks of catastrophic losses are unallowable (see 28.308(e)).

(d) Purchased insurance costs are allowable, subject to paragraph (e) of this section and the following limitations:

(1) For contracts subject to full CAS coverage, the contractor must measure, assign, and allocate costs in accordance with 48 CFR 9904.416.

(2) For all contracts, premiums for insurance purchased from fronting insurance companies (insurance companies not related to the contractor but who reinsure with a captive insurer of the contractor) are unallowable to the extent they exceed the sum of—

(i) The amount that would have been allowed had the contractor insured directly with the captive insurer; and

(ii) Reasonable fronting company charges for services rendered.

(3) Actual losses are unallowable unless expressly provided for in the contract, except-

(i) Losses incurred under the nominal deductible provisions of purchased insurance, in keeping with sound business practice, are allowable; and

(ii) Minor losses, such as spoilage, breakage, and disappearance of small hand tools that occur in the ordinary course of business and that are not covered by insurance, are allowable.

(e) Self-insurance and purchased insurance costs are subject to the following cost limitations:

(1) Costs of insurance required or approved pursuant to the contract are allowable.

(2) Costs of insurance maintained by the contractor in connection with the general conduct of its business are allowable subject to the following limitations:

(i) Types and extent of coverage must follow sound business practice, and the rates and premiums must be reasonable.

(ii) Costs allowed for business interruption or other similar insurance must be limited to exclude coverage of profit.

(iii) The cost of property insurance premiums for insurance coverage in excess of the acquisition cost of the insured assets is allowable only when the contractor has a formal written policy assuring that in the event the insured property is involuntarily converted, the new asset must be valued at the book value of the replaced asset plus or minus adjustments for differences between insurance proceeds and actual replacement cost. If the contractor does not have such a formal written policy, the cost of premiums for insurance coverage in excess of the acquisition cost of the insured asset is unallowable.

(iv) Costs of insurance for the risk of loss of Government property are allowable to the extent that the—

(A) Contractor is liable for such loss;

(B) Contracting officer has not revoked the Government's assumption of risk (see 45.104(b)); and

(C) Insurance does not cover loss of Government property that results from willful misconduct or lack of good faith on the part of any of the contractor's managerial personnel (see the clause at FAR 52.245-1(h)(1)(ii)).

(v) Costs of insurance on the lives of officers, partners, proprietors, or employees are allowable only to the extent that the insurance represents additional compensation (see 31.205-6).

(3) The cost of insurance to protect the contractor against the costs of correcting its own defects in materials and workmanship is unallowable.

(4) The cost of insurance to cover fortuitous or casualty losses resulting from defects in materials or workmanship are allowable as a normal business expense.

(5) Premiums for retroactive or backdated insurance written to cover known losses that have occurred are unallowable.

(6) The Government is obligated to indemnify the contractor only to the extent authorized by law, as expressly provided for in the contract, except as provided in paragraph (d)(3) of this section.

(7) Late premium payment charges related to employee deferred compensation plan insurance incurred pursuant to 29 U.S.C. 1307 or 29 U.S.C. 1323 are unallowable.

31.205-20 Interest and other financial costs.

(a) The following costs are unallowable:

(1) Interest on borrowings, however represented.

(2) Bond discounts.

(3) Costs of financing and refinancing capital (net worth plus long-term liabilities).

(4) Legal and professional fees paid in connection with preparing prospectuses (except see 31.205-28).

(5) Costs of preparing and issuing stock rights (except see 31.205-28).

(b) Interest assessed by State or local taxing authorities under the conditions specified in 31.205-41(b)(3) is allowable.

31.205-21 Labor relations costs.

(a) Costs incurred in maintaining satisfactory relations between the contractor and its employees, including costs of shop stewards, labor management committees, employee publications, and other related activities, are allowable.

(b) As required by Executive Order 13494, Economy in Government Contracting, costs of any activities undertaken to persuade employees of any entity to exercise, or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively, through representatives of the employees' own choosing are unallowable. Examples of unallowable costs are—

(1) Preparing and distributing materials;

(2) Hiring or consulting legal counsel or consultants;

(3) Meetings (including paying the salaries of the attendees at meetings held for this purpose); and

(4) Planning or conducting activities by managers, supervisors, or union representatives during work hours.

31.205-22 Lobbying and political activity costs.

(a) Costs associated with the following activities are unallowable:

(1) Attempts to influence the outcomes of any Federal, State, or local election, referendum, initiative, or similar procedure, through in-kind or cash contributions, endorsements, publicity, or similar activities.

(2) Establishing, administering, contributing to, or paying the expenses of a political party, campaign, political action committee, or other organization established for the purpose of influencing the outcomes of elections.

(3) Any attempt to influence the introduction of Federal, state, or local legislation, or enactment or modification of any pending Federal, state, or local legislation—

(i) Through communication with any member or employee of the Congress or state legislature including efforts to influence state or local officials to engage in similar lobbying activity, or with any government official or employee in connection with a decision to sign or veto enrolled legislation; or

(ii) By preparing, distributing or using publicity or propaganda, or by urging members of the general public or any segment thereof to contribute to or participate in any mass demonstration, march, rally, fund raising drive, lobbying campaign or letter writing or telephone campaign.

(4) Legislative liaison activities, including attendance at legislative sessions or committee hearings, gathering information regarding legislation, and analyzing the effect of legislation, when such activities are carried on in support of or in knowing preparation for an effort to engage in unallowable activities.

(5) Costs incurred in attempting to improperly influence (see 3.401), either directly or indirectly, an employee or officer of the Executive branch of the Government to give consideration to or act regarding a regulatory or contract matter.

(b) Costs associated with the following activities are excepted from paragraph (a) of this section:

(1) Providing a technical and factual presentation of information on a topic directly related to the performance of a contract through a hearing testimony, statements, or letters to the Congress or a state legislature, or subdivision, member, or cognizant staff member thereof, in response to a documented request (including a Congressional Record notice requesting testimony or statements for the record at a regularly scheduled hearing) made by the recipient member, legislative body,

or subdivision, or a cognizant staff member thereof, provided such information is readily obtainable and can be readily put in deliverable form; and provided that costs under this section for transportation, lodging or meals are unallowable unless incurred for the purpose of offering testimony at a regularly scheduled Congressional hearing pursuant to a written request for such presentation made by the Chairman or Ranking Minority Member of the Committee or Subcommittee conducting such hearing.

(2) Any lobbying made unallowable by paragraph (a)(3) of this section to influence state or local legislation in order to directly reduce contract cost, or to avoid material impairment of the contractor's authority to perform the contract.

(3) Any activity specifically authorized by statute to be undertaken with funds from the contract.

(c) When a contractor seeks reimbursement for indirect costs, total lobbying costs must be separately identified in the indirect cost rate proposal, and thereafter treated as other unallowable activity costs.

(d) Contractors must maintain adequate records to demonstrate that the certification of costs as being allowable or unallowable (see 42.703-2) pursuant to this section complies with the requirements of this section.

(e) Existing procedures should be utilized to resolve in advance any significant questions or disagreements concerning the interpretation or application of this section.

31.205-23 Losses on other contracts.

Losses on other contracts, including the contractor’s contributed portion under cost-sharing contracts, are unallowable.

31.205-24 [Reserved]

31.205-25 Manufacturing and production engineering costs.

(a) The following costs of manufacturing and production engineering effort are allowable:

(1) Developing and deploying new or improved materials, systems, processes, methods, equipment, tools and techniques that are, or are expected to be, used in producing products or services.

(2) Developing and deploying pilot production lines;

(3) Improving current production functions, such as plant layout, production scheduling and control, methods and job analysis, equipment capabilities and capacities, inspection techniques, and tooling analysis (including tooling design and application improvements).

(4) Material and manufacturing producibility analysis for production suitability and to optimize manufacturing processes, methods, and techniques.

(b) This cost principle does not cover—

(1) Basic and applied research effort related to new technology, materials, systems, processes, methods, equipment, tools and techniques (see 31.205-18); and

(2) Development effort for manufacturing or production materials, systems, processes, methods, equipment, tools and techniques that are intended for sale (see 31.205-18).

(c) Where manufacturing or production development costs are capitalized or required to be capitalized under the contractor's capitalization policies, allowable cost will be determined in accordance with the requirements of 31.205-11.

31.205-26 Material costs.

(a) (1) Material costs include the costs of items, such as raw materials, parts, subassemblies, components, and manufacturing supplies, whether purchased or manufactured by the contractor, and may include collateral items such as inbound transportation and in-transit insurance.

(2) In computing material costs, the contractor must consider reasonable overruns, spoilage, or defective work (unless otherwise provided in any contract provision relating to inspecting and correcting defective work).

(b) The contractor must—

(1) Adjust the costs of material for income and other credits, including available trade discounts, refunds, rebates, allowances, and cash discounts, and credits for scrap, salvage, and material returned to vendors; and

(2) Credit such income and other credits either directly to the cost of the material or allocate such income and other credits as a credit to indirect costs. When the contractor can demonstrate that failure to take cash discounts was reasonable, the contractor does not need to credit lost discounts.

(c) Reasonable adjustments arising from differences between periodic physical inventories and book inventories may be included in arriving at costs when such adjustments relate to the period of contract performance.

(d) (1) When materials are purchased specifically for and are identifiable solely with performance under a contract, the actual purchase cost of those materials should be charged to the contract.

(2) If material is issued from stores, any generally recognized method of pricing such material is acceptable if that method is consistently applied and the results are equitable.

(e) Allowance for materials, supplies and services that are sold or transferred between any divisions, subdivisions, subsidiaries, or affiliates of the contractor under a common control—

(1) Must be on the basis of cost incurred in accordance with this subpart; or

(2) May be at price when—

(i) It is the established practice of the transferring organization to price interorganizational transfers at other than cost for commercial work of the contractor or any division, subsidiary or affiliate of the contractor under a common control; and

(ii) The item being transferred qualifies for an exception under 15.403-1(b) and the contracting officer has not determined the price to be unreasonable.

(f) When a commercial product or commercial service under paragraph (e) of this section is sold or transferred at a price based on a catalog or market price, the contractor—

(1) Should adjust the price to reflect the quantities being acquired; and

(2) May adjust the price to reflect the actual cost of any modifications necessary because of contract requirements.

31.205-27 Organization costs.

(a) (1) Except as provided in paragraph (b) of this section, expenditures in connection with the following are unallowable —

(i) Planning or executing the organization or reorganization of the corporate structure of a business, including mergers and acquisitions,

(ii) Resisting or planning to resist the reorganization of the corporate structure of a business or a change in the controlling interest in the ownership of a business, and

(iii) Raising capital (net worth plus long-term liabilities.

(2) Such expenditures include incorporation fees and costs of attorneys, accountants, brokers, promoters and organizers, management consultants and investment counselors, whether or not employees of the contractor.

(3) Unallowable reorganization costs include the cost of any change in the contractor's financial structure, excluding administrative costs of short-term borrowings for working capital, resulting in alterations in the rights and interests of security holders, whether or not additional capital is raised.

(b) The cost of activities primarily intended to provide compensation will not be considered organizational costs subject to this section but will be governed by 31.205-6. These activities include acquiring stock for—

(1) Executive bonuses;

(2) Employee savings plans; and

(3) Employee stock ownership plans.

31.205-28 Other business expenses.

The following types of recurring costs are allowable:

(a) Registry and transfer charges resulting from changes in ownership of securities issued by the contractor.

(b) Cost of shareholders' meetings.

(c) Normal proxy solicitations.

(d) Preparing and publishing reports to shareholders.

(e) Preparing and submitting required reports and forms to taxing and other regulatory bodies.

(f) Incidental costs of directors' and committee meetings.

(g) Other similar costs.

31.205-29 Plant protection costs.

Allowable plant protection costs include—

(a) Wages, uniforms, and equipment of personnel engaged in plant protection;

(b) Depreciation on plant protection capital assets; and

(c) Necessary expenses to comply with military requirements.

31.205-30 Patent costs.

(a) The following patent costs are allowable when incurred as a requirement of a Government contract (except see 31.205-33):

(1) Costs of preparing invention disclosures, reports, and other documents.

(2) Costs for searching the art to the extent necessary to make the invention disclosures.

(3) Other costs in connection with the filing and prosecution of a United States patent application where title or royalty-free license is to be conveyed to the Government.

(b) General counseling services relating to patent matters, such as advice on patent laws, regulations, clauses, and employee agreements, are allowable.

(c) Other than those for general counseling services, patent costs not required by the contract are unallowable (see 31.205-37).

31.205-31 Plant reconversion costs.

(a) Plant reconversion costs are those incurred in restoring or rehabilitating the contractor's facilities to approximately the same condition that existed immediately prior to the start of the Government contract, with the exception of reasonable wear and tear.

(b) Reconversion costs are unallowable except for the cost of removing Government property and the restoration or rehabilitation costs caused by such removal.

(c) In circumstances, where equity so dictates, additional costs may be allowed to the extent agreed upon before costs are incurred. Care should be exercised to avoid duplication of costs through allowance as contingencies, additional profit or fee, or in other contracts.

31.205-32 Precontract costs.

Precontract costs are costs incurred before the effective date of the contract directly pursuant to the negotiation and in anticipation of the contract award when such incurrence is necessary to comply with the proposed contract delivery schedule. These costs are allowable to the extent that they would have been allowable if incurred after the date of the contract (see 31.110).

31.205-33 Professional and consultant service costs.

(a) *Definition.*

Professional and consultant services, as used in this section, means services provided by persons who are members of a particular profession or possess a special skill and who are not officers or employees of the contractor (*e.g.*, services acquired by contractors or subcontractors in order to enhance their legal, economic, financial, or technical positions).

(b) Professional and consultant services are generally acquired to obtain information, advice, opinions, alternatives, conclusions, recommendations, training, or direct assistance, such as for studies, analyses, evaluations, liaison with Government officials, or other forms of representation.

(c) Costs of professional and consultant services are allowable subject to this section when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Government (except see 31.205-30 and 31.205-47).

(d) Costs of professional and consultant services performed under any of the following circumstances are unallowable:

(1) Services to improperly obtain, distribute, or use information or data protected by law or regulation (*e.g.*, 52.215-1(e), Restriction on Disclosure and Use of Data).

(2) Services that are intended to improperly influence the contents of solicitations, the evaluation of proposals or quotations, or the selection of sources for contract award, whether award is by the Government, or by a prime contractor or subcontractor.

(3) Any other services obtained, performed, or otherwise resulting in violation of any statute or regulation prohibiting improper business practices or conflicts of interest.

(4) Services performed that are inconsistent with the purpose and scope of the services contracted for or otherwise agreed upon.

(e) In determining the allowability of costs (including retainer fees), no single factor or combination of factors is necessarily determinative; therefore, the contracting officer must consider the following factors:

(1) The nature and scope of the service rendered in relation to the service required.

(2) The necessity of contracting for the service, considering the contractor's capability in the particular area.

(3) The past pattern of acquiring such services and their costs, particularly in the years prior to the award of Government contracts.

(4) The impact of Government contracts on the contractor's business.

(5) Whether the proportion of Government work to the contractor's total business is such as to influence the contractor in favor of incurring the cost, particularly when the services rendered are not of a continuing nature and have little relationship to work under Government contracts.

(6) Whether the service can be performed more economically by employment rather than by contracting.

(7) The qualifications of the individual or concern rendering the service, and the customary fee charged, especially on non-Government contracts.

(8) Adequacy of the contractual agreement for the service (e.g., description of the service, estimate of time required, rate of compensation, termination provisions)

(f) Retainer fees are allowable when supported by evidence that—

(1) The services covered by the retainer agreement are necessary and customary;

(2) The level of past services justifies the amount of the retainer fees (if no services were rendered, fees are not automatically unallowable);

(3) The retainer fee is reasonable in comparison with maintaining an in-house capability to perform the covered services, when factors such as cost and level of expertise are considered; and

(4) The actual services performed are documented in accordance with the following—

(i) Fees for services rendered are allowable only when supported by evidence of the nature and scope of the service furnished (see also 31.205-38(c)); and

(ii) Evidence necessary to determine that work performed is proper, does not violate law or regulation, and includes —

(A) Details of all agreements (e.g., work requirements, rate of compensation, and nature and amount of other expenses, if any) with the individuals or organizations providing the services and details of actual services performed;

(B) Invoices or billings submitted by consultants, including sufficient detail as to the time expended and nature of the actual services provided; and

(C) Consultants' work products and related documents, such as trip reports indicating persons visited and subjects discussed, meeting minutes, and collateral memoranda and reports.

31.205-34 Recruitment costs.

(a) The following costs are allowable:

(1) Costs for employment agencies, not in excess of standard commercial rates.

(2) Costs of operating an employment office needed to secure and maintain an adequate labor force.

(3) Costs of operating an aptitude and educational testing program.

(4) Travel costs of employees engaged in recruiting personnel.

(5) Travel costs of applicants for interviews.

(6) Costs of help-wanted advertising.

(b) Help-wanted advertising costs are unallowable if the advertising—

(1) Does not describe specific positions or classes of positions; or

(2) Includes material that is not relevant for recruitment purposes, such as extensive illustrations or descriptions of the company's products or capabilities.

31.205-35 Relocation costs.

(a) Relocation costs are costs incident to the permanent change of assigned work location (for a period of 12 months or more) of an existing employee or upon recruitment of a new employee. The following types of relocation costs are allowable:

(1) Costs of travel of the employee and members of the employee's immediate family (see 31.205-46) and transportation of household items and personal effects to the new location.

(2) Costs of finding a new home, such as advance trips by the employee and/or the spouse, to locate living quarters, and temporary lodging during the transition period for the employee and members of the employee's immediate family.

(3) Closing costs incident to the disposition of the actual residence owned by the employee when notified of the transfer (*e.g.*, brokerage fees, legal fees, appraisal fees, points, and finance charges), except that these costs, when added to the costs described in paragraph (a)(4) of this section, must not exceed 14 percent of the sales price of the property sold.

(4) Continuing costs of ownership of the vacant former actual residence being sold, such as maintenance of building and grounds (exclusive of fixing up expenses), utilities, taxes, property insurance, and mortgage interest, after the settlement date or lease date of a new permanent residence, except that these costs, when added to the costs described in paragraph (a)(3) of this section, must not exceed 14 percent of the sales price of the property sold.

(5) The cost of a mortgage title policy is allowable if it is a cost incident to acquiring a home in a new location.

(6) Other necessary and reasonable expenses normally incident to relocation, such as disconnecting and connecting household appliances; automobile registration; driver's license and use taxes; cutting and fitting rugs, draperies, and curtains; forfeited utility fees and deposits; and purchase of insurance against damage to or loss of personal property while in transit.

(7) Costs incident to acquiring a home in the new work location, except that—

(i) These costs are not allowable for existing employees or newly recruited employees who were not homeowners before the relocation; and

(ii) The total costs must not exceed 5 percent of the purchase price of the new home.

(8) Mortgage interest differential payments, except that these costs are not allowable for existing or newly recruited employees who, before the relocation, were not homeowners and the total payments are limited to an amount determined as follows:

(i) The difference between the mortgage interest rates of the old and new residences times the current balance of the old mortgage times 3 years.

(ii) When mortgage differential payments are made on a lump-sum basis and the employee leaves or is transferred again in less than 3 years, the amount initially recognized must be proportionately adjusted to reflect payments only for the actual time of the relocation.

(9) Rental differential payments covering situations where relocated employees retain ownership of a vacated home in the old location and rent at the new location. The rented quarters at the new location must be comparable to those vacated, and the allowable differential payments may not exceed the actual rental costs for the new home, less the fair market rent for the vacated home times 3 years.

(10) Costs of canceling an unexpired lease.

(11) Payments for increased employee income or Federal Insurance Contributions Act (26 U.S.C. chapter 21) taxes incident to allowable reimbursed relocation costs.

(12) Payments for spouse employment assistance.

(b) The costs in paragraph (a) of this section must meet the following criteria to be considered allowable:

(1) The move must be for the benefit of the employer.

(2) Reimbursement must be in accordance with an established policy or practice that is consistently followed by the employer and is designed to motivate employees to relocate promptly and economically.

(3) The costs must not be otherwise unallowable under subpart 31.2.

(4) Amounts to be reimbursed must not exceed the employee’s actual expenses, except as provided for in paragraphs (b)(5) and (b)(6) of this section.

(5) For miscellaneous costs of the type discussed in paragraph (a)(6) of this subsection, a lump-sum amount, not to exceed $5,000, may be allowed in lieu of actual costs.

(6) (i) Reimbursement on a lump-sum basis may be allowed for any of the following relocation costs when adequately supported by data on the individual elements (e.g., transportation, lodging, and meals) comprising the build-up of the lump-sum amount to be paid based on the circumstances of the particular employee's relocation:

(A) Costs of finding a new home, as discussed in paragraph (a)(2) of this section.

(B) Costs of travel to the new location, in accordance with paragraph (a)(1) of this section (but not costs for the transportation of household goods).

(C) Costs of temporary lodging, in accordance with paragraph (a)(2) of this section.

(ii) When reimbursement on a lump-sum basis is used, any adjustments to reflect actual costs are unallowable.

(c) The following types of costs are unallowable:

(1) Loss on the sale of a home.

(2) Costs incident to acquiring a home in the new location as follows:

(i) Real estate brokers’ fees and commissions.

(ii) Costs of litigation.

(iii) Real and personal property insurance against damage or loss of property.

(iv) Mortgage life insurance.

(v) Owner's title policy insurance when such insurance was not previously carried by the employee on the old residence.

(vi) Property taxes and operating or maintenance costs.

(3) Continuing mortgage principal payments on a residence being sold.

(4) Costs incident to furnishing equity or nonequity loans to employees or making arrangements with lenders for employees to obtain lower-than-market rate mortgage loans.

(d) If relocation costs for an employee have been allowed as an allocable indirect or direct cost, and the employee resigns within 12 months for reasons within the employee's control, the contractor must refund or credit the relocation costs to the Government.

(e) Subject to the requirements of this section, the costs of family movements and of personnel movements of a special or mass nature are allowable. The cost, however, should be assigned on the basis of work (contracts) or time period benefited.

(f) Relocation costs (both outgoing and return) of employees who are hired for performance on specific contracts or long-term field projects are allowable if the—

(1) Term of employment is 12 months or more;

(2) Employment agreement specifically limits the duration of employment to the time spent on the contract or field project for which the employee is hired;

(3) Employment agreement provides for return relocation to the employee's permanent and principal home immediately prior to the outgoing relocation, or other location of equal or lesser cost; and

(4) Relocation costs are determined in accordance with this section.

(5) The costs to return employees, who are released from employment upon completion of field assignments pursuant to their employment agreements, are not subject to the refund or credit requirement of paragraph (d) of this section.

31.205-36 Rental costs.

(a) This section is applicable to the cost of renting or leasing real or personal property acquired under operating leases as defined in Financial Accounting Standards Board's Accounting Standards Codification (FASB ASC) 842, Leases. (See 31.205-11 for capital leases.)

(b) The following costs are allowable—

(1) Rental costs under operating leases, when the rates are reasonable at the time of the lease decision, after consideration of—

(i) Rental costs of comparable property, if any;

(ii) Market conditions in the area;

(iii) The type, life expectancy, condition, and value of the property leased;

(iv) Alternatives available; and

(v) Other provisions of the agreement.

(2) Rental costs under a sale and leaseback arrangement only up to the amount the contractor would be allowed if the contractor retained title, and the computation of which is based on the net book value of the asset on the date the contractor becomes a lessee of the property adjusted for any gain or loss recognized in accordance with 31.205-16(b).

(3) Charges in the nature of rent for property between any divisions, subsidiaries, or organization under common control—

(i) To the extent that they do not exceed the normal costs of ownership, such as depreciation, taxes, insurance, facilities capital cost of money, and maintenance (excluding interest or other unallowable costs pursuant to part 31); and

(ii) Provided that no part of such costs must duplicate any other allowed cost

(4) Rental cost of personal property leased from any division, subsidiary, or affiliate of the contractor under common control, that has an established practice of leasing the same or similar property to unaffiliated lessees must be allowed in accordance with paragraph (b)(1) of this section.

(c) The allowability of rental costs under unexpired leases in connection with terminations is subject to 31.205-42(e).

31.205-37 Royalties and other costs for use of patents.

(a) Royalties on a patent or amortization of the cost of purchasing a patent or patent rights necessary for the proper performance of the contract and applicable to contract products or processes are allowable unless—

(1) The Government has a license or the right to a free use of the patent;

(2) The patent has been adjudicated to be invalid, or has been administratively determined to be invalid;

(3) The patent is considered to be unenforceable; or

(4) The patent is expired.

(b) Care should be exercised in determining reasonableness when the royalties may have been arrived at as a result of less-than-arm's-length bargaining, including royalties—

(1) Paid to persons, including corporations, affiliated with the contractor;

(2) Paid to unaffiliated parties, including corporations, under an agreement entered into in contemplation that a Government contract would be awarded; or

(3) Paid under an agreement entered into after the contract award.

(c) The royalty amount allowed for a patent formerly owned by a contractor should not exceed the cost that would have been allowed had the contractor retained title.

31.205-38 Selling costs.

(a) (1) Selling encompasses all efforts to market the contractor's products or services, some of which are addressed in other sections of 31.205.

(2) The costs of any selling efforts other than those addressed in this cost principle are unallowable.

(b) Selling activity includes the following broad categories:

(1) *Advertising*. Advertising is defined at 31.205-1(b), and advertising costs are subject to the allowability provisions of 31.205-1(d) and (f).

(2) *Corporate image enhancement*. Corporate image enhancement activities, including broadly targeted sales efforts, other than advertising, are included within the definition of public relations at 31.205-1(a), and the costs of such efforts are subject to the allowability provisions at 31.205-1(e) and (f).

(3) *Bid and proposal costs*. Bid and proposal costs are defined at 31.205-18 and are subject to the allowability provisions of that section.

(4) *Market planning*. Market planning involves market research and analysis and general management planning concerned with development of the contractor's business. Long-range market planning costs are subject to the allowability provisions of 31.205-12. Other market planning costs are allowable.

(5) *Direct selling*. Direct selling efforts are those acts or actions to induce particular customers to purchase particular products or services of the contractor. Direct selling is characterized by person-to-person contact and includes such efforts as familiarizing a potential customer with the contractor's products or services, conditions of sale, service capabilities, etc. It also includes negotiation, liaison between customer and contractor personnel, technical and consulting efforts, individual demonstrations, and any other efforts having as their purpose the application or adaptation of the contractor's products or services for a particular customer's use. The cost of direct selling efforts is allowable.

(c) Notwithstanding any other limitation of this section, seller or agent compensation, fees, commissions, percentages, retainer or brokerage fees, whether or not contingent upon the award of contracts, are allowable only when paid to bona fide employees or established commercial or selling agencies maintained by the contractor for the purpose of securing business.

31.205-39 Service and warranty costs.

(a) Service and warranty costs include those arising from the fulfillment of any contractual obligation of a contractor to provide services, such as installation, training, correcting defects in the products, replacing defective parts, and making refunds in the case of inadequate performance.

(b) When consistent with the terms of the contract, service and warranty costs are allowable. However, care should be exercised to avoid duplication of the allowance as an element of both estimated product cost and risk.

31.205-40 Special tooling and special test equipment costs.

(a) Except as provided in paragraph (b), the cost of special tooling and special test equipment used in performing one or more Government contracts is allowable and must be allocated to the specific Government contract or contracts for which it is acquired.

(b) Depreciation or amortization is the only allowable cost for special tooling and special test equipment—

(1) Acquired or replaced by the contractor before the effective date of the contract, whether or not altered or adapted for use in performing the contract; or

(2) Specifically excluded in the contract schedule.

(c) The cost to adapt contractor-owned special tooling or special test equipment for use under a contract is an allowable cost. The cost to return the equipment to its prior configuration is also an allowable cost.

31.205-41 Taxes.

(a) *Definition*.

Exemption, as used in this section, means freedom from taxation, in whole or in part, and includes a tax abatement or reduction resulting from mode of assessment, method of calculation, or otherwise.

(b) The following types of costs are allowable:

(1) Federal, State, and local taxes (see part 29) that are required to be and are paid or accrued in accordance with generally accepted accounting principles.

(2) Taxes otherwise allowable under paragraph (b)(1) of this section, but upon which a claim of illegality or erroneous assessment exists, are allowable provided the contractor, before paying such taxes—

(i) Promptly requests instructions from the contracting officer concerning such taxes; and

(ii) Takes all action directed by the contracting officer arising out of paragraph (b)(2)(i) of this section or an independent decision of the Government as to the existence of a claim of illegality or erroneous assessment, to—

(A) Determine the legality of the assessment; or

(B) Secure a refund of such taxes.

(3) Interest or penalties incurred by the contractor for non-payment of any tax at the direction of the contracting officer or by reason of the failure of the contracting officer to ensure timely direction after a prompt request.

(4) The Environmental Tax, also known as the Superfund Tax, (section 59A of the Internal Revenue Code).

(c) The following types of costs are not allowable:

(1) Federal income and excess profits taxes.

(2) Taxes in connection with financing, refinancing, refunding operations, or reorganizations (see 31.205-20 and 31.205-27).

(3) Taxes from which exemptions are available to the contractor directly, or available to the contractor based on an exemption afforded the Government, except when the contracting officer determines that the administrative burden incident to obtaining the exemption outweighs the corresponding benefits accruing to the Government. When partial exemption from a tax is attributable to Government contract activity, taxes charged to such work in excess of that amount resulting from application of the preferential treatment. These provisions intend that the tax preference attributable to the Government contract activity be realized by the Government.

(4) Special assessments on land that represent capital improvements.

(5) Taxes (including excises) on real or personal property, or on the value, use, possession or sale of such property, which is used solely in connection with work other than on Government contracts.

(6) Any excise tax in subtitle D, Chapter 43 of the Internal Revenue Code of 1986, which includes excise taxes imposed in connection with qualified pension plans, welfare plans, deferred compensation plans, or other similar types of plans.

(7) Income tax accruals designed to account for the tax effects of differences between taxable income and pretax income as reflected by the books of account and financial statements.

(8) Any tax imposed under 26 U.S.C. 5000C.

(d) Taxes on property used solely in connection with non-Government or Government work should be considered directly applicable to the respective category of work unless the amounts involved are insignificant or comparable results would otherwise be obtained, for example—

(1) Taxes on contractor-owned work-in-process that is used solely in connection with non-Government work should be allocated to such work;

(2) Taxes on contractor-owned work-in-process inventory (and Government-owned work-in-process inventory when taxed) used solely in connection with Government work should be charged to such work; and

(3) The cost of taxes incurred on property used in both Government and non-Government work must be apportioned to all such work based upon the use of such property on the respective final cost objectives.

(e) Any taxes, interest, or penalties that were allowed as contract costs and are refunded to the contractor must be credited or paid to the Government as directed by the contracting officer.

(1) If a contractor or subcontractor obtains a foreign tax credit that reduces its Federal income tax return because of the payment of any tax or duty allowed as contract costs, and if those costs were reimbursed by a foreign government, the amount of the reduction must be paid to the United States Treasury at the time the Federal income tax return is filed.

(2) Any interest actually paid or credited to a contractor incident to a refund of tax, interest, or penalty must be paid or credited to the Government only to the extent that such interest accrued over the period during which the contractor had been reimbursed by the Government for the taxes, interest, or penalties.

31.205-42 Termination costs.

The following cost principles apply to contract terminations and are used in conjunction with the other cost principles in this subpart:

(a) *Common items.* The contracting officer should consider the contractor's plans and orders for current and planned production when determining if items can reasonably be used on other work of the contractor.

(1) The costs of items reasonably usable on the contractor's other work must not be allowable unless the contractor submits evidence that the items could not be retained at cost without sustaining a loss.

(2) Contemporaneous purchases of common items by the contractor must be regarded as evidence that such items are reasonably usable on the contractor's other work.

(3) Any acceptance of common items as allocable to the terminated portion of the contract should be limited to the extent that the quantities of such items on hand, in transit, and on order are in excess of the reasonable quantitative requirements of other work.

(b) *Costs continuing after termination.*

(1) Despite all reasonable efforts by the contractor, costs that cannot be discontinued immediately after the effective date of termination are generally allowable.

(2) Costs continuing after the effective date of the termination due to the negligent or willful failure of the contractor to discontinue the costs must be unallowable.

(c) *Initial costs.* Initial costs, including starting load and preparatory costs, are allowable as follows:

(1) Starting load costs, not fully absorbed because of termination, are nonrecurring labor, material, and related overhead costs incurred in the early part of production and result from factors such as—

(i) Excessive spoilage due to inexperienced labor;

(ii) Idle time and subnormal production due to testing and changing production methods;

(iii) Training; and

(iv) Lack of familiarity or experience with the product, materials, or manufacturing processes.

(2) Preparatory costs incurred in preparing to perform the terminated contract include such costs as those incurred for initial plant rearrangement and alterations, management and personnel organization, and production planning. They do not include special machinery and equipment and starting load costs.

(3) When initial costs are included in the settlement proposal as a direct charge, such costs must not be included in overhead. Initial costs attributable to only one contract must not be allocated to other contracts.

(4) If initial costs are claimed and they have not been segregated on the contractor's books, they must be segregated for settlement purposes from cost reports and schedules reflecting that high unit cost incurred during the early stages of the contract.

(5) If the settlement proposal is on the inventory basis, initial costs should normally be allocated on the basis of total end items called for by the contract immediately before termination; however, if the contract includes end items of a diverse nature, some other equitable basis may be used, such as machine or labor hours.

(d) *Loss of useful value.* Loss of useful value of special tooling, and special machinery and equipment is generally allowable, provided the—

(1) Special tooling, or special machinery and equipment is not reasonably capable of use in the other work of the contractor;

(2) Government's interest is protected by transfer of title or by other means deemed appropriate by the contracting officer; and

(3) Loss of useful value for any one terminated contract is limited to that portion of the acquisition cost, which bears the same ratio to the total acquisition cost as the terminated portion of the contract bears to the entire terminated contract, and other Government contracts for which the special tooling, or special machinery and equipment was acquired.

(e) *Rental under unexpired leases.* Rental costs under unexpired leases, less the residual value of such leases, are allowable when reasonably necessary for the performance of the terminated contract, if—

(1) The amount of rental claimed does not exceed the reasonable use value of the property leased for the period of the contract and such further period as may be reasonable; and

(2) The contractor makes all reasonable efforts to terminate, assign, settle, or otherwise reduce the cost of such lease.

(f) *Alterations of leased property.* The cost of alterations and reasonable restorations required by the lease may be allowed when the alterations were necessary for performing the contract.

(g) *Settlement expenses*. (1) Settlement expenses, including the following, are generally allowable:

(i) Accounting, legal, clerical, and similar costs reasonably necessary for—

(A) The preparation and presentation of settlement claims, including supporting data, to the contracting officer; and

(B) The termination and settlement of subcontracts.

(ii) Reasonable costs for the storage, transportation, protection, and disposition of property acquired or produced for the contract.

(iii) Indirect costs related to salary and wages incurred as settlement expenses in paragraphs (g)(1)(i) and (g)(1)(ii); normally, such indirect costs must be limited to payroll taxes, fringe benefits, occupancy costs, and immediate supervision costs.

(2) If settlement expenses are significant, a cost account or work order must be established to separately identify and accumulate them.

(h) *Subcontractor claims.*

(1) Subcontractor claims, including the allocable portion of the claims common to the contract and to other work of the contractor, are generally allowable.

(2) An appropriate share of the contractor's indirect expense may be allocated to the amount of settlements with subcontractors provided that the amount allocated is reasonably proportionate to the relative benefits received and is otherwise consistent with 31.201-4 and 31.203(d). The indirect expense so allocated must exclude the same and similar costs claimed directly or indirectly as settlement expenses.

31.205-43 Trade, business, technical, and professional activity costs.

The following types of costs are allowable:

(a) Memberships in trade, business, technical, and professional organizations.

(b) Subscriptions to trade, business, professional, or other technical periodicals.

(c) When the principal purpose of a meeting, convention, conference, symposium, or seminar is the dissemination of trade, business, technical or professional information or the stimulation of production or improved productivity—

(1) Costs of organizing, setting up, and sponsoring the meetings, conventions, symposia, etc., including rental of meeting facilities, transportation, subsistence, and incidental costs;

(2) Costs of attendance by contractor employees, including travel costs (see 31.205-46); and

(3) Costs of attendance by individuals who are not employees of the contractor when—

(i) Such costs are not also reimbursed to the individual by the employing company or organization, and

(ii) The individual's attendance is essential to achieve the purpose of the conference, meeting, convention, symposium, etc.

31.205-44 Training and education costs.

Costs for employee training and education that are related to the field in which the employee works, or may reasonably be expected to work, are allowable except for the following:

(a) Overtime compensation for training and education is unallowable.

(b) The cost of salaries for attending undergraduate level classes or part-time graduate level classes during working hours is unallowable, except when unusual circumstances do not permit attendance at such classes outside of working hours.

(c) Costs of tuition, fees, training materials, textbooks, subsistence, salary, and any other payments in connection with full-time graduate level education, are unallowable for any portion of the program that exceeds two school years or the length of the degree program, whichever is less.

(d) Grants to educational or training institutions, including the donation of facilities or other properties, scholarships, and fellowships are considered contributions and are unallowable.

(e) Training or education costs for other than bona fide employees are unallowable, except that the costs incurred for educating employee dependents (primary and secondary level studies) when the employee is working in a foreign country where suitable public education is not available may be included in overseas differential pay.

(f) Contractor contributions to college savings plans for employee dependents are unallowable.

31.205-45 [Reserved]

31.205-46 Travel costs.

(a) *Costs for transportation, lodging, meals, and incidental expenses*. (1) Costs incurred by contractor personnel on official company business are allowable, subject to the limitations contained in this section.

(i) Costs for transportation may be based on mileage rates, actual costs incurred, or on a combination thereof, provided the method used results in a reasonable charge.

(ii) Costs for lodging, meals, and incidental expenses may be based on per diem, actual expenses, or a combination thereof, provided the method used results in a reasonable charge.

(2) Except as provided in paragraph (a)(3) of this section, costs incurred for lodging, meals, and incidental expenses, must be considered to be reasonable and allowable only to the extent that they do not exceed, on a daily basis, the maximum per diem rates in effect at the time of travel as set forth in the—

(i) Federal Travel Regulation (FTR), prescribed by the General Services Administration, for travel in the United States, available at chapters 300 through 304 of title 41 CFR;

(ii) Joint Travel Regulations (JTR), prescribed by the Department of Defense, for the United States and its outlying areas, available at https://www.travel.dod.mil/Policy-Regulations/Joint-Travel-Regulations/; or

(iii) Standardized Regulations (Government Civilians, Foreign Areas), section 925, Maximum Travel Per Diem Allowances of Foreign Areas, prescribed by the Department of State, for travel in areas not covered in (a)(2)(i) and (ii) of this paragraph, available at https://allowances.state.gov/content.asp?content_id=134&menu_id=75.

(3) In unusual situations, actual costs in excess of the maximum per diem rates are allowable provided that such amounts do not exceed the higher amounts authorized for Federal civilian employees as permitted in the regulations referenced in paragraph (a)(2) (i), (ii), or (iii) or this section. For such higher amounts to be allowable, the following conditions must be met:

(i) One of the conditions warranting approval of the actual expense method, as set forth in the regulations referred in paragraph (a)(2)(i), (ii), or (iii) of this section, must exist.

(ii) A written justification for use of the higher amounts must be approved by an official of the contractor's organization.

(iii) If it becomes necessary to exercise the authority to use the higher actual expense method repetitively or on a continuing basis in a particular area, the contractor must obtain advance approval from the contracting officer.

(iv) Documentation to support actual costs incurred must be in accordance with the contractor's established practices, subject to paragraph (a)(7) of this section, and a receipt is required for each expenditure of $75.00 or more. The approved justification required by paragraph (a)(3)(ii) of this section and, if applicable, paragraph (a)(3)(iii) of this section must be retained.

(4) Paragraphs (a)(2) and (a)(3) of this section do not incorporate the regulations cited in paragraphs (a)(2)(i), (ii), and (iii) of this section in their entirety. Only the maximum per diem rates, the definitions of lodging, meals, and incidental expenses, and the regulatory coverage dealing with unusual situations are addressed.

(5) Contracting officers should consider an advance agreement to address compliance with paragraphs (a)(2) and (3) of this section (see 31.110).

(6) (i) The maximum per diem rates referenced in paragraph (a)(2) of this section generally would not constitute a reasonable daily charge—

(A) When no lodging costs are incurred; and/or

(B) On partial travel days (e.g., day of departure and return).

(ii) (A) The contractor must make appropriate downward adjustments from the maximum per diem rates under these circumstances.

(B) While these adjustments need not be calculated in accordance with the FTR or JTR, they must result in a reasonable charge.

(7) Costs must be allowable only if the following information is documented-

(i) Date and place (city, town, or other similar designation) of the expenses;

(ii) Purpose of the trip; and

(iii) Name of person on trip and that person’s title or relationship to the contractor.

(b) *Excess airfare costs*. (1) Airfare costs in excess of the lowest priced airfare available to the contractor during normal business hours are unallowable except when the lowest price airfare results in—

(i) Circuitous routing;

(ii) Travel during unreasonable hours;

(iii) Excessively prolonged travel;

(iv) Increased costs that would offset transportation savings;

(v) Unreasonable or inadequate conditions for the physical or medical needs of the traveler; or

(vi) An inability to meet mission requirements.

(2) Airfare costs in excess of the lowest priced airfare that meet the criteria in paragraph (b)(1) of this section are allowable if documented and justified.

(c) *Cost of travel by contractor-owned, -leased, or -chartered aircraft*. This includes the cost of lease, charter, operation (including personnel), maintenance, depreciation, insurance, and other related costs.

(1) Such costs are limited to the allowable airfare described in paragraph (b) of this section for the flight destination unless this manner of travel is specifically required by the contract or a higher amount is approved by the contracting officer.

(2) A higher amount may be agreed to when the criteria in paragraph (b) of this section are met, or when an advance agreement under paragraph (5) of this section has been executed.

(3) In all cases, travel by contractor-owned, -leased, or -chartered aircraft must be fully documented and justified.

(4) For each contractor-owned, -leased, or -chartered aircraft used for any business purpose which is charged or allocated, directly or indirectly, to a Government contract, the contractor must maintain and make available manifest/logs for all flights on such company aircraft. As a minimum, the manifest/log must indicate—

(i) Date, time, and points of departure;

(ii) Destination, date, and time of arrival;

(iii) Name of each passenger and relationship to the contractor;

(iv) Authorization for trip; and

(v) Purpose of trip.

(5) Where an advance agreement is proposed (see 31.110), consideration may be given to the following:

(i) Whether scheduled commercial airlines or other suitable, less costly, travel accommodations are available at reasonable times, with reasonable frequency, and serve the required destinations conveniently.

(ii) Whether increased flexibility in scheduling results in time savings and more effective use of personnel that would outweigh additional travel costs.

(d) (1) Costs of contractor-owned or leased automobiles, as used in this paragraph, include the costs of lease, operation (including personnel), maintenance, depreciation, insurance, etc., and are allowable, if reasonable, to the extent that the automobiles are used for company business.

(2) That portion of the cost of company-furnished automobiles that relates to personal use by employees (including transportation to and from work) is compensation for personal services and is unallowable.

31.205-47 Costs related to legal and other proceedings.

(a) *Definitions.* As used in this section-

Costs means costs including administrative and clerical expenses; the costs of legal services, whether performed by in-house or private counsel; the costs of the services of accountants, consultants, or others retained by the contractor to assist it; costs of employees, officers, and directors; and any similar costs incurred before, during, and after commencement of a judicial or administrative proceeding, which bears a direct relationship to the proceedings.

Fraud means acts—

(1) Of fraud or corruption or attempts to defraud the Government or to corrupt its agents;

(2) That constitute a cause for debarment or suspension under 9.406-2(a) and 9.407-2(a); and

(3) That violate the False Claims Act, 31 U.S.C., sections 3729-3731, or 41 U.S.C. chapter 87, Kickbacks.

Penalty does not include restitution, reimbursement, or compensatory damages.

Proceeding includes an investigation.

(b) Costs incurred in connection with any proceeding brought by a Federal, State, local, or foreign government for a violation of, or failure to comply with, law or regulation by the contractor (including its agents or employees) (41 U.S.C. 4310 and 10 U.S.C. 3750); a contractor or subcontractor employee submitting a whistleblower complaint of reprisal in accordance with 41 U.S.C. 4712 or 10 U.S.C.4701; or third party, in the name of the United States under the False Claims Act (31 U.S.C. 3730), are unallowable if the result is—

(1) In a criminal proceeding, a conviction;

(2) In a civil or administrative proceeding, either—

(i) A finding of contractor liability where the proceeding involves an allegation of fraud or similar misconduct; or

(ii) The imposition of a monetary penalty, or an order issued by the agency head to the contractor or subcontractor to take corrective action under 41 U.S.C. 4712 or 10 U.S.C. 4701, where the proceeding does not involve an allegation of fraud or similar misconduct; or

(3) A final decision by an appropriate official of an executive agency to:

(i) Debar or suspend the contractor;

(ii) Rescind or void a contract; or

(iii) Terminate a contract for default by reason of a violation or failure to comply with a law or regulation; or

(4) Disposition of the matter by consent or compromise if the proceeding could have led to any of the outcomes listed in paragraphs (b) (1) through (3) of this section (but see paragraphs (c) and (d) of this section); or

(5) Not covered by paragraphs (b) (1) through (3) of this section, but where the underlying alleged contractor misconduct was the same as that which led to a different proceeding whose costs are unallowable by reason of paragraphs (b) (1) through (3) of this section.

(c) (1) To the extent costs are not otherwise unallowable, costs incurred in connection with any proceeding commenced by the United States (see paragraph (b) of this section) that is resolved by consent or compromise pursuant to an agreement entered into between the contractor and the United States, and which are unallowable (solely because of paragraph (b) of this section), may be allowed if specifically provided in such agreement.

(2) (i) In the event of a settlement of any proceeding brought by a third party under the False Claims Act in which the United States did not intervene, reasonable costs incurred by the contractor in connection with such a proceeding that are not otherwise unallowable by regulation or by separate agreement with the United States may be allowed if the contracting officer, in consultation with legal, determines that there was very little likelihood that the third party would have been successful on the merits.

(ii) In the event of disposition, by consent or compromise of a proceeding brought by a whistleblower for alleged reprisal in accordance with 41 U.S.C. 4712 or 10 U.S.C. 4701, reasonable costs incurred by a contractor or subcontractor in connection with such a proceeding that are not otherwise unallowable by regulation, or by agreement with the United States, may be allowed if the contracting officer, in consultation with legal, determines that there was very little likelihood that the claimant would have been successful on the merits.

(d) To the extent that the costs are not otherwise unallowable, costs incurred in connection with a proceeding under paragraph (b) of this section commenced by a State, local, or foreign government may be allowable when the contracting officer determines that the costs were incurred either as a:

(1) Direct result of a specific term or condition of a Government contract; or

(2) Result of compliance with specific written direction of the contracting officer.

(e) Costs incurred in connection with proceedings described in paragraph (b) of this section which are not made unallowable by that paragraph, may be allowable to the extent that—

(1) The costs are reasonable in relation to the activities required to deal with the proceeding and the underlying cause of action;

(2) The costs are not otherwise recovered from the Government or a third party, either directly as a result of the proceeding; and

(3) The percentage of costs allowed does not exceed the percentage determined to be appropriate considering the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States as a party.

(i) Such percentage must not exceed 80 percent of the legal costs incurred.

(ii) Agreements reached under paragraph (c) of this section must be subject to this limitation. If, however, an agreement described in paragraph (c)(1) of this section explicitly states the amount of otherwise allowable incurred legal fees and limits the allowable recovery to 80 percent or less of the stated legal fees, no additional limitation need be applied.

(4) The amount of reimbursement allowed for legal costs in connection with any proceeding described in paragraph (c) (2) of this section must be determined by the contracting officer but must not exceed 80 percent of otherwise allowable legal costs incurred. No additional limitations need be applied.

(f) Costs not covered elsewhere in this section are unallowable if incurred in connection with—

(1) Defense against Government claims or appeals or the prosecution of claims or appeals against the Government;

(2) Organization, reorganization, (including mergers and acquisitions) or resisting mergers and acquisitions (see 31.205-27);

(3) Defense of antitrust suits;

(4) Defense of suits brought by employees or former employees of the contractor under 18 U.S.C. 1031, where the contractor was found liable or settled;

(5) Costs of legal, accounting, and consultant services and directly associated costs incurred in connection with the defense or prosecution of lawsuits or appeals between contractors arising from—

(i) An agreement or contract concerning a teaming arrangement, a joint venture, or similar arrangement of shared interest; or

(ii) Dual sourcing, coproduction, or similar programs, except when incurred as a result of compliance with specific terms and conditions of the contract or subcontract or written instructions from the contracting officer or when agreed to in writing by the contracting officer;

(6) Patent infringement litigation, unless otherwise provided for in the contract.

(7) Representation of, or assistance to, individuals, groups, or legal entities that the contractor is not legally bound to provide arising from an action where the party was convicted of the violation of a law or regulation or was found liable in a civil or administrative proceeding.

(8) Protests of Government solicitations or contract awards, or the defense against protests of such solicitations or contract awards, unless the costs of defending against a protest are incurred pursuant to a written request from the contracting officer.

(9) A Congressional investigation or inquiry into an issue that is the subject matter of a proceeding resulting in a disposition as described in paragraphs (b)(1) through (5) of this section (see 10 U.S.C. 3744(a)(17)).

(g) (1) Costs that may be unallowable under 31.205-47, including directly associated costs, must be segregated and accounted for separately by the contractor.

(2) When a proceeding covered by paragraph (b) and paragraphs (f)(4) and (f)(7) of this section is pending—

(i) The contracting officer must withhold payment of such costs; or

(ii) When determined to be in the best interests of the Government, the contracting officer may provide for conditional payment upon provision of adequate security, or other adequate assurance, and agreement by the contractor to repay all unallowable costs, plus interest, if the costs are subsequently determined to be unallowable.

31.205-48 Research and development costs.

(a) *Definition*.

Research and development, as used in this section, means the type of technical effort described in 31.205-18 but sponsored by a grant or required in the performance of a contract.

(b) When costs are incurred in excess of either the price of a contract or amount of a grant for research and development, the excess is unallowable under any other Government contract.

31.205-49 Goodwill.

(a) Goodwill is an unidentifiable intangible asset that originates under the purchase method of accounting for a business combination when the price paid by the acquiring company exceeds the sum of the identifiable individual assets acquired less liabilities assumed, based upon their fair values.

(b) The excess amount paid is commonly referred to as goodwill.

(c) Goodwill may arise from the acquisition of a company as a whole or a portion thereof.

(d) Any costs for amortization, expensing, write-off, or write-down of goodwill are unallowable.

31.205-50 [Reserved]

31.205-51 Costs of alcoholic beverages.

Costs of alcoholic beverages are unallowable.

31.205-52 Asset valuations resulting from business combinations.

(a) For tangible capital assets, when the purchase method of accounting for a business combination is used, whether or not the contract or subcontract is subject to CAS, the allowable depreciation and cost of money must be based on the capitalized asset values measured and assigned in accordance with 48 CFR 9904.404-50(d), if allocable, reasonable, and not otherwise unallowable.

(b) For intangible capital assets, when the purchase method of accounting for a business combination is used, allowable amortization and cost of money must be limited to the total of the amounts that would have been allowed had the combination not taken place.

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Subpart 31.3 - Contracts With Educational Institutions

31.301 Purpose.

This subpart provides the principles for determining the cost of work performed by educational institutions under contracts and contract modifications with the Government.

31.302 General.

The OMB Uniform Guidance at 2 CFR part 200, subpart E and appendix III, provides principles for determining the costs applicable to work performed by educational institutions under contracts with the Government.

31.303 Requirements.

(a) Contracts that refer to this subpart for determining allowable costs under contracts with educational institutions must be deemed to refer to and must have the allowability of costs determined by the contracting officer in accordance with, the OMB Uniform Guidance at 2 CFR part 200, subpart E and appendix III, in effect on the date of the contract.

(b) Agencies are not expected to place additional restrictions on individual items of cost.

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Subpart 31.4 - [Reserved]

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Subpart 31.5 - [Reserved]

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Subpart 31.6 - Contracts With State, Local, and Federally Recognized Indian Tribal Governments

31.601 Purpose.

This subpart provides the principles for determining allowable cost of contracts, subcontracts, and modifications to contracts and subcontracts with State, local, and federally recognized Indian tribal governments.

31.602 General.

The OMB Uniform Guidance at 2 CFR part 200, subpart E and appendices V and VII sets forth the principles for determining the allowable costs of contracts and subcontracts with State, local, and federally recognized Indian tribal governments. These principles are for cost determination and are not intended to identify the circumstances or dictate the extent of Federal and State or local participation in financing a particular contract.

31.603 Requirements.

(a) Contracts that refer to this subpart for determining allowable costs under contracts with State, local and Indian tribal governments must be deemed to refer to and must have the allowability of costs determined by the contracting officer in accordance with, the OMB Uniform Guidance at 2 CFR part 200, subpart E and appendices V and VII, in effect on the date of the contract.

(b) Agencies are not expected to place additional restrictions on individual items of cost.

(c) In accordance with 10 U.S.C. 3744, 41 U.S.C. 4304, 31 U.S.C. 3730, and 41 U.S.C. 4310, the following are unallowable:

(1) Costs of entertainment, including amusement, diversion, and social activities, and any costs directly associated with such costs (such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities).

(2) Costs incurred to influence (directly or indirectly) legislative action on any matter pending before Congress, a State legislature, or a legislative body of a political subdivision of a State.

(3) Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the United States where the contractor is found liable or has pleaded nolo contendere to a charge of fraud or similar proceeding (including filing of a false certification).

(4) Payments of fines and penalties resulting from violations of, or failure to comply with, Federal, state, local, or foreign laws and regulations, except when incurred as a result of compliance with specific terms and conditions of the contract or specific written instructions from the contracting officer authorizing in advance such payments in accordance with applicable regulations in the FAR or an executive agency supplement to the FAR.

(5) Costs of any membership in any social, dining, or country club or organization.

(6) Costs of alcoholic beverages.

(7) Contributions or donations, regardless of the recipient.

(8) Costs of advertising designed to promote the contractor or its products.

(9) Costs of promotional items and memorabilia, including models, gifts, and souvenirs.

(10) Costs for travel by commercial aircraft which exceed the amount of the standard commercial fare.

(11) Costs incurred in making any payment (commonly known as a golden parachute payment), which is—

(i) In an amount in excess of the normal severance pay paid by the contractor to an employee upon termination of employment; and

(ii) Paid to the employee contingent upon, and following, a change in management control over, or ownership of, the contractor or a substantial portion of the contractor's assets.

(12) Costs of commercial insurance that protects against the costs of the contractor for correction of the contractor's own defects in materials or workmanship.

(13) Costs of severance pay paid by the contractor to a foreign national employed by the contractor under a service contract performed—

(i) Outside the United States, to the extent that the amount of the severance pay paid in any case exceeds the amount paid in industry involved under the customary or prevailing practice for firms in that industry providing similar services in the United States, as determined in accordance with the FAR; or

(ii) In a foreign country, if the termination of the employment of the foreign national is the result of the closing of, or curtailment of activities, at a United States facility in that country at the request of the government of that country.

(14) (i) Unless an exception at 31.205-47(c) or (d) applies, costs incurred by a contractor in connection with any criminal, civil, or administrative proceedings that result in dispositions described at 31.205-47(b)(1) through (5) commenced by:

(A) A Federal, State, local, or foreign government, for a violation of, or failure to comply with, law or regulation by the contractor (including its agents or employees);

(B) A contractor or subcontractor employee submitting a whistleblower complaint of reprisal in accordance with 41 U.S.C. 4712 or 10 U.S.C. 4701; or

(C) A third party in the name of the United States under the False Claims Act, 31 U.S.C. 3730.

(ii) For any proceedings in paragraph (c)(14)(i) of this section that does not result in a disposition described at 31.205-47(b)(1) through (5), or to which exceptions at 31.205-47(c) apply, the cost of that proceeding must be subject to the limitations in 31.205-47(e).

(15) Costs incurred in connection with a Congressional investigation or inquiry into an issue that is the subject matter of a proceeding resulting in a disposition as described at 31.205-47(b)(1) through (5).

Subpart 31.7 - Contracts with Nonprofit Organizations

31.701 Definition.

Nonprofit organization means a business entity organized and operated exclusively for charitable, scientific, or educational purposes, of which no part of the net earnings inure to the benefit of any private shareholder or individual, of which no substantial part of the activities is carrying on propaganda or otherwise attempting to influence legislation or participating in any political campaign on behalf of any candidate for public office, and which are exempt from federal income taxation under section 501 of the Internal Revenue Code.

31.702 General.

The OMB Uniform Guidance at 2 CFR part 200, subpart E and appendix IV, sets forth principles for determining the costs applicable to work performed by nonprofit organizations (as defined in the OMB Uniform Guidance at 2 CFR part 200) under contracts with the Government. See 31.108 for exceptions to the cost principles for nonprofit organizations.

31.703 Requirements.

(a) Contracts that refer to this subpart for determining allowable costs must be deemed to refer to and must have the allowability of costs determined by the contracting officer in accordance with, the OMB Uniform Guidance at 2 CFR part 200, subpart E and appendix IV in effect on the date of the contract.

(b) Agencies are not expected to place additional restrictions on individual items of cost. However, under 10 U.S.C. 3744 and 41 U.S.C. 4304, the costs cited in 31.603(c) are unallowable.

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PART 32 - CONTRACT FINANCING

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32.000 Scope of part.

This part addresses policies and procedures for contract financing, funding and other payment matters. It implements 10 U.S.C. Chapter 277, 41 U.S.C. Chapter 45, and 50 U.S.C. Chapter 55, which authorize contract financing guarantees. This part addresses—

(a) Payment methods, including partial payments and progress payments based on percentage or stage of completion;
(b) Loan guarantees, advance payments, and progress payments based on costs;
(c) Administration of debts to the Government arising out of contracts;
(d) Contract funding, including the use of contract clauses limiting costs or funds;
(e) Assignment of claims to aid in private financing;
(f) Selected payment clauses;
(g) Financing of purchases of commercial products and commercial services;
(h) Financing of other than commercial purchases;
(i) Performance-based payments;
(j) Electronic funds transfer payments; and
(k) Fast payment procedures.

32.001 Definitions.

As used in this part—

Commercial interim payment means any payment that is not a commercial advance payment or a delivery payment. These payments are contract financing payments and not subject to the interest penalty provisions of the Prompt Payment Act in subpart 32.9.

Contract action means an action resulting in a contract, as defined in subpart 2.1, including actions for additional supplies or services outside the existing contract scope, but excludes actions that are within the scope and under the terms of the existing contract, such as contract modifications issued pursuant to the Changes clause, or funding and other administrative changes.

Contract financing payment means an authorized Government disbursement of monies to a contractor prior to acceptance of supplies or services by the Government.

(1) Contract financing payments may include-
(i) Advance payments;
(ii) Performance-based payments;
(iii) Commercial advance, installment, and interim payments;
(iv) Progress payments based on cost under the clause at 52.232-16, Progress Payments;
(v) Progress payments based on a percentage or stage of completion (see 32.102(e)), except those made under the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts, or the clause at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts; and
(vi) Interim payments under a cost reimbursement contract, except for a cost reimbursement contract for services when Alternate I of the clause at 52.232-25, Prompt Payment, is used.

(2) Contract financing payments do not include-
(i) Invoice payments;
(ii) Payments for partial deliveries; or
(iii) Lease and rental payments.

Customary contract financing means that financing deemed by an agency to be available for routine use by contracting officers. Most customary contract financing arrangements should be usable by contracting officers without specific reviews or approvals by higher management.

Delivery payment means a payment for accepted supplies or services, including payments for accepted partial deliveries. Commercial financing payments are liquidated by deduction from these payments. Delivery payments are invoice payments for prompt payment purposes.

Designated billing office means the office or person (governmental or nongovernmental) designated in the contract where the contractor first submits invoices and contract financing requests. The contract might designate different offices to receive invoices and contract financing requests. The designated billing office might be-

(1) The Government disbursing office;
(2) The contract administration office;
(3) The office accepting the supplies delivered or services performed by the contractor;

(4) The contract audit office; or

(5) A nongovernmental agent.

Designated payment office means the office designated in the contract to make invoice payments or contract financing payments. Normally, this will be the Government disbursing office.

Due date means the date on which payment should be made.

Invoice payment means a Government disbursement of monies to a contractor under a contract or other authorization for supplies or services accepted by the Government.

(1) Invoice payments include-

(i) Payments for partial deliveries that have been accepted by the Government;

(ii) Final cost or fee payments where amounts owed have been settled between the Government and the contractor;

(iii) For purposes of subpart 32.9 only, all payments made under the clause at , Payments Under Fixed-Price Construction Contracts, and the clause at , Payments Under Fixed-Price Architect-Engineer Contracts; and

(iv) Interim payments under a cost-reimbursement contract for services when Alternate I of the clause at , Prompt Payment, is used

(2) Invoice payments do not include contract financing payments.

Liquidate means to decrease a payment for an accepted supply item or service under a contract for the purpose of recouping financing payments previously paid to the contractor.

Unusual contract financing means any financing not deemed customary contract financing by the agency. Unusual contract financing is financing that is legal and proper under applicable laws, but that the agency has not authorized contracting officers to use without specific reviews or approvals by higher management.

32.002 Applicability of subparts.

(a) The following sections are applicable to all purchases:

(1) Sections 32.000 through 32.009.

(2) Subpart 32.3, Loan Guarantees for Defense Production.

(3) Subpart 32.6, Contract Debts.

(4) Subpart 32.7, Contract Funding.

(5) Subpart 32.8, Assignment of Claims.

(6) Subpart 32.9, Prompt Payment.

(7) Subpart 32.11, Electronic Funds Transfer.

(8) Subpart 32.12, Fast Payment Procedure.

(b) Subpart 32.2, Commercial Product and Commercial Service Purchase Financing, is applicable only to purchases of commercial products and commercial services under authority of part 12.

(c) The following subparts of this part are applicable to all purchases made under any authority other than part 12:

(1) Subpart 32.1, Financing for Other Than a Commercial Purchase.

(2) Subpart 32.4, Advance Payments for Other Than Commercial Acquisitions.

(3) Subpart 32.5, Progress Payments Based on Costs.

(4) Subpart 32.10, Performance-Based Payments.

32.003 Simplified acquisition procedures financing.

Unless agency regulations otherwise permit, contract financing must not be provided for purchases made under the authority of part 13.

32.004 Contract performance in foreign countries.

The enforceability of contract provisions for security of Government financing in a foreign jurisdiction is dependent upon local law and procedure. Prior to providing contract financing where foreign jurisdictions may become involved, the contracting officer must ensure the Government's security is enforceable. This may require the provision of additional or different security than that normally provided for in the standard contract clauses.

32.005 Consideration for contract financing.

(a) *Requirement.* (1) When a contract financing clause is included at the inception of a contract, there must be no separate consideration for the contract financing clause. The value of the contract financing to the contractor is expected to be reflected in either:

(i) A bid or negotiated price that will be lower than such price would have been in the absence of the contract financing, or

(ii) Contract terms and conditions, other than price, that are more beneficial to the Government than they would have been in the absence of the contract financing.

(2) Adequate new consideration is required for changes to, or the addition of, contract financing after award.

(b) *Amount of new consideration.* The contractor may provide new consideration by monetary or nonmonetary means, provided the value is adequate. The fair and reasonable consideration should approximate the amount by which the price would have been less had the contract financing terms been contained in the initial contract. In the absence of definite information on this point, the contracting officer should apply the following criteria in evaluating whether the proposed new consideration is adequate:

(1) The value to the contractor of the anticipated amount and duration of the contract financing at the imputed financial costs of the equivalent working capital.

(2) The estimated profit rate to be earned through contract performance.

(c) *Interest.* Except as provided in subpart 32.4, Advance Payments for Other Than Commercial Acquisitions, the contract must not provide for any other type of specific charges, such as interest, for contract financing.

32.006 Reduction or suspension of contract payments upon finding of fraud.

32.006-1 General.

(a) Under 10 U.S.C. 3806(j), the statutory authority implemented by this section is available to the Department of Defense (DoD) and the National Aeronautics and Space Administration; this statutory authority is not available to the United States Coast Guard. Under 41 U.S.C. 4506, this statutory authority is available to all agencies subject to Division C of subtitle I of title 41.

(b) 10 U.S.C. 3806(c) and 41 U.S.C. 4506 provide for a reduction or suspension of further payments to a contractor when the agency head determines there is substantial evidence that the contractor's request for advance, partial, or progress payments is based on fraud. This authority does not apply to commercial interim payments under subpart 32.2, or performance-based payments under subpart 32.10.

(c) The agency head may not delegate his or her responsibilities under these statutes below Level IV of the Executive Schedule.

(d) Authority to reduce or suspend payments under these statutes is in addition to other Government rights, remedies, and procedures.

(e) In accordance with these statutes, agency head determinations and decisions under this section may be made for an individual contract or any group of contracts affected by the fraud.

32.006-2 Definition.

Remedy coordination official, as used in this section, means the person or entity in the agency who coordinates within that agency the administration of criminal, civil, administrative, and contractual remedies resulting from investigations of fraud or corruption related to procurement activities. (See 10 U.S.C. 3806(a) and 41 U.S.C. 4506(a).)

32.006-3 Responsibilities.

(a) Agencies must establish appropriate procedures to implement the policies and procedures of this section.

(b) Government personnel must report suspected fraud related to advance, partial, or progress payments in accordance with agency regulations.

32.006-4 Procedures.

(a) In any case that an agency’s remedy coordination official finds substantial evidence that a contractor’s request for advance, partial, or progress payments under a contract awarded by that agency is based on fraud, the remedy coordination official must recommend that the agency head reduce or suspend further payments to the contractor. The remedy coordination official must submit to the agency head a written report setting forth the remedy coordination official’s findings that support each recommendation.

(b) Upon receiving a recommendation from the remedy coordination official under paragraph (a) of this section, the agency head must determine whether substantial evidence exists that the request for payment under a contract is based on fraud.

(c) If the agency head determines that substantial evidence exists, the agency head may reduce or suspend further payments to the contractor under the affected contract(s). Such reduction or suspension must be reasonably commensurate with the anticipated loss to the Government resulting from the fraud.

(d) When determining whether to reduce or suspend further payment(s), at a minimum, the agency head must consider—

(1) Any recommendation from investigating officers that disclosure of the allegations of fraud to the contractor may compromise an ongoing investigation;

(2) The anticipated loss to the Government as a result of the fraud;

(3) The contractor's overall financial condition and ability to continue performance if payments are reduced or suspended;

(4) How essential the contractor is to the national defense, or to the execution of the agency's official business; and

(5) Assessment of all documentation concerning the alleged fraud, including documentation submitted by the contractor in its response to the notice required by paragraph (e) of this section.

(e) Before making a decision to reduce or suspend further payments, the agency head must, in accordance with agency procedures-

(1) Notify the contractor in writing of the action proposed by the remedy coordination official and the reasons why (such notice must be sufficiently specific to allow the contractor to collect and present evidence addressing the aforesaid reasons); and

(2) Provide the contractor an opportunity to submit information within a reasonable time, in response to the action proposed by the remedy coordination official.

(f) When more than one agency has contracts affected by the fraud, the agencies must consider designating one agency as the lead agency for making the determination and decision.

(g) The agency must retain in its files the written justification for each-

(1) Decision of the agency head whether to reduce or suspend further payments; and

(2) Recommendation provided to the agency head in connection with such decision.

(h) Not later than 180 calendar days after the date of the reduction or suspension action, the remedy coordination official must—

(1) Review the agency head's determination on which the reduction or suspension decision is based; and

(2) Provide a recommendation to the agency head as to whether the reduction or suspension should continue.

32.006-5 Reporting.

(a) In accordance with 41 U.S.C. 4506(h), the head of an agency, other than the DoD, must prepare a report for each fiscal year in which a recommendation has been received pursuant to 32.006-4(a). Reports within the DoD must be prepared in accordance with 10 U.S.C. 3806(h)..

(b) In accordance with 41 U.S.C. 4506(h) and 10 U.S.C. 3806(h), each report must contain—

(1) Each recommendation made by the remedy coordination official;

(2) The actions taken on the recommendation(s), with reasons for such actions; and

(3) An assessment of the effects of each action on the Government.

32.007 Contract financing payments.

(a) Agency heads must not establish a time frame for making contract financing payments that is less than 7 days or exceeds 30 days from receipt of a proper contract financing request, subject to the provisions outlined in 32.009.

(b) A proper contract financing request must comply with the terms and conditions specified by the contract. The contractor must correct any defects in requests submitted in the manner specified in the contract or as directed by the contracting officer.

(c) The Government will not pay an interest penalty to the contractor as a result of delayed contract financing payments.

32.008 Notification of overpayment.

If the contractor notifies the contracting officer of a duplicate payment or that the Government has otherwise overpaid, the contracting officer must follow the procedures at 32.604.

32.009 Providing accelerated payments to small business contractors and to prime contractors that subcontract with a small business concern.

32.009-1 General.

(a) (1) Pursuant to 31 U.S.C. 3903(a), agencies other than the Department of Defense (DoD) must provide accelerated payments, to the fullest extent permitted by law, with a goal of 15 days after receipt of a proper invoice and all other required documentation, if a specific payment date is not established by contract, to—

(i) Small business contractors; and

(ii) Prime contractors that subcontract with a small business concern, if the prime contractor agrees to make payments to the small business subcontractor within 15 days of receiving the accelerated payment from the Government, after receipt of a proper invoice and all other required documentation from the small business subcontractor, to the maximum extent practicable, without any further consideration from or fees charged to the subcontractor.

(2) Pursuant to 10 U.S.C. 3801(b), DoD must provide accelerated payments, to the fullest extent permitted by law, with a goal of 15 days after receipt of a proper invoice and all other required documentation, to—

(i) Small business contractors; and

(ii) Prime contractors that subcontract with a small business concern, if the prime contractor agrees to make payments to the small business subcontractor within 15 days of receiving the accelerated payment from the Government, after receipt of a proper invoice and all other required documentation from the small business subcontractor, to the maximum extent practicable, without any further consideration from or fees charged to the subcontractor.

(b) This acceleration does not provide any new rights under the Prompt Payment Act and does not affect the application of the Prompt Payment Act late payment interest provisions.

(c) Agencies may use the Governmentwide commercial purchase card as a method of payment (see 32.1108) to facilitate accelerated payment, to earn refunds, and to reduce invoice processing costs.

32.009-2 Contract clause.

Insert clause 52.232-40, Providing Accelerated Payments to Small Business Subcontractors, in all solicitations and contracts.

Subpart 32.1 - Financing for Other Than a Commercial Purchase

32.100 Scope of subpart.

This subpart addresses policies and procedures applicable to contract financing and payment for any purchases other than purchases of commercial products or commercial services in accordance with part 12.

32.101 Authority.

The basic authority for the contract financing described in this part is contained in 41 U.S.C. chapter 45, 10 U.S.C. chapter 277, and Subchapter II of the Defense Production Act of 1950 (50 U.S.C. Chapter 55).

32.102 Description of contract financing methods.

(a) Advance payments are advances of money by the Government to a prime contractor before, in anticipation of, and for the purpose of complete performance under one or more contracts. They are expected to be liquidated from payments due to the contractor incident to performance of the contracts. Since they are not measured by performance, they differ from partial, progress, or other payments based on the performance or partial performance of a contract. Advance payments may be made to prime contractors for the purpose of making advances to subcontractors.

(b) Progress payments based on costs are made on the basis of costs incurred by the contractor as work progresses under the contract. This form of contract financing does not include-

(1) Payments based on the percentage or stage of completion accomplished;

(2) Payments for partial deliveries accepted by the Government;

(3) Partial payments for a contract termination proposal; or

(4) Performance-based payments.

(c) Loan guarantees are made by Federal Reserve banks, on behalf of designated guaranteeing agencies, to enable contractors to obtain financing from private sources under contracts for the acquisition of supplies or services for the national defense.

(d) [Reserved]

(e) (1) Progress payments based on a percentage or stage of completion are authorized by the statutes cited in 32.101.

(2) This type of progress payment may be used as a payment method under agency procedures. Agency procedures must ensure that payments are commensurate with work accomplished, which meets the quality standards established under the contract. In accordance with 10 U.S.C. 3804, progress payments must not exceed 80 percent of the eligible costs of work accomplished on undefinitized contract actions.

(f) Performance-based payments are contract financing payments made on the basis of-

(1) Performance measured by objective, quantifiable methods;

(2) Accomplishment of defined events; or

(3) Other quantifiable measures of results.

32.103 Progress payments under construction contracts.

When there is unsatisfactory progress by a contractor during any period for which a progress payment is to be made, a percentage of the progress payment may be retained. Retainage should not be used as a substitute for good contract management, and the contracting officer should not withhold funds without cause. Determinations to retain and the specific amount to be withheld must be made by the contracting officer on a case-by-case basis. Such decisions will be based on the contracting officer's assessment of past performance and the likelihood that such performance will continue. The amount of retainage withheld must not exceed 10 percent of the approved estimated amount in accordance with the terms of the contract and may be adjusted as the contract approaches completion to recognize improved performance, the ability to rely on alternative safeguards, and other factors. Upon completion of all contract requirements, retained amounts must be paid promptly.

32.104 Providing contract financing.

(a) Prudent contract financing can be a useful working tool in Government acquisition by expediting the performance of essential contracts. Contracting officers must consider the criteria in this part when determining whether to include contract financing in solicitations and contracts. Resolve doubts that lack of financing could affect performance by including contract financing in the solicitation. The contracting officer must—

(1) Provide Government financing only to the extent actually needed for prompt and efficient performance, considering the availability of private financing and the probable impact on working capital of the predelivery expenditures and production lead-times associated with the contract, or groups of contracts or orders (*e.g.,* issued under indefinite-delivery contracts, basic ordering agreements, or their equivalent);

(2) Administer contract financing to aid, not impede, the acquisition;

(3) Avoid any undue risk of monetary loss to the Government through the financing;

(4) Include the form of contract financing deemed to be in the Government’s best interest in the solicitation (see 32.106 and 32.113); and

(5) Monitor the contractor’s use of the contract financing provided and the contractor’s financial status.

(b) If the contractor is a small business concern, the contracting officer must give special attention to meeting the contractor’s contract financing need. However, a contractor’s receipt of a certificate of competency from the Small Business Administration has no bearing on the contractor’s need for or entitlement to contract financing.

(c) Subject to specific agency regulations and paragraph (d) of this section, the contracting officer-

(1) May provide customary contract financing in accordance with 32.113; and

(2) Must not provide unusual contract financing except as authorized in 32.114.

(d) Unless prohibited by agency procedures, the contracting officer may provide contract financing in the form of performance-based payments (see subpart 32.10) or customary progress payments (see subpart 32.5) if the following conditions are met:

(1) The contractor-

(i) Will not be able to bill for the first delivery of products for a substantial time after work must begin (normally 4 months or more for small business concerns, and 6 months or more for others), and will make expenditures for contract performance during the predelivery period that have a significant impact on the contractor’s working capital; or

(ii) Demonstrates actual financial need or the unavailability of private financing.

(2) If the contractor is not a small business concern-

(i) For an individual contract, the contract price is $3.5 million or more; or

(ii) For an indefinite-delivery contract, a basic ordering agreement or a similar ordering instrument, the contracting officer expects the aggregate value of orders or contracts that individually exceed the simplified acquisition threshold to have a total value of $3.5 million or more. The contracting officer must limit financing to those orders or contracts that exceed the simplified acquisition threshold.

(3) If the contractor is a small business concern-

(i) For an individual contract, the contract price exceeds the simplified acquisition threshold; or

(ii) For an indefinite-delivery contract, a basic ordering agreement or a similar ordering instrument, the contracting officer expects the aggregate value of orders or contracts to exceed the simplified acquisition threshold.

32.105 Uses of contract financing.

(a) Contract financing methods covered in this part are intended to be self-liquidating through contract performance. Consequently, agencies must only use the methods for financing of contractor working capital, not for the expansion of contractor-owned facilities or the acquisition of fixed assets. However, under loan guarantees, exceptions may be made for-

(1) Facilities expansion of a minor or incidental nature, if a relatively small part of the guaranteed loan is used for the expansion and the contractor's repayment would not be delayed or impaired; or

(2) Other instances of facilities expansion for which contract financing is appropriate under agency procedures.

(b) The limitations in this section do not apply to contracts under which facilities are being acquired for Government ownership.

32.106 Order of preference.

The contracting officer must consider the following order of preference when a contractor requests contract financing, unless an exception would be in the Government's best interest in a specific case:

(a) Private financing without Government guarantee. It is not intended, however, that the contracting officer require the contractor to obtain private financing-

(1) At unreasonable terms; or

(2) From other agencies.

(b) Customary contract financing other than loan guarantees and certain advance payments (see 32.113).

(c) Loan guarantees.

(d) Unusual contract financing (see 32.114).

(e) Advance payments (see exceptions in 32.402(b)).

32.107 Need for contract financing not a deterrent.

(a) If the contractor or offeror meets the standards prescribed for responsible prospective contractors at 9.104, the contracting officer must not treat the contractor's need for contract financing as a handicap for a contract award, *e.g.,* as a responsibility factor or evaluation criterion.

(b) The contractor should not be disqualified from contract financing solely because the contractor failed to indicate a need for contract financing before the contract was awarded.

32.108 Financial consultation.

Each contracting office should have available and use the services of contract financing personnel competent to evaluate credit and financial problems. The contracting officer should consult the appropriate contract financing office to resolve any questions concerning-

(a) The financial capability of an offeror or contractor to perform a contract; or

(b) What form of contract financing is appropriate in a given case, the contracting officer should consult the appropriate contract financing office.

32.109 Termination financing.

To encourage contractors to invest their own funds in performance despite the susceptibility of the contract to termination for the convenience of the Government, the contract financing procedures under this part may be applied to the financing of terminations either in connection with or independently of financing for contract performance (see part 49).

32.110 Payment of subcontractors under cost-reimbursement prime contracts.

If the contractor makes financing payments to a subcontractor under a cost-reimbursement prime contract, the contracting officer should accept the financing payments as reimbursable costs of the prime contract only under the following conditions:

(a) The payments are made under the criteria in subpart 32.5 for customary progress payments based on costs, 32.202-1 for commercial product or commercial service purchase financing, or 32.1003 for performance-based payments, as applicable.

(b) If customary progress payments are made, the payments do not exceed the progress payment rate in 32.501-1, unless unusual progress payments to the subcontractor have been approved in accordance with 32.501-2.

(c) If customary progress payments are made, the subcontractor complies with the liquidation principles of 32.503-8, 32.503-9, and 32.503-10.

(d) If performance-based payments are made, the subcontractor complies with the liquidation principles of 32.1004(d).

(e) The subcontract contains financing payments terms as prescribed in this part.

32.111 Contract clauses for noncommercial purchases.

(a) The contracting officer must insert the following clauses, appropriately modified with respect to payment due dates, in accordance with agency regulations-

(1) The clause at 52.232-1, Payments, in solicitations and contracts when a fixed-price supply contract, a fixed-price service contract, or a contract for nonregulated communication services is contemplated;

(2) The clause at 52.232-2, Payment under Fixed-Price Research and Development Contracts, in solicitations and contracts when a fixed-price research and development contract is contemplated;

(3) The clause at 52.232-3, Payments under Personal Services Contracts, in solicitations and contracts for personal services;

(4) The clause at 52.232-4, Payments under Transportation Contracts and Transportation-Related Services Contracts, in solicitations and contracts for transportation or transportation-related services;

(5) The clause at 52.232-5, Payments under Fixed-Price Construction Contracts, in solicitations and contracts for construction when a fixed-price contract is contemplated;

(6) The clause at 52.232-6, Payments under Communication Service Contracts with Common Carriers, in solicitations and contracts for regulated communication services by common carriers; and

(7) The clause at 52.232-7, Payments under Time-and-Materials and Labor-Hour Contracts, in solicitations and contracts when a time-and-materials or labor-hour contract is contemplated. If the contracting officer determines that it is necessary to withhold payment to protect the Government's interests, paragraph (a)(7) of the clause permits the contracting officer to unilaterally issue a modification requiring the contractor to withhold 5 percent of amounts due, up to a maximum of $50,000 under the contract. The contracting officer must ensure that the modification specifies the percentage and total amount of the withhold payment. Normally, there should be no need to withhold payment for a contractor with a record of timely submittal of the release discharging the Government from all liabilities, obligations, and claims, as required by paragraph (g) of the clause.

(b) The contracting officer must insert the following clauses, appropriately modified with respect to payment due dates in accordance with agency regulations:

(1) The clause at 52.232-8, Discounts for Prompt Payment, in solicitations and contracts when a fixed-price supply contract or fixed-price service contract is contemplated.

(2) A clause, substantially the same as the clause at 52.232-9, Limitation on Withholding of Payments, in solicitations and contracts when a supply contract, research and development contract, service contract, time-and-materials contract, or labor-hour contract is contemplated that includes two or more terms authorizing the temporary withholding of amounts otherwise payable to the contractor for supplies delivered or services performed.

(c) The contracting officer must insert the following clauses, appropriately modified with respect to payments due dates, in accordance with agency regulations:

(1) The clause at 52.232-10, Payments under Fixed-Price Architect-Engineer Contracts, in fixed-price architect-engineer contracts.

(2) The clause at 52.232-11, Extras, in solicitations and contracts when a fixed-price supply contract, fixed-price service contract, or a transportation contract is contemplated.

32.112 Nonpayment of subcontractors under contracts other than for commercial products and commercial services.

32.112-1 Subcontractor assertions of nonpayment.

(a) In accordance with Section 806(a)(4) of Pub. L. 102-190 as amended (10 U.S.C. 4601 note prec.), upon the assertion by a subcontractor or supplier of a prime contractor that the subcontractor or supplier has not been paid in accordance with the payment terms of the subcontract, purchase order, or other agreement with the prime contractor, the contracting officer may determine—

(1) For a construction contract, whether the contractor has made-

(i) Progress payments to the subcontractor or supplier in compliance with the Prompt Payment Act (31 U.S.C. Chapter 39); or

(ii) Final payment to the subcontractor or supplier in compliance with the terms of the subcontract, purchase order, or other agreement with the prime contractor;

(2) For a contract other than construction, whether the contractor has made progress payments, final payments, or other payments to the subcontractor or supplier in compliance with the terms of the subcontract, purchase order, or other agreement with the prime contractor; or

(3) For any contract, whether the contractor's certification of payment of a subcontractor or supplier submitted with its payment request to the Government is accurate.

(b) If, in making the determination in paragraphs (a)(1) and (2) of this subsection, the contracting officer finds the prime contractor is not in compliance, the contracting officer may-

(1) Encourage the contractor to make timely payment to the subcontractor or supplier; or

(2) If authorized by the applicable payment clauses, reduce or suspend progress payments to the contractor.

(c) If the contracting officer determines that a certification referred to in paragraph (a)(3) of this section is inaccurate in any material respect, the contracting officer must initiate administrative or other remedial action.

32.112-2 Subcontractor requests for information.

(a) In accordance with Section 806(a)(4) of Pub. L. 102-190 as amended (10 U.S.C. 4601 note prec.), upon the request of a subcontractor or supplier under a Federal contract other than for a commercial product or commercial service, the contracting officer must promptly inform the subcontractor or supplier as to—

(1) Whether the prime contractor has submitted requests for progress payments or other payments to the Federal Government under the contract; and

(2) Whether final payment under the contract has been made by the Federal Government to the prime contractor.

(b) In accordance with 5 U.S.C. 552(b)(1), this section does not apply to matters that are-

(1) Specifically authorized under criteria established by an Executive order to be kept classified in the interest of national defense or foreign policy; and

(2) Properly classified pursuant to such Executive order.

32.113 Customary contract financing.

The solicitation must specify the customary contract financing offerors may propose. The following are customary contract financing when provided in accordance with this part and agency regulations:

(a) Financing of shipbuilding, or ship conversion, alteration, or repair, when agency regulations provide for progress payments based on a percentage or stage of completion.

(b) Financing of construction or architect-engineer services purchased under the authority of part 36.

(c) Financing of contracts for supplies or services awarded under the sealed bid method of procurement in accordance with part 14 through progress payments based on costs in accordance with subpart 32.5.

(d) Financing of contracts for supplies or services awarded under the competitive negotiation method of procurement in accordance with part 15, through either progress payments based on costs in accordance with subpart 32.5, or performance-based payments in accordance with subpart 32.10 (but not both).

(e) Financing of contracts for supplies or services awarded under a sole-source acquisition as defined in 2.101 and using the procedures of part 15, through either progress payments based on costs in accordance with subpart 32.5, or performance-based payments in accordance with subpart 32.10 (but not both).

(f) Financing of contracts for supplies or services through advance payments in accordance with subpart 32.4.

(g) Financing of contracts for supplies or services through guaranteed loans in accordance with subpart 32.3.

(h) Financing of contracts for supplies or services through any appropriate combination of advance payments, guaranteed loans, and either performance-based payments or progress payments (but not both) in accordance with their respective subparts.

32.114 Unusual contract financing.

Any contract financing arrangement that deviates from this part is unusual contract financing. Unusual contract financing must be authorized only after approval by the head of the agency or as provided for in agency regulations.

Subpart 32.2 - Commercial Product and Commercial Service Purchase Financing

32.200 Scope of subpart.

This subpart provides policies and procedures for commercial financing arrangements under commercial purchases pursuant to part 12.

32.201 Statutory authority.

(a) 10 U.S.C. 3805 and 41 U.S.C.4505 provide that payment for commercial products or commercial services may be made under such terms and conditions as the head of the agency determines are appropriate or customary in the commercial marketplace and are in the best interest of the United States.

(b) 31 U.S.C. 3324(d)(2) authorizes advance payments for subscriptions or other charges for newspapers, magazines, periodicals, or other publications (i.e., any publication printed, microfilmed, photocopied, or magnetically or otherwise recorded for auditory or visual usage).

32.202 General.

32.202-1 Policy.

(a) *Use of financing in contracts.* It is the responsibility of the contractor to provide all resources needed for performance of the contract. Thus, for purchases of commercial products or commercial services, financing of the contract is normally the contractor's responsibility. However, in some markets the provision of financing by the buyer is a commercial practice. In these circumstances, the contracting officer may include appropriate financing terms in contracts for commercial purchases when doing so will be in the best interest of the Government.

(b) *Authorization.* Commercial interim payments and commercial advance payments may be made under the following circumstances-

(1) The contract item financed is a commercial supply or service;

(2) The contract price exceeds the simplified acquisition threshold;

(3) The contracting officer determines that it is appropriate or customary in the commercial marketplace to make financing payments for the item;

(4) Authorizing this form of contract financing is in the best interest of the Government (see paragraph (e) of this section);

(5) Adequate security is obtained (see 32.202-4);

(6) Prior to any performance of work under the contract, the aggregate of commercial advance payments must not exceed 15 percent of the contract price;

(7) The contract is awarded on the basis of competitive procedures or, if only one offer is solicited, adequate consideration is obtained (based on the time value of the additional financing to be provided) if the financing is expected to be substantially more advantageous to the offeror than the offeror's normal method of customer financing; and

(8) The contracting officer obtains concurrence from the payment office concerning liquidation provisions when required by 32.206(e).

(c) *Difference from other than commercial financing.* Government financing of commercial purchases under this subpart is expected to be different from that used for other than commercial purchases under subpart 32.1 and its related subparts. While the contracting officer may adapt techniques and procedures from the other than commercial subparts for use in implementing commercial contract financing arrangements, the contracting officer must have a full understanding of effects of the differing contract environments and of what is needed to protect the interests of the Government in commercial contract financing.

(d) *Unusual contract financing.* Any contract financing arrangement not in accord with the requirements of agency regulations or this part is unusual contract financing and requires advance approval in accordance with agency procedures. If not otherwise specified, such unusual contract financing must be approved by the head of the contracting activity.

(e) *Best interest of the Government.* The statutes cited in 32.201 do not allow contract financing by the Government unless it is in the best interest of the United States. Agencies may establish standards to determine whether contract financing is in the best interest of the Government. These standards may be for certain types of procurements, certain types of items, or certain dollar levels of procurements.

32.202-2 Types of payments for commercial product and commercial service purchases.

These definitions incorporate the requirements of the statutory commercial financing authority and the implementation of the Prompt Payment Act.

Commercial advance payment, as used in this section, means a payment made before any performance of work under the contract. The aggregate of these payments must not exceed 15 percent of the contract price. These payments are contract financing payments and are not subject to the interest penalty provisions of the Prompt Payment Act in subpart 32.9. These payments are not subject to subpart 32.4, Advance Payments for Other Than Commercial Acquisitions.

Commercial interim payment as defined in 32.001.

Delivery payment as defined in 32.001.

32.202-3 Conducting market research about financing terms.

Contract financing may be a subject included in the market research conducted in accordance with part 10. If market research for contract financing is conducted, the contracting officer should consider-

(a) The extent to which other buyers provide contract financing for purchases in that market;

(b) The overall level of financing normally provided;

(c) The amount or percentages of any payments equivalent to commercial advance payments (see 32.202-2);

(d) The basis for any payments equivalent to commercial interim payments (see 32.001), as well as the frequency, and amounts or percentages; and

(e) Methods of liquidation of contract financing payments and any special or unusual payment terms applicable to delivery payments (see 32.001).

32.202-4 Security for Government financing.

(a) Policy. (1) 10 U.S.C. 3805 and 41 U.S.C.4505 require the Government to obtain adequate security for Government financing. The contracting officer must specify in the solicitation the type of security the Government will accept. If the Government is willing to accept more than one form of security, the offeror must be required to specify the form of security it will provide. If acceptable to the contracting officer, the resulting contract must specify the security (see 32.206(b)(1)(iv)).

(2) Subject to agency regulations, the contracting officer may determine the offeror's financial condition to be adequate security, provided the offeror agrees to provide additional security should that financial condition become inadequate as security (see paragraph (c) of the clause at 52.232-29, Terms for Financing of Purchases of Commercial Products and Commercial Services). Assessment of the contractor's financial condition must consider both net worth and liquidity. If the contracting officer finds the offeror's financial condition is not adequate security, the contracting officer must require other adequate security. Paragraphs (b), (c), and (d) of this section list other (but not all) forms of security that the contracting officer may find acceptable.

(3) The value of the security must be at least equal to the maximum unliquidated amount of contract financing payments to be made to the contractor. The value of security may be adjusted periodically during contract performance, as long as it is always equal to or greater than the amount of unliquidated financing.

(b) Paramount lien. (1) The statutes cited in 32.201 provide that if the Government's security is in the form of a lien, such lien is paramount to all other liens and is effective immediately upon the first payment, without filing, notice, or other action by the United States.

(2) When the Government's security is in the form of a lien, the contract must specify what the lien is upon, *e.g.,* the work in process, the contractor's plant, or the contractor's inventory. Contracting officers may be flexible in the choice of assets. The contract must also give the Government a right to verify the existence and value of the assets.

(3) Provision of Government financing must be conditioned upon a contractor certification that the assets subject to the lien are free from any prior encumbrances. Prior liens may result from such things as capital equipment loans, installment purchases, working capital loans, various lines of credit, and revolving credit arrangements.

(c) *Other assets as security.* Contracting officers may consider the guidance at 28.203 and 28.204 in determining which types of assets may be acceptable as security. For the purpose of applying the guidance in part 28 to this section, the term "surety" and/or "individual surety" should be interpreted to mean "offeror" and/or "contractor."

(d) *Other forms of security.* Other acceptable forms of security include-

(1) An irrevocable letter of credit from a federally insured financial institution;

(2) A bond from a surety, acceptable in accordance with part 28 (note that the bond must guarantee repayment of the unliquidated contract financing);

(3) A guarantee of repayment from a person or corporation of demonstrated liquid net worth, connected by significant ownership to the contractor; or

(4) Title to identified contractor assets of adequate worth.

(e) *Management of risk and security.* In establishing contract financing terms, the contracting officer must be aware of certain risks. For example, very high amounts of financing early in the contract (front-end loading) may unduly increase the risk to the Government. The security and the amounts and timing of financing payments must be analyzed as a whole to determine whether the arrangement will be in the best interest of the Government.

32.203 Determining contract financing terms.

When the criteria in 32.202-1(b) are met, the contracting officer may either specify the financing terms in the solicitation (see 32.204) or permit each offeror to propose its own customary financing terms (see 32.205). When the contracting officer has sufficient information on financing terms that are customary in the commercial marketplace for the item, those terms may be specified in the solicitation.

32.204 Procedures for contracting officer-specified commercial contract financing.

The financing terms must be included in the solicitation. Contract financing must not be a factor in the evaluation of resulting proposals, and proposals of alternative financing terms must not be accepted (but see 14.208 and 15.206 concerning amendments of solicitations). However, an offer stating that the contracting officer-specified contract financing terms will not be used by the offeror does not alter the evaluation of the offer, nor does it render the offer nonresponsive or otherwise unacceptable. In the event of award to an offeror who declined the proposed contract financing, the contract financing provisions must not be included in the resulting contract. Contract financing must not be a basis for adjusting offerors' proposed prices, because the effect of contract financing is reflected in each offeror's proposed prices.

32.205 Procedures for offeror-proposed commercial contract financing.

(a) Under this procedure, each offeror may propose financing terms. The contracting officer must then determine which offer is in the best interests of the United States.

(b) *Solicitations.* The contracting officer must include in the solicitation the provision at 52.232-31, invitation to Propose Financing Terms. The contracting officer must also-

(1) Specify the delivery payment (invoice) dates that will be used in the evaluation of financing proposals; and

(2) Specify the interest rate to be used in the evaluation of financing proposals (see paragraph (c)(4) of this section).

(c) Evaluation of proposals. (1) When contract financing terms vary among offerors, the contracting officer must adjust each proposed price for evaluation purposes to reflect the cost of providing the proposed financing in order to determine the total cost to the Government of that particular combination of price and financing.

(2) Contract financing results in the Government making payments earlier than it otherwise would. In order to determine the cost to the Government of making payments earlier, the contracting officer must compute the imputed cost of those financing payments and add it to the proposed price to determine the evaluated price for each offeror.

(3) The imputed cost of a single financing payment is the amount of the payment multiplied by the annual interest rate, multiplied by the number of years, or fraction thereof, between the date of the financing payment and the date the amount would have been paid as a delivery payment. The imputed cost of financing is the sum of the imputed costs of each of the financing payments.

(4) The contracting officer must calculate the time value of proposal-specified contract financing arrangements using as the interest rate the nominal discount rate specified in Appendix C of the Office of Management and Budget (OMB) Circular A-94, "Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs," appropriate to the period of contract financing. Where the period of proposed financing does not match the periods in the OMB Circular, the interest rate for the period closest to the finance period must be used. Appendix C is updated yearly and is available from the Office of Economic Policy in the Office of Management and Budget (OMB).

32.206 Solicitation provisions and contract clauses.

(a) The contract must include the paragraph entitled "Payment" of the clause at 52.212-4, Contract Terms and Conditions —Commercial Products and Commercial Services. If the contract will provide for contract financing, the contracting officer must construct a solicitation provision and contract clause. This solicitation provision must be constructed in accordance with 32.204 or 32.205. If the procedure at 32.205 is used, the solicitation provision at 52.232-31, Invitation to Propose Financing

Terms, must be included. The contract clause must be constructed in accordance with the requirements of this subpart and any agency regulations.

(b) Each contract financing clause must include:

(1) A description of the-

(i) Computation of the financing payment amounts (see paragraph (c) of this section);

(ii) Specific conditions of contractor entitlement to those financing payments (see paragraph (c) of this section);

(iii) Liquidation of those financing payments by delivery payments (see paragraph (e) of this section);

(iv) Security the contractor will provide for financing payments and any terms or conditions specifically applicable thereto (see 32.202-4); and

(v) Frequency, form, and any additional content of the contractor's request for financing payment (in addition to the requirements of the clause at 52.232-29, Terms for Financing of Purchases of Commercial Products and Commercial Services); and

(2) Unless agency regulations authorize alterations, the unaltered text of the clause at 52.232-29, Terms for Financing of Purchases of Commercial Products and Commercial Services.

(c) Computation of amounts, and contractor entitlement provisions. (1) Contracts must provide that delivery payments must be made only for completed supplies and services accepted by the Government in accordance with the terms of the contract. Contracts may provide for commercial advance and commercial interim payments based upon a wide variety of bases, including (but not limited to) achievement or occurrence of specified events, the passage of time, or specified times prior to the delivery date(s). The basis for payment must be objectively determinable. The clause written by the contracting officer must specify, to the extent access is necessary, the information and/or facilities to which the Government must have access for the purpose of verifying the contractor’s entitlement to payment of contract financing.

(2) If the contract is awarded using the offeror-proposed procedure at 32.205, the clause constructed by the contracting officer under paragraph (b)(1) of this section must contain the following:

(i) A statement that the offeror's proposed listing of earliest times and greatest amounts of projected financing payments submitted in accordance with paragraph (d)(2) of the provision at 52.232-31, Invitation to Propose Financing Terms, is incorporated into the contract, and

(ii) A statement that financing payments must be made in the lesser amount and on the later of the date due in accordance with the financing terms of the contract, or in the amount and on the date projected in the listing of earliest times and greatest amounts incorporated in the contract.

(3) If the security accepted by the contracting officer is the contractor’s financial condition, the contracting officer must incorporate in the clause constructed under paragraph (b)(1) of this section the following-

(i) A statement that the contractor’s financial condition has been accepted as adequate security for commercial financing payments; and

(ii) A statement that the contracting officer may exercise the Government's rights to require other security under paragraph (c), Security for Government Financing, of the clause at 52.232-29, Terms for Financing of Purchases of Commercial Products and Commercial Services, in the event the contractor's financial condition changes and the security is deemed not adequate.

(d) *Instructions for multiple appropriations.* If contract financing is to be computed for the contract as a whole, and if there is more than one appropriation account (or subaccount) funding payments under the contract, the contracting officer must include, in the contract, instructions for distribution of financing payments to the respective funds’ accounts. Distribution instructions and contract liquidation instructions must be mutually consistent.

(e) *Liquidation.* Liquidation of contract financing payments must be on the same basis as the computation of contract financing payments; that is, financing payments computed on a whole contract basis must be liquidated on a whole contract basis; and a payment computed on a line- item basis must be liquidated against that line item. If liquidation is on a whole contract basis, the contracting officer must use a uniform liquidation percentage as the liquidation method, unless the contracting officer obtains the concurrence of the cognizant payment office that the proposed liquidation provisions can be executed by that office, or unless agency regulations provide alternative liquidation methods.

(f) [Reserved]

(g) *Installment payment financing for commercial products and commercial services.* Contracting officers may insert the clause at 52.232-30, Installment Payments for Commercial Products and Commercial Services, in solicitations and contracts in lieu of constructing a specific clause in accordance with paragraphs (b) through (e) of this section, if the contract action qualifies under the criteria at 32.202-1(b) and installment payments for the item are either customary or are authorized in accordance with agency procedures.

(1) *Description.* Installment payment financing is payment by the Government to a contractor of a fixed number of equal interim financing payments prior to delivery and acceptance of a contract item. The installment payment arrangement is designed to reduce administrative costs. However, if a contract will have a large number of deliveries, the administrative costs may increase to the point where installment payments are not in the best interests of the Government.

(2) *Authorized types of installment payment financing and rates.* Installment payments may be made using the clause at 52.232-30, Installment Payments for Commercial Products and Commercial Services, either at the 70 percent financing rate cited in the clause or at a lower rate in accordance with agency procedures.

(3) *Calculating the amount of installment financing payments.* The contracting officer must identify in the contract schedule those items for which installment payment financing is authorized. Monthly installment payment amounts are to be calculated by the contractor pursuant to the instructions in the contract clause only for items authorized to receive installment payment financing.

(4) *Liquidating installment payments.* If installment payments have been made for an item, the amount paid to the contractor upon acceptance of the item by the Government must be reduced by the amount of installment payments made for the item. The contractor's request for final payment for each item is required to show this calculation.

32.207 Administration and payment of commercial financing payments.

(a) *Responsibility.* The contracting officer responsible for administration of the contract is responsible for review and approval of contract financing requests.

(b) *Approval of financing requests.* Unless otherwise provided in agency regulations, or by agreement with the designated payment official—

(1) The contracting officer is responsible for receiving, approving, and transmitting all contract financing requests to the designated payment office; and

(2) Each approval must specify the amount to be paid, necessary contractual information, and the account(s) (see 32.206(d)) to be charged for the payment.

(c) *Management of security.* After contract award, the contracting officer responsible for approving requests for financing payments is responsible for determining that the security continues to be adequate. If the contractor's financial condition is the Government's security, this contracting officer is also responsible for monitoring the contractor's financial condition.

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Subpart 32.3 - Loan Guarantees for Defense Production

32.300 Scope of subpart.

This subpart addresses policies and procedures for designated agencies' guarantees of loans made by private financial institutions to borrowers performing contracts related to national defense.

32.301 Definitions.

As used in this subpart-

Borrower means a contractor, subcontractor (at any tier), or other supplier who receives a guaranteed loan.

Federal Reserve Board means the Board of Governors of the Federal Reserve System.

Guaranteeing agency means any agency that the President has authorized to guarantee loans, through Federal Reserve Banks, for expediting national defense production.

32.302 Authority.

Congress has authorized Federal Reserve Banks to act on behalf of guaranteeing agencies, as fiscal agents of the United States in the making of loan guarantees for defense production (Defense Production Act of 1950 (50 U.S.C. 4531)). By Executive Order 10480, August 14, 1953, as amended, the President has designated the following agencies as guaranteeing agencies:

(a) Department of Defense.
(b) Department of Energy.
(c) Department of Commerce.
(d) Department of the Interior.
(e) Department of Agriculture.
(f) General Services Administration.
(g) National Aeronautics and Space Administration.

32.303 General.

(a) 50 USC 4531 authorizes loan guarantees for contract performance or other operations related to national defense, subject to amounts annually authorized by Congress on the maximum obligation of any guaranteeing agency under any loan, discount, advance, or commitment entered into under this authority. (See 50 U.S.C. 4531 for statutory limitations and exceptions concerning the authorization of loan guarantee amounts and the use of loan guarantees for the prevention of insolvency or bankruptcy.)

(b) The guarantee must be for less than 100 percent of the loan unless the agency determines that-

(1) The circumstances are exceptional;
(2) The operations of the contractor are vital to the national defense; and
(3) No other suitable means of financing are available.

(c) Loan guarantees are not issued to other agencies of the Government.

(d) Guaranteed loans are essentially the same as conventional loans made by private financial institutions, except that the guaranteeing agency is obligated, on demand of the lender, to purchase a stated percentage of the loan and to share any losses in the amount of guaranteed percentage. It is the responsibility of the private financial institution to disburse and collect funds and to administer the loan.

(e) Federal Reserve Banks may make loan guarantee agreements on behalf of the guaranteeing agencies.

(f) The guaranteeing agency is responsible for certifying eligibility for the guarantee and fixing the maximum dollar amount and maturity date of the guaranteed loan to meet the contractor’s requirement for financing performance of the defense production contract on hand at the time the guarantee application is submitted.

32.304 [Reserved]

32.305 [Reserved]

32.306 [Reserved]

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Subpart 32.4 - Advance Payments for Other Than Commercial Acquisitions

32.400 Scope of subpart.

This subpart provides policies and procedures for advance payments on prime contracts and subcontracts, except for the types of transactions listed in 32.404. This subpart does not apply to commercial advance payments, which are subject to subpart 32.2.

32.401 Statutory authority.

The agency may authorize advance payments in negotiated and sealed bid contracts if the action is appropriate under-

(a) 41 U.S.C. chapter 45;

(b) 10 U.S.C. chapter 277; or

(c) Pub. L. 85-804 (50 U.S.C. 1431 et. seq.) and Executive Order 10789, November 14, 1958, as amended (see Subpart 50.1 for other applications of this statute).

32.402 General.

(a) A limitation on authority to grant advance payments under Pub. L. 85-804 (50 U.S.C. 1431 et. seq.) is described at 50.102-3(b)(4).

(b) Advance payments may be provided on any type of contract; however, the agency must authorize advance payments sparingly. In most situations, advance payment is the least preferred method of contract financing (see 32.106) and generally they should not be authorized if other types of financing are reasonably available to the contractor in adequate amounts. Loans and credit at excessive interest rates or other exorbitant charges, or loans from other Government agencies, are not considered reasonably available financing.

(c) If statutory requirements and standards for advance payment determinations are met, the contracting officer must generally recommend that the agency authorize advance payments.

(1) The statutory requirements are that-

(i) The contractor gives adequate security;

(ii) The advance payments will not exceed the unpaid contract price (see 32.410(b), paragraph (a)(2)); and

(iii) The agency head or designee determines, based on written findings, that the advance payment-

(A) Is in the public interest (under 32.401(a) or (b)); or

(B) Facilitates the national defense (under 32.401(c)).

(2) The standards for advance payment determinations are that-

(i) The advance payments will not exceed the contractor's interim cash needs based on-

(A) Analysis of the cash flow required for contract performance;

(B) Consideration of the reimbursement or other payment cycle; and

(C) To the extent possible, employment of the contractor's own working capital;

(ii) The advance payments are necessary to supplement other funds or credit available to a contractor;

(iii) The recipient is otherwise qualified as a responsible contractor; and

(iv) The Government will benefit from performance prospects or there are other practical advantages.

(d) If necessary, the agency may authorize advance payments in addition to progress or partial payments on the same contract (see 32.501-1(c)).

(e) Each agency that provides advance payments must-

(1) Place the responsibility for making findings and determinations, and for approval of contract terms concerning advance payments (see 32.410), at an organizational level high enough to ensure uniform application of this subpart (see the limitation at 50.102-1(b) which also applies to advance payments authorized under Pub.L.85-804 (50 U.S.C. 1431); and

(2) Establish procedures for coordination, before advance payment authorization, with the activity that provides contract financing support.

(f) If the contract provides for advance payments authorized under Pub. L. 85-804 (50 U.S.C. 1431), the contracting officer must ensure conformance with the contract requirements at 50.103-7.

32.403 [Reserved]

32.404 Exclusions.

(a) This subpart does not apply to advance payments for-

(1) Rent;
(2) Tuition;
(3) Insurance premiums;
(4) Expenses of investigations in foreign countries;
(5) Extension or connection of public utilities for Government buildings or installations;
(6) Subscriptions to publications;
(7) Purchases of supplies or services in foreign countries, if-
(i) The purchase price does not exceed $20,000 (or equivalent amount of the applicable foreign currency); and
(ii) The advance payment is required by the laws or government regulations of the foreign country concerned;
(8) Enforcement of the customs or narcotics laws; or
(9) Other types of transactions excluded by agency procedures under statutory authority.

(b) Agencies may issue their own instructions to deal with advance payment items in paragraph (a) of this section authorized under statutes relevant to their agencies.

32.405 Applying Pub.L.85-804 to advance payments under sealed bid contracts.

(a) Actions that designated agencies may take to facilitate the national defense without regard to other provisions of law relating to contracts, as explained in 50.101-1(a), also include making advance payments. These advance payments may be made at or after award of sealed bid contracts, as well as negotiated contracts.

(b) Bidders may request advance payments before or after award, even if the invitation for bids does not contain an advance payment provision. However, the contracting officer must reject any bid requiring that advance payments be provided as a basis for acceptance.

(c) When advance payments are requested, the agency may-

(1) Enter into the contract and provide for advance payments conforming to this part 32;

(2) Enter into the contract without providing for advance payments if the contractor does not actually need advance payments; or

(3) Deny award of the contract if the request for advance payments has been disapproved under 32.408-2 and funds adequate for performance are not otherwise available to the offeror.

32.406 Letters of credit.

(a) The Department of the Treasury (Treasury) prescribes regulations and instructions covering the use of letters of credit for advance payments under contracts. See 2 CFR 700.7, and the implementing instructions in the Treasury Financial Manual, available in offices providing financial advice and assistance.

(b) If agencies provide advance payments to contractors, use of the following methods is required unless the agency has obtained a waiver from the Treasury Department:

(1) By letter of credit if the contracting agency expects to have a continuing relationship with the contractor for a year or more, with advances totaling at least $120,000 a year.

(2) By direct Treasury check if the circumstances do not meet the criteria in subparagraph (1) of this section.

(c) If the agency has entered into multiple contracts (or a combination of contract(s) and assistance agreement(s)) involving eligibility of a contractor for more than one letter of credit, the agency must follow arrangements made under Treasury procedures for-

(1) Consolidating funding to the same contractor under one letter of credit or

(2) Replacing multiple letters of credit with a single letter of credit.

(d) The letter of credit enables the contractor to withdraw Government funds in amounts needed to cover its own disbursements of cash for contract performance. Whenever feasible, the agency must, under the direction and approval of the Department of the Treasury, use a letter of credit method that requires the contractor not to withdraw the Government funds until the contractor's checks have been-

(1) Forwarded to the payees (delay of drawdown technique), or

(2) Presented to the contractor's bank for payment (checks paid technique).

(e) The Treasury regulations provide for terminating the advance financing arrangement if the contractor is unwilling or unable to minimize the elapsed time between receipt of the advance and disbursement of the funds. In such cases, if reversion to normal payment methods is not feasible, the Treasury regulation provides for use of a working capital method of advance; *i.e.,* for limiting advances to-

(1) Only the estimated disbursements for a given initial period; and

(2) Subsequently, for only actual cash disbursements.

32.407 Interest.

(a) Except as provided in paragraph (d) of this section, the contracting officer must charge interest on the daily unliquidated balance of all advance payments at the higher of-

(1) The published prime rate of the financial institution (depository) in which the special account (see 32.409-3) is established; or

(2) The rate established by the Secretary of the Treasury under 41 U.S.C. 7109(b).

(b) The interest rate for advance payments must be adjusted for changes in the prime rate of the depository and the semiannual determination by the Secretary of the Treasury under 41 U.S.C. 7109(b). The contracting officer must obtain data from the depository on changes in the interest rate during the month. Interest must be computed at the end of each month on the daily unliquidated balance of advance payments at the applicable daily interest rate.

(c) Interest must be required on contracts that are for acquisition, at cost, of property for Government ownership, if the contracts are awarded in combination with, or in contemplation of, supply contracts or subcontracts.

(d) The agency head or designee may authorize advance payments without interest under the following types of contracts, if in the Government's interest:

(1) Contracts for experimental, research, or development work (including studies, surveys, and demonstrations in socio-economic areas) with nonprofit education or research institutions.

(2) Contracts solely for the management and operation of Government-owned plants.

(3) Cost-reimbursement contracts with governments, including State or local governments, or their instrumentalities.

(4) Other classes of contracts, or unusual cases, for which the exclusion of interest on advances is specifically authorized by agency procedures.

(e) If a contract provides for interest-free advance payments, the contracting officer may require the contractor to charge interest on advances or downpayments to subcontractors and credit the Government for the proceeds from the interest charges. Interest rates must be determined as described in paragraphs (a) and (b) of this section. The contracting officer need not require the contractor to charge interest on an advance to a subcontractor that is an institution of the kind described in paragraph (d)(1) of this section.

(f) The contracting officer must not allow interest charges, required by this 32.407, as reimbursable costs under cost-reimbursement contracts, whether the interest charge was incurred by the prime contractor or a subcontractor.

32.408 Application for advance payments.

(a) A contractor may apply for advance payments before or after the award of a contract.

(b) The contractor must submit any advance payment request in writing to the contracting officer and provide the following information:

(1) A reference to the contract if the request concerns an existing contract, or a reference to the solicitation if the request concerns a proposed contract.

(2) A cash flow forecast showing estimated disbursements and receipts for the period of contract performance. Limit the forecast to the contract to be financed by advance payments.

(3) The proposed total amount of advance payments.

(4) The name and address of the financial institution at which the contractor expects to establish a special account as depository for the advance payments. If advance payments in the form of a letter of credit are anticipated, the contractor must identify the specific account at the financial institution to be used. This subparagraph (4) is not applicable if an alternate method is used under agency procedures.

(5) A description of the contractor's efforts to obtain unguaranteed private financing under eligible contracts. This requirement is not applicable to the contract types described in 32.407(d)(1) and (2)

(6) Other information appropriate to an understanding of-

(i) The contractor's financial condition and need,

(ii) The contractor's ability to perform the contract without loss to the Government, and

(iii) Financial safeguards needed to protect the Government's interest. Generally, if the contract is a type described in 32.407(d)(1) and (2), the contractor may limit the response to this subparagraph (6) to information on the contractor's reliability, technical ability, and accounting system and controls.

32.409 Contracting officer action.

After analysis of the contractor's application and any appropriate investigation, the contracting officer must recommend approval or disapproval and transmit the request and recommendation to the approving authority designated under 32.402(e).

32.409-1 Recommendation for approval.

If recommending approval, the contracting officer must transmit the following, under agency procedures, to the approving authority:

(a) Contract data, including-

(1) Identification and date of the award;

(2) Citation of the appropriation;

(3) Type and dollar amount of the contract;

(4) Items to be supplied, schedule of deliveries or performance, and status of any deliveries or performance;

(5) The contract fee or profit contemplated; and

(6) A copy of the contract, if available.

(b) The contractor's request and supporting information.

(c) A report on the contractor's past performance, responsibility, technical ability, and plant capacity.

(d) Comments on-

(1) The contractor's need for advance payments; and

(2) Potential Government benefits from the contract performance.

(e) Proposed advance payment contract terms, including proposed security requirements.

(f) The findings, determination, and authorization (see 32.410).

(g) The recommendation for approval of the advance payment request.

(h) Justification of any proposal for waiver of interest charges (see 32.407).

32.409-2 Recommendation for disapproval.

If recommending disapproval, the contracting officer must, under agency procedures, transmit-

(a) The items prescribed in 32.409-1(a), (b), and (c); and

(b) The recommendation for disapproval and the reasons.

32.409-3 Security, supervision, and covenants.

(a) If advance payments are approved, the contracting officer must enter into an agreement with the contractor covering special accounts and suitable covenants protecting the Government's interest (see 32.411). This requirement generally applies under all statutory authorities, but modified requirements applicable to certain specific cases are prescribed in paragraphs (e) through (g) of this section.

(b) The agency must-

(1) Ensure that the amount of advance payments does not exceed the contractor's financial needs, and

(2) Closely supervise the contractor's withdrawal of funds from special accounts in which the advance payments are deposited.

(c) In the terms of the agreement, the contracting officer should provide for a paramount lien in favor of the Government. This lien may supplement or replace other security requirements. The lien should cover-

(1) Supplies being acquired;

(2) Any credit balance in the special account in which advance payments are deposited; and

(3) All property that the contractor acquires for performing the contract, except to the extent to which the Government otherwise has valid title to the property.

(d) Security requirements vary to fit the circumstances of different cases. Minimum security requirements are covered by the clauses prescribed in the contract. The contracting officer may supplement these as necessary in each case for protection of the Government's interest. Examples of additional security terms are-

(1) Personal or corporate endorsements or guarantees;

(2) Pledges of collateral;

(3) Subordination or standby of other indebtedness;

(4) Controls or limitations on profit distributions, salaries, bonuses or commissions, rentals and royalties, capital expenditures, creation of liens, retirement of stock or debt, and creation of additional obligations; and

(5) Advance payment bonds (rarely required).

(e) In an advance payment agreement with an instrumentality of the Government, a State, a local government, or an agency or instrumentality of a State or local government, the contracting officer may omit the requirement for deposit of the advances in a special account, if the official approving the advance determines that other adequate security exists to protect the Government's interest.

(f) The requirements of this 32.409-3 do not apply when using letters of credit if an agency's procedures provide for-

(1) The use under a cost-reimbursement contract of Federal funds deposited in the contractor's account at a financial institution (without the contractor acquiring title to the funds); and

(2) The security of such deposit of public moneys in accordance with governing regulations of the Treasury Department.

(g) If a separate special account is not required; *e.g.,* advance payment by a letter of credit, an agency may require a special account for an individual case, or classes of cases, if the circumstances warrant.

32.410 Findings, determination, and authorization.

(a) Each determination concerning advance payments must be supported by written findings (see 32.402(c)(1)(iii)).

(b) The following is an example of the format and text of findings, determination, and authorization with alternative words, phrases, and paragraphs to be selected to conform to the circumstances involved:

Findings, Determination, and Authorization for Advance Payments

Findings

(a) The undersigned hereby finds that:

(1) The _____ [*Insert the name of the contracting activity*] and _____ [*Insert the name of the contractor*] (have entered) (propose to enter) into (negotiated) (sealed bid) Contract No._____, dated _____. [*Summarize the specific facts and significant circumstances concerning the contract and the contractor, that, together with the other findings, will clearly support the determination below.*]

(2) Advance payments (in an amount not to exceed $_____ at any time outstanding) (in an aggregate amount not exceeding $_____, less the aggregate amounts repaid, or withdrawn by the Government) are required by the Contractor to perform under the contract. The amount does not exceed the unpaid contract price or the estimated interim cash needs arising during the reimbursement cycle.

(3) The advance payments are necessary for prompt, efficient contract performance that will benefit the Government.

(4) The proposed advance payment clause provides for security for the protection of the Government. The clause requires that all payments will be deposited in a special account at the Contractor's financial institution and that the Government will have a paramount lien on (i) the credit balance in the special account, (ii) any supplies contracted for, and (iii)any material or other property acquired for performance of the contract. [*Insert the following, if applicable: (The Contractor's financial management system provides for effective control over and accountability for all Federal funds under governing regulations of the Treasury Department.)(An advance payment bond is required.)*] This security is considered adequate.

(5) Advance payments are the only adequate means of financing available to the Contractor, and the amount designated in paragraph (a)(2) is based, to the extent possible, on the use of the Contractor's own working capital in performing the contract. [*Insert paragraph(6), (7), or (8), as applicable.*]

(6) The Contractor is a nonprofit (educational) (and) (research) institution, and the contract is for (experimental) (,) (research and development) work.

(7) The contract is solely for the management and operation of a Government-owned plant.

(8) The following unusual facts and circumstances favor making advance payments to the Contractor without interest: [*List the pertinent facts and circumstances.*]

Determination

(b) Based on the findings in paragraph (a), the undersigned determined that the making of the proposed advance payments, (with interest at the rate of _____ [*Insert the interest rate computed in accordance with 32.407*] percent on the daily unliquidated balance of the advance payments,) (without interest, except as provided by the proposed advance payment clause,) (is in the public interest) (will facilitate the national defense).

Authorization

(c) The advance payments, of which (the amount at any time outstanding) (the aggregate amount, less the aggregate amounts repaid, or withdrawn by the Government), must not exceed $____, are hereby authorized under (41 U.S.C. chapter 45) (10 U.S.C. chapter 277) (the Extraordinary Contracting Authority of Government Agencies in Connection with National Defense Functions (50 U.S.C. 1431 et. seq.) and Executive Order No. 10789 of November 14, 1958) [*or, if other, cite appropriate authority*] on (terms substantially as contained in the proposed advance payment clause, a copy (an outline) of

which is annexed to this authorization) (the following terms:) [*Insert the appropriate terms.*] (All prior authorizations for advance payments under Contract No. _____ are superseded.)

_____ [*Signature*]
_____ [*Name Typed*]
_____ [*Title of Authorized Official*]

[*Each Findings, Determination, and Authorization must be individually prepared to fit the particular circumstances at hand.Paragraphs(a)(1), (2), (3) and (4) and paragraphs (b) and (c) must be used in each case. If the contract is (a) for experimental, developmental or research work and with a nonprofit educational or research institution, or (b) only for management and operation of a Government-owned plant, paragraph (a)(5) should not be included.If the advance payment is to be made without interest to the contractor, include paragraph (a)(6), (7), or (8). If any advance payments have previously been authorized for the contract, include the final sentence of paragraph (c). The alternate parenthetical wording or other modifications may be used as appropriate.The paragraphs actually used must be renumbered sequentially.*]

32.411 Agreement for special account at a financial institution.

The contracting officer must use substantially the following form of agreement for a special account for advance payments:

Agreement for Special Account

This agreement is entered into this _____ day of _____, 20___, between the United States of America (the Government), represented by the Contracting Officer executing this agreement, _____ [*Insert the name of the Contractor*], a _____ [*Insert the name of the State of incorporation*] corporation (the Contractor), and _____, a financial institution operating under the laws of _____, located at _____ (the financial institution).

Recitals

(a) Under date of _____, 20__, the Government and the Contractor entered into Contract No. _____, or a related supplemental agreement, providing for advance payments to the Contractor. A copy of the advance payment terms was furnished to the financial institution.

(b) The contract or supplemental agreement requires that amounts advanced to the Contractor be deposited separate from the Contractor's general or other funds, in a Special Account at a member bank of the Federal Reserve System, any "insured" bank within the meaning of the Act creating the Federal Deposit Insurance Corporation (12 U.S.C. 1811), or a credit union insured by the National Credit Union Administration. The parties agree to deposit the amounts with the financial institution, which meets the requirement.

(c) This Special Account is designated "_____ [*Insert the Contractor's name*], _____ [*Insert the name of the Government agency*] Special Account."

Covenants

In consideration of the foregoing, and for other good and valuable considerations, the parties agree to the following conditions:

(a) The Government must have a lien on the credit balance in the account to secure the repayment of all advance payments made to the Contractor. The lien is paramount to any lien or claim of the financial institution regarding the account.

(b) The financial institution is bound by the terms of the contract relating to the deposit and withdrawal of funds in the Special Account, but is not responsible for the application of funds withdrawn from the account. The financial institution shall act on written directions from the Contracting Officer, the administering office, or a duly authorized representative of either. The financial institution is not liable to any party to this agreement for any action that complies with the written directions. Any written directions received by the financial institution through the Contracting Officer on _____ [*Insert the name of the agency*] stationery and purporting to be signed by, or by the direction of _____ or duly authorized representative, shall be, as far as the rights, duties, and liabilities of the financial institution are concerned, considered as being properly issued and filed with the financial institution by the _____ [*Insert the name of the agency*].

(c) The Government, or its authorized representatives, must have access to the books and records maintained by the financial institution regarding the Special Account at all reasonable times and for all reasonable purposes, including (but not limited to), the inspection or copying of the books and records and any and all pertinent memoranda, checks, correspondence, or documents. The financial institution shall preserve the books and records for a period of 6 years after the closing of this Special Account.

(d) In the event of the service of any writ of attachment, levy of execution, or commencement of garnishment proceedings regarding the Special Account, the financial institution will promptly notify _____ [*Insert the name of the administering office*].

(e) While this Special Account exists, the financial institution shall inform the Government each month of the financial institution's published prime interest rate and changes to the rate during the month. The financial institution shall give this information to the Contracting Officer on the last business day of the month. [*This covenant will not be included in the Special Account Agreements covering interest-free advance payments*.]

Each of the parties to this agreement has executed the agreement on _____, 20____.

_____

_____

[*Signatures and Official Titles*]

32.412 Contract clause.

(a) Insert the clause at 52.232-12, Advance Payments, in solicitations and contracts under which the Government will provide advance payments, except as provided in 32.412(b).

(b) If the agency desires to waive the countersignature requirement because of the contractor's financial strength, good performance record, and favorable experience concerning cost disallowances, the contracting officer must use the clause with its Alternate I.

(c) If a cost-reimbursement contract is contemplated, the contracting officer must use the clause with its Alternate II.

(d) If the agency considers a more rapid liquidation appropriate, the contracting officer must use the clause with its Alternate III.

(e) If the agency provides advance payments under the contract at no interest to the prime contractor, the contracting officer must use the clause with its Alternate IV.

(f) If the requirement for a special account is eliminated in accordance with 32.409-3(e) or (g), the contracting officer must insert in the solicitation or contract the clause set forth in Alternate V of 52.232-12, Advance Payments, instead of the basic clause.

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Subpart 32.5 - Progress Payments Based on Costs

32.500 Scope of subpart.

This subpart prescribes policies, procedures, forms, solicitation provisions, and contract clauses for providing contract financing through progress payments based on costs. This subpart does not apply to-

(a) Payments under cost-reimbursement contracts, but see 32.110 for progress payments made to subcontractors under cost-reimbursement prime contracts; or

(b) Contracts for construction or for shipbuilding or ship conversion, alteration, or repair, when the contracts provide for progress payments based on a percentage or stage of completion (see 10 U.S.C. 3808).

32.501 General.

Progress payments may be customary or unusual. Customary progress payments are those made under the general guidance in this subpart, using the customary progress payment rate, the cost base, and frequency of payment established in the Progress Payments clause, and either the ordinary liquidation method or the alternate method as provided in sections 32.503-8 and 32.503-9. Any other progress payments are considered unusual and may be used only in exceptional cases when authorized in accordance with section 32.501-2.

32.501-1 Customary progress payment rates.

(a) The customary progress payment rate is 80 percent, applicable to the total costs of performing the contract. The customary rate for contracts with small business concerns is 85 percent.

(b) The contracting officer must-

(1) Consider any rate higher than those permitted in paragraph (a) of this section an unusual progress payment; and

(2) Not include a higher rate in a contract unless advance agency approval is obtained as prescribed in 32.501-2.

(c) When advance payments and progress payments are authorized under the same contract, the contracting officer must not authorize a progress payment rate higher than the customary rate.

(d) In accordance with 10 U.S.C. 3804(b) and 41 U.S.C. 4504(b), the limit for progress payments is 80 percent on work accomplished under undefinitized contract actions. The contracting officer must not authorize a higher rate under unusual progress payments or other customary progress payments for the undefinitized actions.

32.501-2 Unusual progress payments.

(a) The contracting officer may provide unusual progress payments only if-

(1) The contract necessitates predelivery expenditures that are large in relation to contract price and in relation to the contractor's working capital and credit;

(2) The contractor fully documents an actual need to supplement any private financing available, including guaranteed loans; and

(3) The contractor's request is approved by the head of the contracting activity or a designee. In addition, see 32.502-2.

(b) The excess of the unusual progress payment rate approved over the customary progress payment rate should be the lowest amount possible under the circumstances.

(c) Progress payments will not be considered unusual merely because they are on letter contracts or the definitive contracts that supersede letter contracts.

32.501-3 Contract price.

(a) For the purpose of making progress payments and determining the limitation on progress payments, the contract price must be as follows:

(1) Under firm-fixed price contracts, the contract price is the current amount fixed by the contract plus the not-to-exceed amount for any unpriced modifications.

(2) If the contract is redeterminable or subject to economic price adjustment, the contract price is the initial price until modified.

(3) Under a fixed-price incentive contract, the contract price is the target price plus the not-to-exceed amount of unpriced modifications. However, if the contractor's properly incurred costs exceed the target price, the contracting officer may provisionally increase the price up to the ceiling or maximum price.

(4) Under a letter contract, the contract price is the maximum amount obligated by the contract as modified.

(5) Under an unpriced order issued against a basic ordering agreement, the contract price is the maximum amount obligated by the order, as modified.

(6) Any portion of the contract specifically providing for reimbursement of costs only must be excluded from the contract price.

(b) The contracting officer must not make progress payments or increase the contract price beyond the funds obligated under the contract, as amended.

32.501-4 [Reserved]

32.501-5 Other protective terms.

If the contracting officer considers it necessary for protection of the Government's interest, protective terms such as the following may be used in addition to the Progress Payments clause of the contract:

(a) Personal or corporate guarantees.

(b) Subordinations or standbys of indebtedness.

(c) Special bank accounts.

(d) Protective covenants of the kinds in paragraph (p) of the clause at , Advance Payments.

(e) A provision, included in the solicitation and resultant contract when first article testing is required (see subpart 9.3), limiting progress payments on first article work by a stated amount or percentage.

32.502 Preaward matters.

This section covers matters that generally are relevant only before contract award. This does not preclude taking actions discussed here after award, if appropriate; *e.g.,* postaward addition of a Progress Payments clause for consideration.

32.502-1 Use of customary progress payments.

The contracting officer may use a Progress Payments clause in solicitations and contracts, in accordance with this subpart. The contracting officer must reject as nonresponsive bids conditioned on progress payments when the solicitation did not provide for progress payments.

32.502-2 Contract finance office clearance.

The contracting officer must obtain the approval of the contract finance office or other offices designated under agency procedures before taking any of the following actions:

(a) Providing a progress payment rate higher than the customary rate (see 32.501-1).

(b) Deviating from the progress payments terms prescribed in this part.

(c) Providing progress payments to a contractor-

(1) Whose financial condition is in doubt;

(2) Who has had an advance payment request or loan guarantee denied for financial reasons (or approved but withdrawn or lapsed) within the previous 12 months; or

(3) Who is named in the consolidated list of contractors indebted to the United States (known commonly as the "Hold-up List").

32.502-3 Solicitation provisions.

(a) Insert the provision at 52.232-13, Notice of Progress Payments, in invitations for bids and requests for proposals that include a Progress Payments clause.

(b) (1) Under the authority of the statutes cited in 32.101, an invitation for bids may restrict the availability of progress payments to small business concerns only.

(2) Insert the provision at 52.232-14, Notice of Availability of Progress Payments Exclusively for Small Business Concerns, in invitations for bids if it is anticipated that-

(i) Both small business concerns and others may submit bids in response to the same invitation; and

(ii) Only the small business bidders would need progress payments.

(c) Insert the provision at 52.232-15, Progress Payments Not Included, in invitations for bids if the solicitation will not contain one of the provisions prescribed in paragraphs (a) and (b) of this section.

32.502-4 Contract clauses.

(a) (1) Insert the clause at 52.232-16, Progress Payments, in-

(i) Solicitations that may result in contracts providing for progress payments based on costs; and

(ii) Fixed-price contracts under which the Government will provide progress payments based on costs.

(2) If advance agency approval has been given in accordance with 32.501-1, the contracting officer may substitute a different customary rate for other than small business concerns for the progress payment and liquidation rate indicated.

(3) If an unusual progress payment rate is approved for the prime contractor (see 32.501-2), substitute the approved rate for the customary rate in paragraphs (a)(1), (a)(6), and (b) of the clause.

(4) If the liquidation rate is changed from the customary progress payment rate (see 32.503-8 and 32.503-9), substitute the new rate for the rate in paragraphs (a)(1), (a)(6), and (b) of the clause.

(5) If an unusual progress payment rate is approved for a subcontract (see 32.504(c) and 32.501-2), modify paragraph (j)(6) of the clause to specify the new rate, the name of the subcontractor, and that the new rate must be used for that subcontractor in lieu of the customary rate.

(b) If the contractor is a small business concern, use the clause with its Alternate I.

(c) If the contract is a letter contract, use the clause with its Alternate II.

(d) If the contractor is not a small business concern, and progress payments are authorized under an indefinite-delivery contract, basic ordering agreement, or their equivalent, use the clause with its Alternate III.

(e) If the nature of the contract necessitates separate progress payment rates for portions of work that are clearly severable and accounting segregation would be maintained (*e.g.,* annual production requirements), describe the application of separate progress payment rates in a supplementary special provision within the contract. The contractor must submit separate progress payment requests and subsequent invoices for the severable portions of work in order to maintain accounting integrity.

32.503 Postaward matters.

This section covers matters that are generally relevant only after award of a contract. This does not preclude taking actions discussed here before award, if appropriate, *e.g.,* preaward review of accounting systems and controls.

32.503-1 [Reserved]

32.503-2 Supervision of progress payments.

(a) The extent of progress payments supervision, by prepayment review or periodic review, should vary inversely with the contractor's experience, performance record, reliability, quality of management, and financial strength, and with the adequacy of the contractor's accounting system and controls. Supervision must be of a kind and degree sufficient to provide timely knowledge of the need for, and timely opportunity for, any actions necessary to protect Government interests.

(b) The administering office must keep itself informed of the contractor's overall operations and financial condition, since difficulties encountered and losses suffered in operations outside the particular progress payment contract may affect adversely the performance of that contract and the liquidation of the progress payments.

(c) For contracts with contractors-

(1) Whose financial condition is doubtful or not strong in relation to progress payments outstanding or to be outstanding;

(2) With management of doubtful capacity;

(3) Whose accounting controls are found by experience to be weak; or

(4) Experiencing substantial difficulties in performance, full information on progress under the contract involved (including the status of subcontracts) and on the contractor's other operations and overall financial condition should be obtained and analyzed frequently, with a view to protecting the Government's interests better and taking such action as may be proper to make contract performance more certain.

(d) So far as practicable, all cost problems, particularly those involving indirect costs, that are likely to create disagreements in future administration of the contract should be identified and resolved at the inception of the contract (see 31.109).

32.503-3 Initiation of progress payments and review of accounting system.

(a) For contractors that the administrative contracting officer (ACO) has found by previous experience or recent audit review (within the last 12 months) to be--

(1) Reliable, competent, and capable of satisfactory performance;

(2) Possessed of an adequate accounting system and controls; and

(3) In sound financial condition, progress payments in amounts requested by the contractor should be approved as a matter of course.

(b) For all other contractors, the ACO must not approve progress payments before determining—

(1) That—

(i) The contractor will be capable of liquidating any progress payments; or

(ii) The Government is otherwise protected against loss by additional protective provisions; and

(2) That the contractor's accounting system and controls are adequate for proper administration of progress payments. The services of the responsible audit agency or office should be used to the greatest extent practicable. However, if the auditor so advises, a complete audit may not be necessary.

32.503-4 Approval of progress payment requests.

(a) When the reliability of the contractor and the adequacy of the contractor's accounting system and controls have been established (see 32.503-3) the ACO may, in approving any particular progress payment request (including initial requests on new contracts), rely upon that accounting system and upon the contractor's certification, without requiring audit or review of the request before payment.

(b) The ACO should not routinely ask for audits of progress payment requests. However, when there is reason to-

(1) Question the reliability or accuracy of the contractor's certification; or

(2) Believe that the contract will involve a loss, the ACO should ask for a review or audit of the request before payment is approved or the request is otherwise disposed of.

(c) When there is reason to doubt the amount of a progress payment request, only the doubtful amount should be withheld, subject to later adjustment after review or audit; any clearly proper and due amounts should be paid without awaiting resolution of the differences.

32.503-5 Administration of progress payments.

(a) While the ACO may, in approving progress payment requests under 32.503-3, rely on the contractor's accounting system and certification without prepayment review, postpayment reviews (including audits when considered necessary) must be made periodically, or when considered desirable by the ACO to determine the validity of progress payments already made and expected to be made.

(b) These postpayment reviews or audits must, as a minimum, include a determination of whether or not-

(1) The unliquidated progress payments are fairly supported by the value of the work accomplished on the undelivered portion of the contract;

(2) The applicable limitation on progress payments in the Progress Payments clause has been exceeded;

(3) (i) The unpaid balance of the contract price will be adequate to cover the anticipated cost of completion; or

(ii) The contractor has adequate resources to complete the contract; and

(4) There is reason to doubt the adequacy and reliability of the contractor's accounting system and controls and certification.

(c) Under indefinite-delivery contracts, the contracting officer should administer progress payments made under each individual order as if the order constituted a separate contract, unless agency procedures provide otherwise. When the contract will be administered by an agency other than the awarding agency, the contracting officer must coordinate with the contract administration office if the awarding agency wants the administration of progress payments to be on a basis other than order-by-order.

32.503-6 Suspension or reduction of payments.

(a) *General.* The Progress Payments clause provides a Government right to reduce or suspend progress payments, or to increase the liquidation rate, under specified conditions. These conditions and actions are discussed in paragraphs (b) through (g) of this subsection.

(1) The contracting officer must take these actions only in accordance with the contract terms and never precipitately or arbitrarily. These actions should be taken only after-

(i) Notifying the contractor of the intended action and providing an opportunity for discussion;

(ii) Evaluating the effect of the action on the contractor's operations, based on the contractor's financial condition, projected cash requirements, and the existing or available credit arrangements; and

(iii) Considering the general equities of the particular situation.

(2) The contracting officer must take immediate unilateral action only if warranted by circumstances such as overpayments or unsatisfactory contract performance.

(3) In all cases, the contracting officer must-

(i) Act fairly and reasonably;

(ii) Base decisions on substantial evidence; and

(iii) Document the contract file. Findings made under paragraph (c) of the Progress Payments clause must be in writing.

(b) *Contractor noncompliance.* (1) The contractor must comply with all material requirements of the contract. This includes the requirement to maintain an efficient and reliable accounting system and controls, adequate for the proper administration of progress payments. If the system or controls are deemed inadequate, progress payments must be suspended (or the portion of progress payments associated with the unacceptable portion of the contractor's accounting system must be suspended) until the necessary changes have been made.

(2) If the contractor fails to comply with the contract without fault or negligence, the contracting officer will not take action permitted by paragraph (c)(1) of the Progress Payments clause, other than to correct overpayments and collect amounts due from the contractor.

(c) *Unsatisfactory financial condition.* (1) If the contracting officer finds that contract performance (including full liquidation of progress payments) is endangered by the contractor's financial condition, or by a failure to make progress, the contracting officer must require the contractor to make additional operating or financial arrangements adequate for completing the contract without loss to the Government.

(2) If the contracting officer concludes that further progress payments would increase the probable loss to the Government, the contracting officer must suspend progress payments and all other payments until the unliquidated balance of progress payments is eliminated.

(d) *Excessive inventory.* If the inventory allocated to the contract exceeds reasonable requirements (including a reasonable accumulation of inventory for continuity of operations), the contracting officer should, in addition to requiring the transfer of excessive inventory from the contract, take one or more of the following actions, as necessary, to avoid or correct overpayment:

(1) Eliminate the costs of the excessive inventory from the costs eligible for progress payments, with appropriate reduction in progress payments outstanding.

(2) Apply additional deductions to billings for deliveries (increase liquidation).

(e) *Delinquency in payment of costs of performance.* (1) If the contractor is delinquent in paying the costs of contract performance in the ordinary course of business, the contracting officer must evaluate whether the delinquency is caused by an unsatisfactory financial condition and, if so, must apply the guidance in paragraph (c) of this section. If the contractor's financial condition is satisfactory, the contracting officer must not deny progress payments if the contractor agrees to-

(i) Cure the payment delinquencies;

(ii) Avoid further delinquencies; and

(iii) Make additional arrangements adequate for completing the contract without loss to the Government.

(2) If the contractor has, in good faith, disputed amounts claimed by subcontractors, suppliers, or others, the contracting officer must not consider the payments delinquent until the amounts due are established by the parties through litigation or arbitration. However, the amounts must be excluded from costs eligible for progress payments so long as they are disputed.

(3) Determinations of delinquency in making contributions under employee pension, profit sharing, or stock ownership plans, and exclusion of costs for such contributions from progress payment requests, must be in accordance with paragraph (a)(3) of the clause at 52.232-16, Progress Payments, without regard to the provisions of 32.503-6.

(f) *Fair value of undelivered work*. Progress payments must be commensurate with the fair value of work accomplished in accordance with contract requirements. The contracting officer must adjust progress payments when necessary to ensure that the fair value of undelivered work equals or exceeds the amount of unliquidated progress payments. On loss contracts, the application of a loss ratio as provided at paragraph (g) of this section constitutes this adjustment.

(g) *Loss contracts.* (1) If the sum of the total costs incurred under a contract plus the estimated costs to complete the performance are likely to exceed the contract price, the contracting officer must compute a loss ratio factor and adjust future progress payments to exclude the element of loss. The loss ratio factor is computed as follows:

(i) Revise the current contract price used in progress payment computations (the current ceiling price under fixed-price incentive contracts) to include the not-to-exceed amount for any pending change orders and unpriced orders.

(ii) Divide the revised contract price by the sum of the total costs incurred to date plus the estimated additional costs of completing the contract performance.

(2) If the contracting officer believes a loss is probable, future progress payment requests must be modified as follows:

(i) The contract price must be the revised amount computed under paragraph (g)(1)(i) of this section.

(ii) The total costs eligible for progress payments must be the product of

(A) The sum of paid costs eligible for progress payments times

(B) The loss ratio factor computed under paragraph (g)(1)(ii) of this section.

(iii) The costs applicable to items delivered, invoiced, and accepted must not include costs in excess of the contract price of the items.

(3) The contracting officer may use audit assistance, technical services, management reports, and other sources of pertinent data to evaluate progress payment requests. If the contracting officer concludes that the contractor's figures in the contractor's progress payment request are not correct, the contracting officer must-

(i) In the manner prescribed in paragraph (4) of this section, prepare a supplementary analysis to be attached to the contractor's request;

(ii) Advise the contractor in writing of the differences; and

(iii) Adjust all further progress payments in accordance with paragraph (1) of this section, using the contracting officer's figures, until the difference is resolved.

(4) The following is an example of the supplementary analysis required in paragraph (g)(3) of this section:

Section I:

Contract price	$2,850,000
Change orders and unpriced orders (to extent funds have been obligated)	$150,000
Revised contract price	$3,000,000

Section II:

Total costs incurred to date	$2,700,000
Estimated additional costs to complete	$900,000
Total costs to complete	$3,600,000

$$\textit{Loss ratio factor}\ \frac{\$3,000,000}{\$3,600,000} = 83.3\%$$

Total costs eligible for progress payments	$2,700,000
Loss ratio factor	×83.3%
Recognized costs for progress payments	$2,249,100
Progress payment rate	×80.0%
Alternate amount to be used	$1,799,280

Section III:

Factored costs of items delivered*	$750,000
Recognized costs applicable to undelivered items ($2,249,100–$750,000)	$1,499,100

*This amount must be the same as the contract price of the items delivered.

32.503-7 [Reserved]

32.503-8 Liquidation rates-ordinary method.

The Government recoups progress payments through the deduction of liquidations from payments that would otherwise be due to the contractor for completed contract items. To determine the amount of the liquidation, the contracting officer applies a liquidation rate to the contract price of contract items delivered and accepted. The ordinary method is that the liquidation rate is the same as the progress payment rate. At the beginning of a contract, the contracting officer must use this method.

32.503-9 Liquidation rates—alternate method.

(a) The liquidation rate determined under 32.503-8 must apply throughout the period of contract performance unless the contracting officer adjusts the liquidation rate under the alternate method in this 32.503-9. The objective of the alternate liquidation rate method is to permit the contractor to retain the earned profit element of the contract prices for completed items in the liquidation process. The contracting officer may reduce the liquidation rate if—

(1) The contractor requests a reduction in the rate;

(2) The rate has not been reduced in the preceding 12 months;

(3) The contract delivery schedule extends at least 18 months from the contract award date;

(4) Data on actual costs are available--

(i) For the products delivered, or

(ii) If no deliveries have been made, for a performance period of at least 12 months;

(5) The reduced liquidation rate would result in the Government recouping under each invoice the full extent of the progress payments applicable to the costs allocable to that invoice;

(6) The contractor would not be paid for more than the costs of items delivered and accepted (less allocable progress payments) and the earned profit on those items;

(7) The unliquidated progress payments would not exceed the limit prescribed in paragraph (a)(5) of the Progress Payments clause;

(8) The parties agree on an appropriate rate; and

(9) The contractor agrees to certify annually, or more often if requested by the contracting officer, that the alternate rate continues to meet the conditions of sections 32.503-5 and 32.503-6. The certificate must be accompanied by adequate supporting information.

(b) The contracting officer must change the liquidation rate in the following circumstances:

(1) The rate must be increased for both previous and subsequent transactions, if the contractor experiences a lower profit rate than the rate anticipated at the time the liquidation rate was established. Accordingly, the contracting officer must adjust the progress payments associated with contract items already delivered, as well as subsequent progress payments.

(2) The rate must be increased or decreased in keeping with the successive changes to the contract price or target profit when—

(i) The target profit is changed under a fixed-price incentive contract with successive targets; or

(ii) A redetermined price involves a change in the profit element under a contract with prospective price redetermination at stated intervals.

(c) Whenever the liquidation rate is changed, the contracting officer must issue a contract modification to specify the new rate in the Progress Payments clause. Adequate consideration for these contract modifications is provided by the consideration included in the initial contract. The parties must promptly make the payment or liquidation required in the circumstances.

32.503-10 Establishing alternate liquidation rates.

(a) The contracting officer must ensure that the liquidation rate is—

(1) High enough to result in Government recoupment of the applicable progress payments on each billing; and

(2) Supported by documentation included in the administration office contract file.

(b) The minimum liquidation rate is the expected progress payments divided by the contract price. Each of these factors is discussed below:

(1) The contracting officer must compute the expected progress payments by multiplying the estimated cost of performing the contract by the progress payment rate.

(2) For purposes of computing the liquidation rate, the contracting officer may adjust the estimated cost and the contract price to include the estimated value of any work authorized but not yet priced and any projected economic

adjustments; however, the contracting officer's adjustment must not exceed the Government's estimate of the price of all authorized work or the funds obligated for the contract.

(3) The following are examples of the computation. Assuming an estimated price of $2,200,000 and total estimated costs eligible for progress payments of $2,000,000:

(i) If the progress payment rate is 80 percent, the minimum liquidation rate should be 72.7 percent, computed as follows:

$$\frac{\$2,000,000 \times 80\%}{\$2,200,000} = 72.7\%$$

(ii) If the progress payment rate is 85 percent, the minimum liquidation rate should be 77.3 percent, computed as follows:

$$\frac{\$2,000,000 \times 85\%}{\$2,200,000} = 77.3\%$$

(4) Minimum liquidation rates will generally be expressed to tenths of a percent. Decimals between tenths will be rounded up to the next highest tenth (not necessarily the nearest tenth), since rounding down would produce a rate below the minimum rate calculated.

32.503-11 Adjustments for price reduction.

(a) If a retroactive downward price reduction occurs under a redeterminable contract that provides for progress payments, the contracting officer must—

(1) Determine the refund due and obtain repayment from the contractor for the excess of payments made for delivered items over amounts due as recomputed at the reduced prices; and

(2) Increase the unliquidated progress payments amount for overdeductions made from the contractor's billings for items delivered.

(b) The contracting officer must also increase the unliquidated progress payments amount if the contractor makes an interim or voluntary price reduction under a redeterminable or incentive contract.

32.503-12 Maximum unliquidated amount.

(a) The contracting officer must ensure that any excess of the unliquidated progress payments over the contractual limitation in paragraph (a) of the Progress Payments clause in the contract is promptly corrected through one or more of the following actions:

(1) Increasing the liquidation rate.

(2) Reducing the progress payment rate.

(3) Suspending progress payments.

(b) The excess described in paragraph (a) of this section is most likely to arise under the following circumstances:

(1) The costs of performance exceed the contract price.

(2) The alternate method of liquidation (see 32.503-9) is used and the actual costs of performance exceed the cost estimates used to establish the liquidation rate.

(3) The rate of progress or the quality of contract performance is unsatisfactory.

(4) The rate of rejections, waste, or spoilage is excessive.

(c) As required, the services of the responsible audit agency or office should be fully utilized, along with the services of qualified cost analysis and engineering personnel.

32.503-13 [Reserved]

32.503-14 Protection of Government title.

(a) Since the Progress Payments clause gives the Government title to all of the materials, work-in-process, finished goods, and other items of property described in paragraph (d) of the Progress Payments clause, under the contract under which progress payments have been made, the ACO must ensure that the Government title to these inventories is not compromised by other encumbrances. Ordinarily, the ACO, in the absence of reason to believe otherwise, may rely upon the contractor's certification contained in the progress payment request.

(b) If the ACO becomes aware of any arrangement or condition that would impair the Government's title to the property affected by progress payment, the ACO must require additional protective provisions (see 32.501-5) to establish and protect the Government's title.

(c) The existence of any such encumbrance is a violation of the contractor's obligations under the contract, and the ACO may, if necessary, suspend or reduce progress payments under the terms of the Progress Payments clause covering failure to comply with any material requirement of the contract. In addition, if the contractor fails to disclose an existing encumbrance in the progress payments certification, the ACO should consult with legal counsel concerning possible violation of 31 U.S.C. 3729, the False Claims Act.

32.503-15 Application of Government title terms.

(a) Property to which the Government obtains title by operation of the Progress Payments clause solely is not, as a consequence, Government-furnished property.

(b) Although property title is vested in the Government under the Progress Payments clause, the acquisition, handling, and disposition of certain types of property are governed by—

(1) The clause at 52.245-1, Government Property; and

(2) The termination clauses at 52.249, for termination inventory.

(c) The contractor may sell or otherwise dispose of current production scrap in the ordinary course of business on its own volition, even if title has vested in the Government under the Progress Payments clause. The contracting officer must require the contractor to credit the costs of the contract performance with the proceeds of the scrap disposition.

(d) When the title to materials or other inventories is vested in the Government under the Progress Payments clause, the contractor may transfer the inventory items from the contract for its own use or other disposition only if, and on terms, approved by the contracting officer. The contractor is required to—

(1) Eliminate the costs allocable to the transferred property from the costs of contract performance, and

(2) Repay or credit to the Government an amount equal to the unliquidated progress payments, allocable to the transferred property.

(e) If excess property remains after the contract performance is complete and all contractor obligations under the contract are satisfied, including full liquidation of progress payments, the excess property is outside the scope of the Progress Payments clause. Therefore, the contractor holds title to it.

32.503-16 Risk of loss.

(a) Under the Progress Payments clause, and except for normal spoilage, the contractor bears the risk of loss for Government property under the clause, even though title is vested in the Government, unless the Government has expressly assumed this risk. The clauses prescribed in this regulation related to progress payments, default, and terminations do not constitute a Government assumption of this risk.

(b) If a loss occurs in connection with property for which the contractor bears the risk, the contractor is obligated to repay to the Government the amount of unliquidated progress payments based on costs allocable to the property.

(c) The contractor is not obligated to pay for the loss of property for which the Government has assumed the risk of loss. However, a serious loss may impede the satisfactory progress of contract performance, so that the contracting officer may need to act under paragraph (c)(5) of the Progress Payments clause.

32.504 Subcontracts under prime contracts providing progress payments.

(a) Subcontracts may include either performance-based payments, provided they meet the criteria in 32.1003, or progress payments, provided they meet the criteria in subpart 32.5 for customary progress payments, but not both. Subcontracts for commercial purchases may include commercial product or commercial service purchase financing terms, provided they meet the criteria in 32.202-1.

(b) The contractor's requests for progress payments may include the full amount of commercial product or commercial service purchase financing payments, performance-based payments, or progress payments to a subcontractor, whether paid or unpaid, provided that unpaid amounts are limited to amounts determined due and that the contractor will pay—

(1) In accordance with the terms and conditions of a subcontract or invoice; and

(2) Ordinarily within 30 days of the submission of the contractor's progress payment request to the Government.

(c) If the contractor is considering making unusual progress payments to a subcontractor, the parties will be guided by the policies in 32.501-2. If the Government approves unusual progress payments for the subcontract, the contracting officer must issue a contract modification to specify the new rate in paragraph (j)(6) of the clause at 52.232-16, Progress Payments, in

the prime contract. This will allow the contractor to include the progress payments to the subcontractor in the cost basis for progress payments by the Government. This modification is not a deviation and does not require the clearance prescribed in 32.502-2(b).

(d) The contractor has a duty to ensure that financing payments to subcontractors conform to the standards and principles prescribed in paragraph (j) of the Progress Payments clause in the prime contract. Although the contracting officer should, to the extent appropriate, review the subcontract as part of the overall administration of progress payments in the prime contract, there is no special requirement for contracting officer review or consent merely because the subcontract includes financing payments, except as provided in paragraph (c) of this section. However, the contracting officer must ensure that the contractor has installed the necessary management control systems, including internal audit procedures.

(e) When financing payments are in the form of progress payments, the Progress Payments clause at 52.232-16 requires that the subcontract include the substance of the Progress Payments clause in the prime contract, modified to indicate that the contractor, not the Government, awards the subcontract and administers the progress payments. The following exceptions apply to wording modifications:

(1) The subcontract terms on title to property under progress payments must provide for vesting of title in the Government, not the contractor, as in paragraph (d) of the Progress Payments clause in the prime contract. A reference to the contractor may, however, be substituted for "Government" in paragraph (d)(2)(iv) of the clause.

(2) In the subcontract terms on reports and access to records, the contractor shall not delete the references to "Contracting Officer" and "Government" in adapting paragraph (g) of the Progress Payments clause in the contract, but may expand the terms as follows:

(i) The term "Contracting Officer" may be changed to "Contracting Officer or Prime Contractor".

(ii) The term "the Government" may be changed to "the Government or Prime Contractor".

(3) The subcontract special terms regarding default must include paragraph (h) of the Progress Payments clause in the contract through its subdivision (i). The rest of paragraph (h) is optional.

(f) When financing payments are in the form of performance-based payments, the Performance-Based Payments clause at 52.232-32 requires that the subcontract terms include the substance of the Performance-Based Payments clause, modified to indicate that the contractor, not the Government, awards the subcontract and administers the performance-based payments, and include appropriately worded modifications similar to those noted in paragraph (e) of this section.

(g) When financing payments are in the form of commercial product or commercial service purchase financing, the subcontract must include a contract financing clause structured in accordance with 32.206.

Subpart 32.6 Contract Debts

32.600 Scope of subpart.

This subpart prescribes policies and procedures for identifying, collecting, and deferring collection of contract debts (including interest, if applicable). Sections 32.607, 32.608, and 32.610 of this subpart do not apply to claims against common carriers for transportation overcharges and freight and cargo losses (31 U.S.C. 3726).

32.601 General.

(a) Contract debts are amounts that—

(1) Have been paid to a contractor to which the contractor is not currently entitled under the terms and conditions of the contract; or

(2) Are otherwise due from the contractor under the terms and conditions of the contract.

(b) Contract debts include, but are not limited to, the following:

(1) Billing and price reductions resulting from contract terms for price redetermination or for determination of prices under incentive type contracts.

(2) Price or cost reductions for defective certified cost or pricing data.

(3) Financing payments determined to be in excess of the contract limitations at 52.232-16(a)(7), Progress Payments, or 52.232-32(d)(2), Performance—Based Payments, or any contract clause for financing of commercial products or commercial services.

(4) Increases to financing payment liquidation rates.

(5) Overpayments disclosed by quarterly statements required under price redetermination or incentive contracts.

(6) Price adjustments resulting from Cost Accounting Standards (CAS) noncompliances or changes in cost accounting practice.

(7) Reinspection costs for nonconforming supplies or services.

(8) Duplicate or erroneous payments.

(9) Damages or excess costs related to defaults in performance.

(10) Breach of contract obligations concerning progress payments, performance-based payments, advance payments, financing of commercial products or commercial services, or Government-furnished property.

(11) Government expense of correcting defects.

(12) Overpayments related to errors in quantity or billing or deficiencies in quality.

(13) Delinquency in contractor payments due under agreements or arrangements for deferral or postponement of collections.

(14) Reimbursement of amounts due under 33.102(b)(3) and 33.104(h)(8).

32.602 Responsibilities.

(a) The contracting officer has primary responsibility for identifying and demanding payment of contract debts except those resulting from errors made by the payment office. The contracting officer must not collect contract debts or otherwise agree to liquidate contract debts (*e.g.*, offset the amount of the debt against existing unpaid bills due the contractor, or allow contractors to retain contract debts to cover amounts that may become payable in future periods).

(b) The payment office has primary responsibility for—

(1) Collecting contract debts identified by contracting officers;

(2) Identifying and collecting duplicate and erroneous payments; and

(3) Authorizing the liquidation of contract debts in accordance with agency procedures.

32.603 Debt determination.

(a) If the contracting officer has any indication that a contractor owes money to the Government under a contract, the contracting officer must determine promptly whether an actual debt is due and the amount. Any unnecessary delay may contribute to—

(1) Loss of timely availability of the funds to the program for which the funds were initially provided;

(2) Increased difficulty in collecting the debt; or

(3) Actual monetary loss to the Government.

(b) The amount of indebtedness determined by the contracting officer must be an amount that—

(1) Is based on the merits of the case; and

(2) Is consistent with the contract terms.

32.604 Demand for payment.

(a) Except as provided in paragraph (c) of this section, the contracting officer must take the following actions:

(1) Issue the demand for payment as soon as the contracting officer has determined that an actual debt is due the Government and the amount.

(2) Issue the demand for payment even if—

(i) The debt is or will be the subject of a bilateral modification;

(ii) The contractor is otherwise obligated to pay the money under the existing contract terms; or

(iii) The contractor has agreed to repay the debt.

(3) Issue the demand for payment as a part of the final decision, if a final decision is required by 32.605(a).

(b) The demand for payment must include the following:

(1) A description of the debt, including the debt amount.

(2) A distribution of the principal amount of the debt by line(s) of accounting subject to the following:

(i) If the debt affects multiple lines of accounting, the contracting officer must, to the maximum extent practicable, identify all affected lines of accounting. If it is not practicable to identify all affected lines of accounting, the contracting officer may select representative lines of accounting in accordance with paragraph (b)(2)(ii) of this section.

(ii) In selecting representative lines of accounting, the contracting officer must—

(A) Consider the affected departments or agencies, years of appropriations, and the predominant types of appropriations; and

(B) Not distribute to any line of accounting an amount of the principal in excess of the total obligation for the line of accounting; and

(iii) Include the lines of accounting even if the associated funds are expired or cancelled. While cancelled funds will be deposited in a miscellaneous receipt account of the Treasury if collected, the funds are tracked under the closed year appropriation(s) to comply with the Anti-Deficiency Act.

(iv) If the debt affects multiple contracts and the lines of accounting are not readily available, the contracting officer must—

(A) Issue the demand for payment without the distribution of the principal amount to the affected lines of accounting;

(B) Include a statement in the demand for payment advising when the distribution will be provided; and

(C) Provide the distribution by the date identified in the demand for payment.

(3) The basis for and amount of any accrued interest or penalty.

(4) (i) For debts resulting from specific contract terms (*e.g.*, debts resulting from incentive clause provisions, Quarterly Limitation on Payments Statement, Cost Accounting Standards, price reduction for defective pricing), a notification stating that payment should be made promptly, and that interest is due in accordance with the terms of the contract. Interest must be computed from the date specified in the applicable contract clause until repayment by the contractor. The interest rate must be the rate specified in the applicable contract clause. In the case of a debt arising from a price reduction for defective pricing, or as specifically set forth in a Cost Accounting Standards (CAS) clause in the contract, interest is computed from the date of overpayment by the Government until repayment by the contractor at the underpayment rate established by the Secretary of the Treasury, for the periods affected, under 26 U.S.C. 6621(a)(2).

(ii) For all other contract debts, a notification stating that any amounts not paid within 30 days from the date of the demand for payment will bear interest. Interest must be computed from the date of the demand for payment until repayment by the contractor. The interest rate must be the interest rate established by the Secretary of the Treasury, as provided in 41 U.S.C. 7109, which is applicable to the period in which the amount becomes due, and then at the rate applicable for each six-month period as established by the Secretary until the amount is paid.

(5) A statement advising the contractor—

(i) To contact the contracting officer if the contractor believes the debt is invalid or the amount is incorrect; and

(ii) If the contractor agrees, to remit a check payable to the agency's payment office annotated with the contract number along with a copy of the demand for payment to the payment office identified in the contract or as otherwise specified in the demand letter in accordance with agency procedures.

(6) Notification that the payment office may initiate procedures, in accordance with the applicable statutory and regulatory requirements, to offset the debt against any payments otherwise due the contractor.

(7) Notification that the debt may be subject to administrative charges in accordance with the requirements of 31 U.S.C. 3717(e) and the Debt Collection Improvement Act of 1996.

(8) Notification that the contractor may submit a request for installment payments or deferment of collection if immediate payment is not practicable or if the amount is disputed.

(c) Except as provided in paragraph (d) of this section, the contracting officer should not issue a demand for payment if the contracting officer only becomes aware of the debt when the contractor—

(1) Provides a lump sum payment or submits a credit invoice. (A credit invoice is a contractor's request to liquidate the debt against existing unpaid bills due the contractor); or

(2) Notifies the contracting officer that the payment office overpaid on an invoice payment. When the contractor provides the notification, the contracting officer must notify the payment office of the overpayment.

(d) If a demand for payment was not issued as provided for in paragraph (c) of this section, the contracting officer must issue a demand for payment no sooner than 30 days after the contracting officer becomes aware of the debt unless—

(1) The contractor has liquidated the debt;

(2) The contractor has requested an installment payment agreement; or

(3) The payment office has issued a demand for payment.

(e) The contracting officer must—

(1) Furnish a copy of the demand for payment to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt; and

(2) Forward a copy of the demand to the payment office.

32.605 Final decisions.

(a) The contracting officer must issue a final decision as required by 33.211 if—

(1) The contracting officer and the contractor are unable to reach agreement on the existence or amount of a debt in a timely manner;

(2) The contractor fails to liquidate a debt previously demanded by the contracting officer within the timeline specified in the demand for payment unless the amounts were not repaid because the contractor has requested an installment payment agreement; or

(3) The contractor requests a deferment of collection on a debt previously demanded by the contracting officer (see 32.607-2).

(b) If a demand for payment was previously issued for the debt, the demand for payment included in the final decision must identify the same due date as the original demand for payment.

(c) The contracting officer must—

(1) Furnish the decision to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt; and

(2) Forward a copy to the payment office identified in the contract.

32.606 Debt collection.

(a) If the contractor has not liquidated the debt within 30 days of the date due or requested installment payments or deferment of collection, the payment office must initiate withholding of principal, interest, penalties, and administrative charges. In the event the contract is assigned under the Assignment of Claims Act of 1940 (31 U.S.C. 3727 and 41 U.S.C. 6305), the rights of the assignee will be scrupulously respected and withholding of payments must be consistent with those rights. For additional information on assignment of claims, see Subpart 32.8.

(b) As provided for in the Debt Collection Improvement Act of 1996 (31 U.S.C. 3711(g)(1)), payment offices are required to transfer any debt that is delinquent more than 180 days to the Department of Treasury for collection.

(c) The contracting officer must periodically follow up with the payment office to determine whether the debt has been collected and credited to the correct appropriation(s).

32.607 Installment payments and deferment of collection.

(a) The contracting officer must not approve or deny a contractor's request for installment payments or deferment of collections. The office designated in agency procedures is responsible for approving or denying requests for installment payments or deferment of collections.

(b) If a contractor has not appealed the debt or filed an action under the Disputes clause of the contract and the contractor has submitted a proposal for debt deferment or installment payments—

(1) The office designated in agency procedures may arrange for deferment/installment payments if the contractor is unable to pay at once in full or the contractor's operations under national defense contracts would be seriously impaired. The arrangement must include appropriate covenants and securities and should be limited to the shortest practicable maturity; and

(2) The deferment/installment agreement must include a specific schedule or plan for payment. It should permit the Government to make periodic financial reviews of the contractor and to require payments earlier than required by the agreement if the Government considers the contractor's ability to pay improved. It should also provide for required stated or measurable payments on the occurrence of specific events or contingencies that improve the contractor's ability to pay.

(c) If not already applicable under the contract terms, interest on contract debt must be made an element of any agreement entered for installment payments or deferment of collection.

32.607-1 Installment payments.

If a contractor requests an installment payment agreement, the contracting officer must notify the contractor to send a written request for installment payments to the office designated in agency procedures.

32.607-2 Deferment of collection.

(a) All requests for deferment of collection must be submitted in writing to the contracting officer.

(b) Deferments pending disposition of appeal may be granted to small business concerns and financially weak contractors, balancing the need for Government security against loss and undue hardship on the contractor.

(c) The deferment agreement must not provide that a claim of the Government will not become due and payable pending mutual agreement on the amount of the claim or, in the case of a dispute, until the decision is reached.

(d) At a minimum, the deferment agreement must contain the following:

(1) A description of the debt.

(2) The date of first demand for payment.

(3) Notice of an interest charge, in conformity with 32.608 and the FAR clause at 52.232-17, Interest; or, in the case of a debt arising from a defective pricing or a CAS noncompliance overpayment, interest, as prescribed by the applicable Price Reduction for Defective Certified Cost or Pricing Data or CAS clause (see 32.607(c)).

(4) Identification of the office to which the contractor is to send debt payments.

(5) A requirement for the contractor to submit financial information requested by the Government and for reasonable access to the contractor's records and property by Government representatives.

(6) Provision for the Government to terminate the deferment agreement and accelerate the maturity of the debt if the contractor defaults or if bankruptcy or insolvency proceedings are instituted by or against the contractor.

(7) Protective requirements that are considered by the Government to be prudent and feasible in the specific circumstances. The coverage of protective terms at 32.409 and 32.501-5 may be used as a guide.

(e) If a contractor appeal of the debt determination is pending, the deferment agreement must also include a requirement that the contractor must—

(1) Diligently prosecute the appeal; and

(2) Pay the debt in full when the appeal is decided, or when the parties reach agreement on the debt amount.

(f) The deferment agreement may provide for the right to make early payments without prejudice, for refund of overpayments, and for crediting of interest.

32.608 Interest.

32.608-1 Interest charges.

Unless specified otherwise in the clause at 52.232-17, Interest, interest charges must apply to any contract debt unpaid after 30 days from the issuance of a demand unless—

(a) The contract is a kind excluded under 32.611; or

(b) The contract or debt has been exempted from interest charges under agency procedures.

32.608-2 Interest credits.

(a) An equitable interest credit must be applied under the following circumstances:

(1) When the amount of debt initially determined is subsequently reduced, *e.g.*, through a successful appeal.

(2) When any amount collected by the Government is in excess of the amount found to be due on appeal under the Disputes Clause of the contract.

(3) When the collection procedures followed in a given case result in an overcollection of the debt due.

(4) When the responsible official determines that the Government has unduly delayed payments to the contractor on the same contract at some time during the period to which the interest charge applied, provided an interest penalty was not paid for such late payment.

(b) Any appropriate interest credits must be computed under the following procedures:

(1) Interest at the rate under 52.232-17 must be charged on the reduced debt from the date of collection by the Government until the date the monies are remitted to the contractor.

(2) Interest may not be reduced for any time between the due date under the demand and the period covered by a deferment of collection, unless the contract includes an interest clause, *e.g.*, the clause prescribed in 32.611.

(3) Interest must not be credited in an amount that, when added to other amounts refunded or released to the contractor, exceeds the total amount that has been collected, or withheld for the purpose of collecting the debt. This limitation must be further reduced by the amount of any limitation applicable under paragraph (b)(2) of this section.

32.609 Delays in receipt of notices or demands.

If interest is accrued based on the date of the demand letter and delivery of the demand letter is delayed by the Government (*e.g.*, undue delay after dating at the originating office or delays in the mail), the date of the debt and accrual of interest must be extended to a time that is fair and reasonable under the particular circumstances.

32.610 Compromising debts.

For debts under $100,000, excluding interest, the designated agency official may compromise the debt pursuant to the Federal Claims Collection Standards (31 CFR part 902) and agency regulations. Unless specifically authorized by agency procedures, contracting officers cannot compromise debts.

32.611 Contract clause.

(a) Insert the clause at 52.232-17, Interest, in solicitations and contracts unless it is contemplated that the contract will be in one or more of the following categories:

(1) Contracts at or below the simplified acquisition threshold.

(2) Contracts with Government agencies.

(3) Contracts with a State or local government or instrumentality.

(4) Contracts with a foreign government or instrumentality.

(5) Contracts without any provision for profit or fee with a nonprofit organization.

(6) Contracts described in Subpart 5.5, Paid Advertisements.

(7) Any other exceptions authorized under agency procedures.

(b) The contracting officer may insert the FAR clause at 52.232-17, Interest, in solicitations and contracts when it is contemplated that the contract will be in any of the categories specified in 32.611(a).

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Subpart 32.7 Contract Funding

32.700 Scope of subpart.

This subpart describes basic requirements for contract funding and prescribes procedures for using limitation of cost or limitation of funds clauses. Detailed acquisition funding requirements are contained in agency fiscal regulations.

32.701 [Reserved]

32.702 Policy.

No officer or employee of the Government may create or authorize an obligation in excess of the funds available, or in advance of appropriations (Anti-Deficiency Act, 31 U.S.C. 1341), unless otherwise authorized by law. Before executing any contract, the contracting officer must obtain written assurance from responsible fiscal authority that adequate funds are available or expressly condition the contract upon availability of funds in accordance with 32.703-2.

32.703 Contract funding requirements.

32.703-1 General.

(a) If the contract is fully funded, funds are obligated to cover the price or target price of a fixed-price contract or the estimated cost and any fee of a cost-reimbursement contract.

(b) If the contract is incrementally funded, funds are obligated to cover the amount allotted and any corresponding increment of fee.

32.703-2 Contracts conditioned upon availability of funds.

(a) *Fiscal year contracts.* The contracting officer may initiate a contract action properly chargeable to funds of the new fiscal year before these funds are available, *provided* that the contract includes the clause at 52.232-18, Availability of Funds (see 32.706-1(a)). This authority may be used only for operation and maintenance and continuing services (e.g., rentals, utilities, and supply items not financed by stock funds)-

(1) Necessary for normal operations and

(2) For which Congress previously had consistently appropriated funds, unless specific statutory authority exists permitting applicability to other requirements.

(b) *Indefinite-quantity or requirements contracts.* A one-year indefinite-quantity or requirements contract for services that is funded by annual appropriations may extend beyond the fiscal year in which it begins; *provided,* that (1) any specified minimum quantities are certain to be ordered in the initial fiscal year (see part 37) and (2) the contract includes the clause at 52.232-19, Availability of Funds for the Next Fiscal Year (see 32.706-1(b)).

(c) *Acceptance of supplies or services.* The Government will not accept supplies or services under a contract conditioned upon the availability of funds until the contracting officer has given the contractor notice, to be confirmed in writing, that funds are available.

32.703-3 Contracts crossing fiscal years.

(a) A contract that is funded by annual appropriations may not cross fiscal years, except in accordance with statutory authorization (e.g., 31 U.S.C. 1308, 41 U.S.C. 6302, 42 U.S.C. 3515, and paragraph (b) of this section), or when the contract calls for an end product that cannot feasibly be subdivided for separate performance in each fiscal year (e.g., contracts for expert or consultant services).

(b) The head of an executive agency, except NASA, may enter into a contract, exercise an option, or place an order under a contract for severable services for a period that begins in one fiscal year and ends in the next fiscal year if the period of the contract awarded, option exercised, or order placed does not exceed one year (10 U.S.C. 3133 and 41 U.S.C. 3902). Funds made available for a fiscal year may be obligated for the total amount of an action entered into under this authority.

32.704 Limitation of cost or funds.

(a) (1) When a contract contains the clause at 52.232-20, Limitation of Cost; or 52.232-22, Limitation of Funds, the contracting officer, upon learning that the contractor is approaching the estimated cost of the contract or the limit of the funds allotted, will promptly obtain funding and programming information pertinent to the contract's continuation and notify the contractor in writing that—

(i) Additional funds have been allotted, or the estimated cost has been increased, in a specified amount;

(ii) The contract is not to be further funded and that the contractor should submit a proposal for an adjustment of fee, if any, based on the percentage of work completed in relation to the total work called for under the contract;

(iii) The contract is to be terminated; or

(iv) (A) The Government is considering whether to allot additional funds or increase the estimated cost,

(B) the contractor is entitled by the contract terms to stop work when the funding or cost limit is reached, and

(C) any work beyond the funding or cost limit will be at the contractor's risk.

(2) Upon learning that a partially funded contract containing any of the clauses referenced in subparagraph (1) of this section will receive no further funds, the contracting officer must promptly give the contractor written notice of the decision not to provide funds.

(b) Under a cost-reimbursement contract, the contracting officer may issue a change order, a direction to replace or repair defective items or work, or a termination notice without immediately increasing the funds available. Since a contractor is not obligated to incur costs in excess of the estimated cost in the contract, the contracting officer must ensure availability of funds for directed actions. The contracting officer may direct that any increase in the estimated cost or amount allotted to a contract be used for the sole purpose of funding termination or other specified expenses.

(c) Government personnel encouraging a contractor to continue work in the absence of funds (31 U.S.C. 1341 *et seq.)* may subject the violator to civil or criminal penalties.

32.705 Unenforceability of unauthorized obligations.

Many supplies or services are acquired subject to supplier license agreements. These are particularly common in information technology acquisitions, but they may apply to any supply or service. For example, computer software and services delivered through the internet (web services) are often subject to license agreements, referred to as End User License Agreements (EULA), Terms of Service (TOS), or other similar legal instruments or agreements. Many of these agreements contain indemnification clauses that are inconsistent with Federal law and unenforceable, but which could create a violation of the Anti-Deficiency Act (31 U.S.C. 1341 *et seq.*) if agreed to by the Government.

32.706 Contract clauses.

32.706-1 Clauses for contracting in advance of funds.

(a) Insert the clause at 52.232-18, Availability of Funds, in solicitations and contracts if the contract will be chargeable to funds of the new fiscal year and the contract action will be initiated before the funds are available.

(b) Insert the clause at 52.232-19, Availability of Funds for the Next Fiscal Year, in solicitations and contracts if a one-year indefinite-quantity or requirements contract for services is contemplated and the contract—

(1) Is funded by annual appropriations; and

(2) Is to extend beyond the initial fiscal year (see 32.703-2(b)).

32.706-2 Clauses for limitation of cost or funds.

(a) Insert the clause at 52.232-20, Limitation of Cost, in solicitations and contracts if a fully funded cost-reimbursement contract is contemplated, whether or not the contract provides for payment of a fee. The 60-day period may be varied from 30 to 90 days and the 75 percent from 75 to 85 percent. "Task Order" or other appropriate designation may be substituted for "Schedule" wherever that word appears in the clause.

(b) Insert the clause at 52.232-22, Limitation of Funds, in solicitations and contracts if an incrementally funded cost-reimbursement contract is contemplated.

32.706-3 Clause for unenforceability of unauthorized obligations.

Insert the clause at 52.232-39, Unenforceability of Unauthorized Obligations in all solicitations and contracts.

Subpart 32.8 Assignment of Claims

32.800 Scope of subpart.

This subpart prescribes policies and procedures for the assignment of claims under the Assignment of Claims Act of 1940 (31 U.S.C. 3727, 41 U.S.C. 6305) (hereafter referred to as *the Act*).

32.801 Definitions.

Designated agency, as used in this subpart, means any department or agency of the executive branch of the United States Government (see 32.803(d)).

No-setoff commitment, as used in this subpart, means a contractual undertaking that, to the extent permitted by the Act, payments by the designated agency to the assignee under an assignment of claims will not be reduced to liquidate the indebtedness of the contractor to the Government.

32.802 Conditions.

Under the Assignment of Claims Act, a contractor may assign moneys due or to become due under a contract if all the following conditions are met:

(a) The contract specifies payments aggregating $1,000 or more.

(b) The assignment is made to a bank, trust company, or other financing institution, including any Federal lending agency.

(c) The contract does not prohibit the assignment.

(d) Unless otherwise expressly permitted in the contract, the assignment—

(1) Covers all unpaid amounts payable under the contract;

(2) Is made only to one party, except that any assignment may be made to one party as agent or trustee for two or more parties participating in the financing of the contract; and

(3) Is not subject to further assignment.

(e) The assignee sends a written notice of assignment together with a true copy of the assignment instrument to the—

(1) Contracting officer or the agency head;

(2) Surety on any bond applicable to the contract; and

(3) Disbursing officer designated in the contract to make payment.

32.803 Policies.

(a) Any assignment of claims that has been made under the Act to any type of financing institution listed in 32.802(b) may thereafter be further assigned and reassigned to any such institution if the conditions in 32.802(d) and (e) continue to be met.

(b) A contract may prohibit the assignment of claims if the agency determines the prohibition to be in the Government's interest.

(c) Under a requirements or indefinite quantity type contract that authorizes ordering and payment by multiple Government activities, amounts due for individual orders for $1,000 or more may be assigned.

(d) Any contract of a designated agency (see FAR 32.801), except a contract under which full payment has been made, may include a no-setoff commitment only when a determination of need is made by the head of the agency, in accordance with the Presidential delegation of authority dated October 3, 1995, and after such determination has been published in the Federal Register. The Presidential delegation makes such determinations of need subject to further guidance issued by the Office of Federal Procurement Policy. The following guidance has been provided: Use of the no-setoff provision may be appropriate to facilitate the national defense; in the event of a national emergency or natural disaster; or when the use of the no-setoff provision may facilitate private financing of contract performance. However, in the event an offeror is significantly indebted to the United States, the contracting officer should consider whether the inclusion of the no-setoff commitment in a particular contract is in the best interests of the United States. In such an event, the contracting officer should consult with the Government officer(s) responsible for collecting the debt(s).

(e) When an assigned contract does not include a no-setoff commitment, the Government may apply against payments to the assignee any liability of the contractor to the Government arising independently of the assigned contract if the liability existed at the time notice of the assignment was received even though that liability had not yet matured so as to be due and payable.

32.804 Extent of assignee's protection.

(a) No payments made by the Government to the assignee under any contract assigned in accordance with the Act may be recovered on account of any liability of the contractor to the Government. This immunity of the assignee is effective whether the contractor's liability arises from or independently of the assigned contract.

(b) Except as provided in paragraph (c) of this section, the inclusion of a no-setoff commitment in an assigned contract entitles the assignee to receive contract payments free of reduction or setoff for—

(1) Any liability of the contractor to the Government arising independently of the contract; and

(2) Any of the following liabilities of the contractor to the Government arising from the assigned contract:

(i) Renegotiation under any statute or contract clause.

(ii) Fines.

(iii) Penalties, exclusive of amounts that may be collected or withheld from the contractor under, or for failure to comply with, the terms of the contract.

(iv) Taxes or social security contributions.

(v) Withholding or nonwithholding of taxes or social security contributions.

(c) In some circumstances, a setoff may be appropriate even though the assigned contract includes a no-setoff commitment, e.g.—

(1) When the assignee has neither made a loan under the assignment nor made a commitment to do so; or

(2) To the extent that the amount due on the contract exceeds the amount of any loans made or expected to be made under a firm commitment for financing.

32.805 Procedure.

(a) *Assignments.*

(1) Assignments by corporations must be—

(i) Executed by an authorized representative;

(ii) Attested by the secretary or the assistant secretary of the corporation; and

(iii) Impressed with the corporate seal or accompanied by a true copy of the resolution of the corporation's board of directors authorizing the signing representative to execute the assignment.

(2) Assignments by a partnership may be signed by one partner, if the assignment is accompanied by adequate evidence that the signer is a general partner of the partnership and is authorized to execute assignments on behalf of the partnership.

(3) Assignments by an individual must be signed by that individual and the signature acknowledged before a notary public or other person authorized to administer oaths.

(b) *Filing.* The assignee must forward to each party specified in 32.802(e) an original and three copies of the notice of assignment, together with one true copy of the instrument of assignment. The true copy must be a certified duplicate or photostat copy of the original assignment.

(c) *Format for notice of assignment.* The following is a suggested format for use by an assignee in providing the notice of assignment required by 32.802(e).

Notice of Assignment

TO: _____ [*address to one of the parties specified in 32.802(e)*].

This has reference to Contract No. _____ dated _____, entered into between _____ [*contractor's name and address*] and _____ [*government agency, name of office, and address*], for _____ [*describe nature of the contract*].

Moneys due or to become due under the contract described above have been assigned to the undersigned under the provisions of the Assignment of Claims Act of 1940, as amended, (31 U.S.C. 3727, 41 U.S.C. 6305).

A true copy of the instrument of assignment executed by the Contractor on _____ [*date*], is attached to the original notice.

Payments due or to become due under this contract should be made to the undersigned assignee.

Please return to the undersigned the three enclosed copies of this notice with appropriate notations showing the date and hour of receipt and signed by the person acknowledging receipt on behalf of the addressee.

Very truly yours,

_____ [*name of assignee*]

By

_____ [*signature of signing officer*]

Title

_____ [*title of signing officer*]

_____ [*address of assignee*]

Acknowledgement

Receipt is acknowledged of the above notice and of a copy of the instrument of assignment. They were received at ____ (a.m.) (p.m.) on _____, 20____.

_____ [*signature*]

_____ [*title*]

On behalf of

_____ [*name of addressee of this notice*]

(d) *Examination by the Government.* In examining and processing notices of assignment and before acknowledging their receipt, contracting officers should ensure that the following conditions and any additional conditions specified in agency regulations, have been met:

(1) The contract has been properly approved and executed.

(2) The contract is one under which claims may be assigned.

(3) The assignment covers only money due or to become due under the contract.

(4) The assignee is registered separately in the System for Award Management unless one of the exceptions in 4.1102 applies.

(e) *Release of assignment.*

(1) A release of an assignment is required whenever—

(i) There has been a further assignment or reassignment under the Act; or

(ii) The contractor wishes to reestablish its right to receive further payments after the contractor's obligations to the assignee have been satisfied and a balance remains due under the contract.

(2) The assignee, under a further assignment or reassignment, in order to establish a right to receive payment from the Government, must file with the addressees listed in 32.802(e) a—

(i) Written notice of release of the contractor by the assigning financing institution;

(ii) Copy of the release instrument;

(iii) Written notice of the further assignment or reassignment; and

(iv) Copy of the further assignment or reassignment instrument.

(3) If the assignee releases the contractor from an assignment of claims under a contract, the contractor, in order to establish a right to receive payment of the balance due under the contract, must file a written notice of release together with a true copy of the release of assignment instrument with the addressees noted in 32.802(e).

(4) The addressee of a notice of release of assignment or the official acting on behalf of that addressee must acknowledge receipt of the notice.

32.806 Contract clauses.

(a) (1) The contracting officer must insert the clause at 52.232-23, Assignment of Claims, in solicitations and contracts expected to exceed the micro-purchase threshold, unless the contract will prohibit the assignment of claims (see 32.803(b)). The use of the clause is not required for purchase orders. However, the clause may be used in purchase orders expected to exceed the micro-purchase threshold, that are accepted in writing by the contractor, if such use is consistent with agency policies and regulations.

(2) If a no-setoff commitment has been authorized (see FAR 32.803(d)), the contracting officer must use the clause with its *Alternate I.*

(b) The contracting officer must insert the clause at 52.232-24, Prohibition of Assignment of Claims, in solicitations and contracts for which a determination has been made under agency regulations that the prohibition of assignment of claims is in the Government's interest.

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Subpart 32.9 Prompt Payment

32.900 Scope of subpart.

This subpart prescribes policies, procedures, and clauses for implementing Office of Management and Budget (OMB) prompt payment regulations at 5 CFR part 1315.

32.901 Applicability.

(a) This subpart applies to invoice payments on all contracts, except contracts with payment terms and late payment penalties established by other governmental authority (*e.g.,* tariffs).

(b) This subpart does not apply to contract financing payments (see definition at 32.001).

32.902 Definitions.

As used in this subpart—

Discount for prompt payment means an invoice payment reduction offered by the contractor for payment prior to the due date.

Mixed invoice means an invoice that contains items with different payment due dates.

Payment date means the date on which a check for payment is dated or, for an electronic funds transfer (EFT), the settlement date.

Settlement date, as it applies to electronic funds transfer, means the date on which an electronic funds transfer payment is credited to the contractor's financial institution.

32.903 Responsibilities.

(a) Agency heads—

(1) Must establish the policies and procedures necessary to implement this subpart;

(2) May prescribe additional standards for establishing invoice payment due dates (see 32.904) necessary to support agency programs and foster prompt payment to contractors;

(3) May adopt different payment procedures in order to accommodate unique circumstances, provided that such procedures are consistent with the policies in this subpart;

(4) Must inform contractors of points of contact within their cognizant payment offices to enable contractors to obtain status of invoices; and

(5) May authorize the use of the accelerated payment methods specified at 5 CFR 1315.5 but see 32.009-1(a).

(b) When drafting solicitations and contracts, contracting officers must identify for each line item number, subline item number, or exhibit line item number—

(1) The applicable Prompt Payment clauses that apply to each item when the solicitation or contract contains items that will be subject to different payment terms; and

(2) The applicable Prompt Payment food category (*e.g.,* which item numbers are meat or meat food products, which are perishable agricultural commodities), when the solicitation or contract contains multiple payment terms for various classes of foods and edible products.

32.904 Determining payment due dates.

(a) *General.* Agency procedures must ensure that, when specifying due dates, contracting officers give full consideration to the time reasonably required by Government officials to fulfill their administrative responsibilities under the contract.

(b) *Payment due dates.* Except as prescribed in paragraphs (c) through (f) of this section, or as authorized in 32.908(a)(2) or (c)(2), the due date for making an invoice payment is as follows:

(1) The later of the following two events:

(i) The 30th day after the designated billing office receives a proper invoice from the contractor (except as provided in paragraph (b)(3) of this section).

(ii) The 30th day after Government acceptance of supplies delivered or services performed.

(A) For a final invoice, when the payment amount is subject to contract settlement actions, acceptance is deemed to occur on the effective date of the contract settlement.

(B) For the sole purpose of computing an interest penalty that might be due the contractor—

(1) Government acceptance is deemed to occur constructively on the 7th day after the contractor delivers supplies or performs 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 requirement;

(2) If actual acceptance occurs within the constructive acceptance period, the Government must base the determination of an interest penalty on the actual date of acceptance;

(3) The constructive acceptance requirement does not compel Government officials to accept supplies or services, perform contract administration functions, or make payment prior to fulfilling their responsibilities; and

(4) Except for a contract for the purchase of a commercial product or commercial service, including a brand-name commercial product for authorized resale (*e.g.,* commissary items), the contracting officer may specify a longer period for constructive acceptance in the solicitation and resulting contract, if required to afford the Government a reasonable opportunity to inspect and test the supplies furnished or to evaluate the services performed. The contracting officer must document in the contract file the justification for extending the constructive acceptance period beyond 7 days. Extended acceptance periods must not be a routine agency practice and must be used only when necessary to permit proper Government inspection and testing of the supplies delivered or services performed.

(2) If the contract does not require submission of an invoice for payment (*e.g.,* periodic lease payments), the contracting officer must specify the due date in the contract.

(3) If the designated billing office fails to annotate the invoice with the actual date of receipt at the time of receipt, the invoice payment due date is the 30th day after the date of the contractor's invoice, provided the designated billing office receives a proper invoice and there is no disagreement over quantity, quality, or contractor compliance with contract requirements.

(c) *Architect-engineer contracts.*

(1) The due date for making payments on contracts that contain the clause at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts, is as follows:

(i) The due date for work or services completed by the contractor is the later of the following two events:

(A) The 30th day after the designated billing office receives a proper invoice from the contractor.

(B) The 30th day after Government acceptance of the work or services completed by the contractor.

(1) For a final invoice, when the payment amount is subject to contract settlement actions (e.g., release of claims), acceptance is deemed to occur on the effective date of the settlement.

(2) For the sole purpose of computing an interest penalty that might be due the contractor, Government acceptance is deemed to occur constructively on the 7th day after the contractor completes the work or services in accordance with the terms and conditions of the contract (see also paragraph (c)(2) of this section). If actual acceptance occurs within the constructive acceptance period, the Government must base the determination of an interest penalty on the actual date of acceptance.

(ii) The due date for progress payments is the 30th day after Government approval of contractor estimates of work or services accomplished. For the sole purpose of computing an interest penalty that might be due the contractor—

(A) Government approval is deemed to occur constructively on the 7th day after the designated billing office receives the contractor estimates (see also paragraph (c)(2) of this section).

(B) If actual approval occurs within the constructive approval period, the Government must base the determination of an interest penalty on the actual date of approval.

(iii) If the designated billing office fails to annotate the invoice or payment request with the actual date of receipt at the time of receipt, the payment due date is the 30th day after the date of the contractor's invoice or payment request, provided the designated billing office receives a proper invoice or payment request and there is no disagreement over quantity, quality, or contractor compliance with contract requirements.

(2) The constructive acceptance and constructive approval requirements described in paragraphs (c)(1)(i) and (ii) of this section are conditioned upon receipt of a proper payment request and no disagreement over quantity, quality, contractor compliance with contract requirements, or the requested progress payment amount. These requirements do not compel Government officials to accept work or services, approve contractor estimates, perform contract administration functions, or make payment prior to fulfilling their responsibilities. The contracting officer may specify a longer period for constructive acceptance or constructive approval, if required to afford the Government a reasonable opportunity to inspect and test the supplies furnished or to evaluate the services performed. The contracting officer must document in the contract file the justification for extending the constructive acceptance or approval period beyond 7 days.

(d) *Construction contracts.*

(1) The due date for making payments on construction contracts is as follows:

(i) The due date for making progress payments based on contracting officer approval of the estimated amount and value of work or services performed, including payments for reaching milestones in any project, is 14 days after the designated billing office receives a proper payment request.

(A) If the designated billing office fails to annotate the payment request with the actual date of receipt at the time of receipt, the payment due date is the 14th day after the date of the contractor's payment request, provided the designated billing office receives a proper payment request and there is no disagreement over quantity, quality, or contractor compliance with contract requirements.

(B) The contracting officer may specify a longer period in the solicitation and resulting contract if required to afford the Government a reasonable opportunity to adequately inspect the work and to determine the adequacy of the contractor's performance under the contract. The contracting officer must document in the contract file the justification for extending the due date beyond 14 days.

(C) The contracting officer must not approve progress payment requests unless the certification and substantiation of amounts requested are provided as required by the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts.

(ii) The due date for payment of any amounts retained by the contracting officer in accordance with the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts, will be as specified in the contract or, if not specified, 30 days after approval by the contracting officer for release to the contractor. The contracting officer must base the release of retained amounts on the contracting officer's determination that satisfactory progress has been made.

(iii) The due date for final payments based on completion and acceptance of all work (including any retained amounts), and payments for partial deliveries that have been accepted by the Government (*e.g.,* each separate building, public work, or other division of the contract for which the price is stated separately in the contract) is as follows:

(A) The later of the following two events:

(1) The 30th day after the designated billing office receives a proper invoice from the contractor.

(2) The 30th day after Government acceptance of the work or services completed by the contractor. For a final invoice, when the payment amount is subject to contract settlement actions (*e.g.,* release of contractor claims), acceptance is deemed to occur on the effective date of the contract settlement.

(B) If the designated billing office fails to annotate the invoice with the actual date of receipt at the time of receipt, the invoice payment due date is the 30th day after the date of the contractor's invoice, provided the designated billing office receives a proper invoice and there is no disagreement over quantity, quality, or contractor compliance with contract requirements.

(2) For the sole purpose of computing an interest penalty that might be due the contractor for payments described in paragraph (d)(1)(iii) of this section—

(i) Government acceptance or approval is deemed to occur constructively on the 7th day after the contractor completes the work or services in accordance with the terms and conditions of the contract, unless there is a disagreement over quantity, quality, contractor compliance with a contract requirement, or the requested amount;

(ii) If actual acceptance occurs within the constructive acceptance period, the Government must base the determination of an interest penalty on the actual date of acceptance;

(iii) The constructive acceptance requirement does not compel Government officials to accept work or services, approve contractor estimates, perform contract administration functions, or make payment prior to fulfilling their responsibilities; and

(iv) The contracting officer may specify a longer period for constructive acceptance or constructive approval in the solicitation and resulting contract, if required to afford the Government a reasonable opportunity to adequately inspect the work and to determine the adequacy of the contractor's performance under the contract. The contracting officer must document in the contract file the justification for extending the constructive acceptance or approval beyond 7 days.

(3) Construction contracts contain special provisions concerning contractor payments to subcontractors, along with special contractor certification requirements. The Office of Management and Budget has determined that these certifications must not be construed as final acceptance of the subcontractor's performance. The certification in 52.232-5(c) implements this determination; however, certificates are still acceptable if the contractor deletes paragraph (c)(4) of 52.232-5 from the certificate.

(4) (i) Paragraph (d) of the clause at 52.232-5, Payments under Fixed-Price Construction Contracts, and paragraph (e)(6) of the clause at 52.232-27, Prompt Payment for Construction Contracts, provide for the contractor to pay interest on unearned amounts in certain circumstances. The Government must recover this interest from subsequent payments to the contractor. Therefore, contracting officers normally must make no demand for payment. Contracting officers must—

(A) Compute the amount in accordance with the clause;
(B) Provide the contractor with a final decision; and
(C) Notify the payment office of the amount to be withheld.

(ii) The payment office is responsible for making the deduction of interest. Amounts collected in accordance with these provisions revert to the United States Treasury.

(e) *Cost-reimbursement contracts for services.* For purposes of computing late payment interest penalties that may apply, the due date for making interim payments on cost-reimbursement contracts for services is 30 days after the date of receipt of a proper invoice.

(f) *Food and specified items.*

If the items delivered are:	Payment must be made as close as possible to, but not later than:
(1) *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 Public Law98-181, including any edible fresh or frozen poultry meat, any perishable poultry meat food product, fresh eggs, and any perishable egg product.	7th day after product delivery.
(2) *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)).	7th day after product delivery.
(3) *Perishable agricultural commodities*. As defined in section 1(4) of the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. 499a(4)).	10th day after product delivery, unless another date is specified in the contract.
(4) *Dairy 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. Liquid milk, cheese, certain processed cheese products, butter, yogurt, ice cream, mayonnaise, salad dressings, and other similar products fall within this classification. Nothing in the Act limits this classification to refrigerated products. If questions arise regarding the proper classification of a specific product, the contracting officer must follow prevailing industry practices 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.	10th day after a proper invoice has been received.

(g) *Multiple payment due dates.* Contracting officers may encourage, but not require, contractors to submit separate invoices for products with different payment due dates under the same contract or order. When an invoice contains items with different payment due dates (*i.e.,* a mixed invoice), the payment office will, subject to agency policy—

(1) Pay the entire invoice on the earliest due date; or
(2) Split invoice payments, making payments by the applicable due dates.

32.905 Payment documentation and process.

(a) *General.* Payment will be based on receipt of a proper invoice and satisfactory contract performance.

(b) *Content of invoices.*

(1) A proper invoice must include the following items (except for interim payments on cost reimbursement contracts for services):

(i) Name and address of the contractor.

(ii) Invoice date and invoice number. (Contractors should date invoices as close as possible to the date of mailing or transmission.)

(iii) Contract number or other authorization for supplies delivered or services performed (including order number and line item number).

(iv) Description, quantity, unit of measure, unit price, and extended price of supplies delivered, or services performed.

(v) Shipping and payment terms (*e.g.,* shipment number and date of shipment, discount for prompt payment terms). Bill of lading number and weight of shipment will be shown for shipments on Government bills of 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 notify in the event of a defective invoice.

(viii) Taxpayer Identification Number (TIN). The contractor must include its TIN on the invoice only if required by agency procedures. (See 4.9 TIN requirements.)

(ix) Electronic funds transfer (EFT) banking information.

(A) The contractor must include EFT banking information on the invoice only if required by agency procedures.

(B) If EFT banking information is not required to be on the invoice, in order for the invoice to be a proper invoice, the contractor must have submitted correct EFT banking information in accordance with the applicable solicitation provision (*e.g.,* 52.232-38, Submission of Electronic Funds Transfer Information with Offer), contract clause (*e.g.,* 52.232-33, Payment by Electronic Funds Transfer—System for Award Management, or 52.232-34, Payment by Electronic Funds Transfer—Other Than System for Award Management), or applicable agency procedures.

(C) EFT banking information is not required if the Government waived the requirement to pay by EFT.

(x) Any other information or documentation required by the contract (*e.g.,* evidence of shipment).

(2) An interim payment request under a cost-reimbursement contract for services constitutes a proper invoice for purposes of this section if it includes all of the information required by the contract.

(3) If the invoice does not comply with these requirements, the designated billing office must return it within 7 days after receipt (3 days on contracts for meat, meat food products, or fish; 5 days on contracts for perishable agricultural commodities, dairy products, edible fats or oils, and food products prepared from edible fats or oils), with the reasons why it is not a proper invoice. If such notice is not timely, then the designated billing office must adjust the due date for the purpose of determining an interest penalty, if any.

(c) *Authorization to pay.* All invoice payments, with the exception of interim payments on cost-reimbursement contracts for services, must be supported by a receiving report or other Government documentation authorizing payment (*e.g.,* Government certified voucher). The agency receiving official should forward the receiving report or other Government documentation to the designated payment office by the 5th working day after Government acceptance or approval, unless other arrangements have been made. This period of time does not extend the due dates prescribed in this section. Acceptance should be completed as expeditiously as possible. The receiving report or other Government documentation authorizing payment must, as a minimum, include the following:

(1) Contract number or other authorization for supplies delivered or services performed.

(2) Description of supplies delivered or services performed.

(3) Quantities of supplies received and accepted or services performed, if applicable.

(4) Date supplies delivered or services performed.

(5) Date that the designated Government official—

(i) Accepted the supplies or services; or

(ii) Approved the progress payment request, if the request is being made under the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts, or the clause at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts.

(6) Signature, printed name, title, mailing address, and telephone number of the designated Government official responsible for acceptance or approval functions.

(d) *Billing office.* The designated billing office must immediately annotate each invoice with the actual date it receives the invoice.

(e) *Payment office.* The designated payment office will annotate each invoice and receiving report with the actual date it receives the invoice.

32.906 Making payments.

(a) *General.* The Government will not make invoice payments earlier than 7 days prior to the due dates specified in the contract unless the agency head determines—

(1) To make earlier payment on a case-by-case basis; or

(2) That the use of accelerated payment methods is necessary. See 32.903(a)(5) but see 32.009-1(a).

(b) *Payment office.* The designated payment office—

(1) Will mail checks on the same day they are dated;

(2) For payments made by EFT, will specify a date on or before the established due date for settlement of the payment at a Federal Reserve Bank;

(3) When the due date falls on a Saturday, Sunday, or legal holiday when Government offices are closed, may make payment on the following working day without incurring a late payment interest penalty.

(4) When it is determined that the designated billing office erroneously rejected a proper invoice and upon resubmission of the invoice, will enter in the payment system the original date the invoice was received by the designated billing office for the purpose of calculating the correct payment due date and any interest penalties that may be due.

(c) *Partial deliveries.*

(1) Contracting officers must, where the nature of the work permits, write contract statements of work and pricing arrangements that allow contractors to deliver and receive invoice payments for discrete portions of the work as soon as completed and found acceptable by the Government (see 32.102(d)).

(2) Unless specifically prohibited by the contract, the clause at 52.232-1, Payments, provides that the contractor is entitled to payment for accepted partial deliveries of supplies or partial performance of services that comply with all applicable contract requirements and for which prices can be calculated from the contract terms.

(d) *Contractor identifier.* Each payment or remittance advice will use the contractor invoice number in addition to any Government or contract information in describing any payment made.

(e) *Discounts.* When a discount for prompt payment is taken, the designated payment office will make payment to the contractor as close as possible to, but not later than, the end of the discount period. The discount period is specified by the contractor and is calculated from the date of the contractor's proper invoice. If the contractor has not placed a date on the invoice, the due date is calculated from the date the designated billing office receives a proper invoice, provided the agency annotates such invoice with the date of receipt at the time of receipt. When the discount date falls on a Saturday, Sunday, or legal holiday when Government offices are closed, the designated payment office may make payment on the following working day and take a discount. Payment terms are specified in the clause at 52.232-8, Discounts for Prompt Payment.

32.907 Interest penalties.

(a) *Late payment.* The designated payment office will pay an interest penalty automatically, without request from the contractor, when all the following conditions, if applicable, have been met:

(1) The designated billing office received a proper invoice.

(2) The Government processed a receiving report or other Government documentation authorizing payment, and there was no disagreement over quantity, quality, or contractor compliance with any contract requirement.

(3) In the case of a final invoice, the payment amount is not subject to further contract settlement actions between the Government and the contractor.

(4) The designated payment office paid the contractor after the due date.

(5) In the case of interim payments on cost-reimbursement contracts for services, when payment is made more than 30 days after the designated billing office receives a proper invoice.

(b) *Improperly taken discount.* The designated payment office will pay an interest penalty automatically, without request from the contractor, if the Government takes a discount for prompt payment improperly. The interest penalty is calculated 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.

(c) *Failure to pay interest.*

(1) The designated payment office will pay a penalty amount, in addition to the interest penalty amount, only if—

(i) The Government owes an interest penalty of $1 or more;

(ii) The designated payment office does not pay the interest penalty within 10 days after the date the invoice amount is paid; and

(iii) The contractor makes a written demand to the designated payment office for additional penalty payment in accordance with paragraph (c)(2) of this section, postmarked not later than 40 days after the date the invoice amount is paid.

(2) (i) Contractors must support written demands for additional penalty payments with the following data. The Government must not request additional data. Contractors must—

(A) 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;

(B) Attach a copy of the invoice on which the unpaid late payment interest is due; and

(C) State that payment of the principal has been received, including the date of receipt.

(ii) If there is no postmark or the postmark is illegible—

(A) The designated payment office that receives the demand will annotate it with the date of receipt, provided the demand is received on or before the 40th day after payment was made; or

(B) If the designated payment office fails to make the required annotation, the Government will determine the demand's validity based on the date the contractor has placed on the demand; provided such date is no later than the 40th day after payment was made.

(d) *Disagreements.*

(1) The payment office will not pay interest penalties if payment delays are due to disagreement between the Government and contractor concerning—

(i) The payment amount;

(ii) Contract compliance; or

(iii) Amounts temporarily withheld or retained in accordance with the terms of the contract.

(2) The Government and the contractor must resolve claims involving disputes, and any interest that may be payable in accordance with the Disputes clause.

(e) *Computation of interest penalties.* The Government will compute interest penalties in accordance with OMB prompt payment regulations at 5 CFR part 1315.

(f) *Unavailability of funds.* The temporary unavailability of funds to make a timely payment does not relieve an agency from the obligation to pay interest penalties.

32.908 Contract clauses.

(a) Insert the clause at 52.232-26, Prompt Payment for Fixed-Price Architect-Engineer Contracts, in solicitations and contracts that contain the clause at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts.

(1) As authorized in 32.904(c)(2), the contracting officer may modify the date in paragraph (a)(4)(i) of the clause to specify a period longer than 7 days for constructive acceptance or constructive approval, if required to afford the Government a practicable opportunity to inspect and test the supplies furnished or evaluate the services performed.

(2) As provided in 32.903, agency policies and procedures may authorize amendment of paragraphs (a)(1)(i) and (ii) of the clause to insert a period shorter than 30 days (but not less than 7 days) for making contract invoice payments.

(b) Insert the clause at 52.232-27, Prompt Payment for Construction Contracts, in all solicitations and contracts for construction (see part 36).

(1) As authorized in 32.904(d)(1)(i)(B), the contracting officer may modify the date in paragraph (a)(1)(i)(A) of the clause to specify a period longer than 14 days if required to afford the Government a reasonable opportunity to adequately inspect the work and to determine the adequacy of the Contractor's performance under the contract.

(2) As authorized in 32.904(d)(2)(iv), the contracting officer may modify the date in paragraph (a)(4)(i) of the clause to specify a period longer than 7 days for constructive acceptance or constructive approval if required to afford the Government a reasonable opportunity to inspect and test the supplies furnished or evaluate the services performed.

(c) Insert the clause at 52.232-25, Prompt Payment, in all other solicitations and contracts, except when the clause at 52.212-4, Contract Terms and Conditions—Commercial Products and Commercial Services, applies, or when payment terms and late payment penalties are established by other governmental authority (*e.g.,* tariffs).

(1) As authorized in 32.904(b)(1)(ii)(B)(*4*), the contracting officer may modify the date in paragraph (a)(5)(i) of the clause to specify a period longer than 7 days for constructive acceptance, if required to afford the Government a reasonable opportunity to inspect and test the supplies furnished or to evaluate the services performed, except in the case of a contract for the purchase of a commercial product or commercial service, including a brand-name commercial product for authorized resale (*e.g.,* commissary items).

(2) As provided in 32.903, agency policies and procedures may authorize amendment of paragraphs (a)(1)(i) and (ii) of the clause to insert a period shorter than 30 days (but not less than 7 days) for making contract invoice payments.

(3) If the contract is a cost-reimbursement contract for services, use the clause with its *Alternate I.*

32.909 Contractor inquiries.

(a) Direct questions involving—

(1) Delinquent payments to the designated billing office or designated payment office; and

(2) Disagreements in payment amount or timing to the contracting officer for resolution. The contracting officer must coordinate within appropriate contracting channels and seek the advice of other offices as necessary to resolve disagreements.

(b) Small business concerns may contact the agency's local small business specialist or representative from the Office of Small and Disadvantaged Business Utilization to obtain additional assistance related to payment issues, late payment interest penalties, and information on the Prompt Payment Act.

Subpart 32.10 Performance-Based Payments

32.1000 Scope of subpart.

This subpart provides policy and procedures for performance-based payments under noncommercial purchases pursuant to Subpart 32.1.

32.1001 Policy.

(a) Performance-based payments are the preferred Government financing method when the contracting officer finds them practical, and the contractor agrees to their use.

(b) Performance-based payments are contract financing payments that are not payment for accepted items.

(c) Performance-based payments are fully recoverable, in the same manner as progress payments, in the event of default.

(d) Performance-based payments are contract financing payments and, therefore, are not subject to the interest-penalty provisions of prompt payment (see Subpart 32.9). These payments must be made in accordance with agency policy.

(e) Performance-based payments must not be used for—

(1) Payments under cost-reimbursement line items;

(2) Contracts for architect-engineer services or construction, or for shipbuilding or ship conversion, alteration, or repair, when the contracts provide for progress payments based upon a percentage or stage of completion; or

(3) Contracts awarded through sealed bid procedures.

32.1002 Bases for performance-based payments.

Performance-based payments may be made on any of the following bases:

(a) Performance measured by objective, quantifiable methods.

(b) Accomplishment of defined events.

(c) Other quantifiable measures of results.

32.1003 Criteria for use.

The contracting officer may use performance-based payments for individual orders and contracts provided—

(a) The contracting officer and offeror agree on the performance-based payment terms;

(b) The contract, individual order, or line item is a fixed-price type;

(c) For indefinite delivery contracts, the individual order does not provide for progress payments; and

(d) For other than indefinite-delivery contracts, the contract does not provide for progress payments.

32.1004 Procedures.

Performance-based payments may be made either on a whole contract or on a deliverable item basis, unless otherwise prescribed by agency regulations. Financing payments to be made on a whole contract basis are applicable to the entire contract, and not to specific deliverable items. Financing payments to be made on a deliverable item basis are applicable to a specific individual deliverable item. (A deliverable item for these purposes is a separate item with a distinct unit price. Thus, a line item for 10 airplanes, with a unit price of $1,000,000 each, has 10 deliverable items-the separate planes. A line item for 1 lot of 10 airplanes, with a lot price of $10,000,000, has only one deliverable item-the lot.)

(a) *Establishing performance bases.*

(1) The basis for performance-based payments may be either specifically described events (e.g., milestones) or some measurable criterion of performance. Each event or performance criterion that will trigger a finance payment must be an integral and necessary part of contract performance and must be identified in the contract, along with a description of what constitutes successful performance of the event or attainment of the performance criterion. The signing of contracts or modifications, the exercise of options, the passage of time, or other such occurrences do not represent meaningful efforts or actions and must not be identified as events or criteria for performance-based payments. An event need not be a critical event in order to trigger a payment, but the Government must be able to readily verify successful performance of each such event or performance criterion.

(2) Events or criteria may be either severable or cumulative. The successful completion of a severable event or criterion is independent of the accomplishment of any other event or criterion. Conversely, the successful accomplishment of a cumulative event or criterion is dependent upon the previous accomplishment of another event. A contract may provide for more than one series of severable and/or cumulative performance events or criteria performed in parallel. The contracting officer must include the following in the contract:

(i) The contract must not permit payment for a cumulative event or criterion until the dependent event or criterion has been successfully completed.

(ii) The contract must specifically identify severable events or criteria.

(iii) The contract must specifically identify cumulative events or criteria and identify which events or criteria are preconditions for the successful achievement of each event or criterion.

(iv) Because performance-based payments are contract financing, events or criteria must not serve as a vehicle to reward the contractor for completion of performance levels over and above what is required for successful completion of the contract.

(v) If payment of performance-based finance amounts is on a deliverable item basis, each event or performance criterion must be part of the performance necessary for that deliverable item and must be identified to a specific line item or subline item.

(b) *Establishing performance-based finance payment amounts.*

(1) The contracting officer must establish a complete, fully defined schedule of events or performance criteria and payment amounts when negotiating contract terms. If a contract action significantly affects the price, or event or performance criterion, the contracting officer responsible for pricing the contract modification must adjust the performance-based payment schedule appropriately.

(2) Total performance-based payments must—

(i) Reflect prudent contract financing provided only to the extent needed for contract performance (see 32.104(a)); and

(ii) Not exceed 90 percent of the contract price if on a whole contract basis, or 90 percent of the delivery item price if on a delivery item basis.

(3) The contract must specifically state the amount of each performance-based payment either as a dollar amount or as a percentage of a specifically identified price (e.g., contract price or unit price of the deliverable item). The payment of contract financing has a cost to the Government in terms of interest paid by the Treasury to borrow funds to make the payment. Because the contracting officer has wide discretion as to the timing and amount of the performance-based payments, the contracting officer must ensure that—

(i) The total contract price is fair and reasonable, all factors considered; and

(ii) Performance-based payment amounts are commensurate with the value of the performance event or performance criterion and are not expected to result in an unreasonably low or negative level of contractor investment in the contract. To confirm sufficient investment, the contracting officer may request expenditure profile information from offerors, but only if other information in the proposal, or information otherwise available to the contracting officer, is expected to be insufficient.

(4) Unless agency procedures prescribe the bases for establishing performance-based payment amounts, contracting officers may establish them on any rational basis, including (but not limited to)—

(i) Engineering estimates of stages of completion;

(ii) Engineering estimates of hours or other measures of effort to be expended in performance of an event or achievement of a performance criterion; or

(iii) The estimated projected cost of performance of particular events.

(5) When subsequent contract modifications are issued, the contracting officer must adjust the performance-based payment schedule as necessary to reflect the actions required by those contract modifications.

(c) *Instructions for multiple appropriations.* If there is more than one appropriation account (or subaccount) funding payments on the contract, the contracting officer must provide instructions to the Government payment office for distribution of financing payments to the respective funds accounts. Distribution instructions must be consistent with the contract's liquidation provisions.

(d) *Liquidating performance-based finance payments.* Performance-based amounts must be liquidated by deducting a percentage or a designated dollar amount from the delivery payments. The contracting officer must specify the liquidation rate or designated dollar amount in the contract. The method of liquidation must ensure complete liquidation no later than final payment.

(1) If the contracting officer establishes the performance-based payments on a delivery item basis, the liquidation amount for each line item is the percent of that delivery item price that was previously paid under performance-based finance payments or the designated dollar amount.

(2) If the performance-based finance payments are on a whole contract basis, liquidation is by predesignated liquidation amounts or liquidation percentages.

(e) *Competitive negotiated solicitations.*

(1) If a solicitation requests offerors to propose performance-based payments, the solicitation must specify—

(i) What, if any, terms must be included in all offers; and

(ii) The extent to which and how offeror-proposed performance-based payment terms will be evaluated. Unless agencies prescribe other evaluation procedures, if the contracting officer anticipates that the cost of providing performance-based payments would have a significant impact on determining the best value offer, the solicitation should state that the evaluation of the offeror's proposed prices will include an adjustment to reflect the estimated cost to the Government of providing each offeror's proposed performance-based payments (see Alternate I to the provision at 52.232-28).

(2) The contracting officer must—

(i) Review the proposed terms to ensure they comply with this section; and

(ii) Use the adjustment method at 32.205(c) if the price is to be adjusted for evaluation purposes in accordance with paragraph (e)(1)(ii) of this section.

32.1005 Solicitation provision and contract clause.

(a) Insert the clause at 52.232-32, Performance-Based Payments, in—

(1) Solicitations that may result in contracts providing for performance-based payments; and

(2) Fixed-price contracts under which the Government will provide performance-based payments.

(b) (1) Insert the solicitation provision at 52.232-28, Invitation to Propose Performance-Based Payments, in negotiated solicitations that invite offerors to propose performance-based payments.

(2) Use the provision with its Alternate I in competitive negotiated solicitations if the Government intends to adjust proposed prices for proposal evaluation purposes (see 32.1004(e)).

32.1006 [Reserved]

32.1007 Administration and payment of performance-based payments.

(a) *Responsibility.* The contracting officer responsible for administering performance-based payments (*see* 42.302(a)(13)) for the contract must review and approve all performance-based payments for that contract.

(b) *Approval of financing requests.* Unless otherwise provided in agency regulations, or by agreement with the appropriate payment official—

(1) The contracting officer must be responsible for receiving, approving, and transmitting all performance-based payment requests to the appropriate payment office; and

(2) Each approval must specify the amount to be paid, necessary contractual information, and the appropriation account(s) (see 32.1004(c)) to be charged for the payment.

(c) *Reviews.* The contracting officer is responsible for determining what reviews are required for protection of the Government's interests. The contracting officer should consider the contractor's experience, performance record, reliability, financial strength, and the adequacy of controls established by the contractor for the administration of performance-based payments. Based upon the risk to the Government, post-payment reviews and verifications should normally be arranged as considered appropriate by the contracting officer. If considered necessary by the contracting officer, pre-payment reviews may be required.

(d) *Incomplete performance.* The contracting officer must not approve a performance-based payment until the specified event or performance criterion has been successfully accomplished in accordance with the contract. If an event is cumulative, the contracting officer must not approve the performance-based payment unless all identified preceding events or criteria are accomplished.

(e) *Government-caused delay.* Entitlement to a performance-based payment is solely on the basis of successful performance of the specified events or performance criteria. However, if there is a Government-caused delay, the contracting officer may renegotiate the performance-based payment schedule to facilitate contractor billings for any successfully accomplished portions of the delayed event or criterion.

32.1008 Suspension or reduction of performance-based payments.

The contracting officer must apply the policy and procedures in paragraphs (a), (b), (c), and (e) of 32.503-6, Suspension or reduction of payments, whenever exercising the Government's rights to suspend or reduce performance-based payments in accordance with paragraph (e) of the clause at 52.232-32, Performance-Based Payments.

32.1009 Title.

(a) Since the clause at 52.232-32, Performance-Based Payments, gives the Government title to the property described in paragraph (f) of the clause, the contracting officer must ensure that the Government title is not compromised by other encumbrances. Ordinarily, the contracting officer, in the absence of reason to believe otherwise, may rely upon the contractor's certification contained in the payment request.

(b) If the contracting officer becomes aware of any arrangement or condition that would impair the Government's title to the property affected by the Performance-Based Payments clause, the contracting officer must require additional protective provisions.

(c) The existence of any such encumbrance is a violation of the contractor's obligations under the contract, and the contracting officer may, if necessary, suspend or reduce payments under the terms of the Performance-Based Payments clause covering failure to comply with a material requirement of the contract. In addition, if the contractor fails to disclose an existing encumbrance in the certification, the contracting officer should consult with legal counsel concerning possible violation of 31 U.S.C. 3729, the False Claims Act.

32.1010 Risk of loss.

(a) Under the clause at 52.232-32, Performance-Based Payments, and except for normal spoilage, the contractor bears the risk of loss for Government property, even though title is vested in the Government, unless the Government has expressly assumed this risk. The clauses prescribed in this regulation related to performance-based payments, default, and terminations do not constitute a Government assumption of risk.

(b) If a loss occurs in connection with property for which the contractor bears the risk, and the property is needed for performance, the contractor is obligated to repay the Government the performance-based payments related to the property.

(c) The contractor is not obligated to pay for the loss of property for which the Government has assumed the risk of loss. However, a serious loss may impede the satisfactory progress of contract performance, so that the contracting officer may need to act under paragraph (e)(2) of the Performance-Based Payments clause. In addition, while the contractor is not required to repay previous performance-based payments in the event of a loss for which the Government has assumed the risk, such a loss may prevent the contractor from making the certification required by the Performance-Based Payments clause.

Subpart 32.11 Electronic Funds Transfer.

32.1100 Scope of subpart.

This subpart provides policy and procedures for contract financing and delivery payments to contractors by electronic funds transfer (EFT).

32.1101 Statutory requirements.

31 U.S.C. 3332 requires, subject to implementing regulations of the Secretary of the Treasury at 31 CFR part 208, that EFT be used to make all contract payments.

32.1102 Definitions.

As used in this subpart—

Electronic Funds Transfer information (EFT) means information necessary for making a payment by EFT through specified EFT mechanisms.

Governmentwide commercial purchase card means a card that is similar in nature to a commercial credit card that is used to make financing and delivery payments for supplies and services. The purchase card is an EFT method, and it may be used as a means to meet the requirement to pay by EFT, to the extent that purchase card limits do not preclude such payments.

Payment information means the payment advice provided by the Government to the contractor that identifies what the payment is for, any computations or adjustments made by the Government, and any information required by the Prompt Payment Act.

32.1103 Applicability.

The Government must provide all contract payments through EFT except if—

(a) The office making payment under a contract that requires payment by EFT, loses the ability to release payment by EFT. To the extent authorized by 31 CFR part 208, the payment office must make necessary payments pursuant to paragraph (a)(2) of the clause at either 52.232-33 or 52.232-34 until such time as it can make EFT payments;

(b) The payment is to be received by or on behalf of the contractor outside the United States and Puerto Rico (but see 32.1106(b));

(c) A contract is paid in other than United States currency (but see 32.1106(b));

(d) Payment by EFT under a classified contract could compromise the safeguarding of classified information or national security, or arrangements for appropriate EFT payments would be impractical due to security considerations;

(e) A contract is awarded by a deployed contracting officer in the course of military operations, including, but not limited to, contingency operations as defined in 2.101, or a contract is awarded by any contracting officer in the conduct of emergency operations, such as responses to natural disasters or national or civil emergencies, if—

(1) EFT is not known to be possible; or

(2) EFT payment would not support the objectives of the operation;

(f) The agency does not expect to make more than one payment to the same recipient within a one-year period;

(g) An agency's need for supplies and services is of such unusual and compelling urgency that the Government would be seriously injured unless payment is made by a method other than EFT;

(h) There is only one source for supplies and services and the Government would be seriously injured unless payment is made by a method other than EFT; or

(i) Otherwise authorized by Department of the Treasury Regulations at 31 CFR part 208.

32.1104 Protection of EFT information.

The Government must protect against improper disclosure of contractors' EFT information.

32.1105 Assignment of claims.

The use of EFT payment methods is not a substitute for a properly executed assignment of claims in accordance with Subpart 32.8. EFT information that shows the ultimate recipient of the transfer to be other than the contractor, in the absence of a proper assignment of claims, is considered to be incorrect EFT information within the meaning of the “Suspension of Payment” paragraphs of the EFT clauses at 52.232-33 and 52.232-34.

32.1106 EFT mechanisms.

(a) *Domestic EFT mechanisms.* The EFT clauses at 52.232-33 and 52.232-34 are designed for use with the domestic United States banking system, using United States currency, and only the specified mechanisms (U.S. Automated Clearing House, and Fedwire Transfer System) of EFT. However, the head of an agency may authorize the use of any other EFT mechanism for domestic EFT with the concurrence of the office or agency responsible for making payments.

(b) *Nondomestic EFT mechanisms and other than United States currency.* The Government must provide payment by other than EFT for payments received by or on behalf of the contractor outside the United States and Puerto Rico or for contracts paid in other than United States currency. However, the head of an agency may authorize appropriate use of EFT with the concurrence of the office or agency responsible for making payments if—

(1) The political, financial, and communications infrastructure in a foreign country supports payment by EFT; or

(2) Payments of other than United States currency may be made safely.

32.1107 Payment information.

The payment or disbursing office must forward to the contractor available payment information that is suitable for transmission as of the date of release of the EFT instruction to the Federal Reserve System.

32.1108 Payment by Governmentwide commercial purchase card.

A Governmentwide commercial purchase card charge authorizes the third party (e.g., financial institution) that issued the purchase card to make immediate payment to the contractor. The Government reimburses the third party at a later date for the third party's payment to the contractor.

(a) The clause at 52.232-36, Payment by Third Party, governs when a contractor submits a charge against the purchase card for contract payment. The clause provides that the contractor must make such payment requests by a charge to a Government account with the third party at the time the payment clause(s) of the contract authorizes the contractor to submit a request for payment, and for the amount due in accordance with the terms of the contract. To the extent that such a payment would otherwise be approved, the charge against the purchase card should not be disputed when the charge is reported to the Government by the third party. To the extent that such payment would otherwise not have been approved, an authorized individual (see 1.603-3) must take action to remove the charge, such as by disputing the charge with the third party or by requesting that the contractor credit the charge back to the Government under the contract.

(b) (1) Written contracts to be paid by purchase card should include the clause at 52.232-36, Payment by Third Party, as prescribed by 32.1110(d). However, payment by a purchase card also may be made under a contract that does not contain the clause to the extent the contractor agrees to accept that method of payment.

(2) (i) When it is contemplated that the Governmentwide commercial purchase card will be used as the method of payment, and the contract or order is above the micro-purchase threshold, contracting officers are required to verify by looking in the System for Award Management (SAM) whether the contractor has any delinquent debt subject to collection under the Treasury Offset Program (TOP) at contract award and order placement. Information on TOP is available at *http://fms.treas.gov/debt/index.html* .

(ii) The contracting officer must not authorize the Governmentwide commercial purchase card as a method of payment during any period the SAM indicates that the contractor has delinquent debt subject to collection under the TOP. In such cases, payments under the contract must be made in accordance with the clause at 52.232-33, Payment by Electronic Funds Transfer—System for Award Management, or 52.232-34, Payment by Electronic Funds Transfer—Other Than System for Award Management, as appropriate (see FAR 32.1110(d)).

(iii) Contracting officers must not use the presence of the SAM debt flag indicator to exclude a contractor from receipt of the contract award or issuance or placement of an order.

(iv) The contracting officer may take steps to authorize payment by Governmentwide commercial purchase card when a contractor alerts the contracting officer that the SAM debt flag indicator has been changed to no longer show a delinquent debt.

(c) The clause at 52.232-36, Payment by Third Party, requires that the contract—

(1) Identify the third party and the particular purchase card to be used; and

(2) Not include the purchase card account number. The purchase card account number should be provided separately to the contractor.

32.1109 EFT information submitted by offerors.

If offerors are required to submit EFT information prior to award, the successful offeror is not responsible for resubmitting this information after award of the contract except to make changes, or to place the information on invoices if required by agency procedures. Therefore, contracting officers must forward EFT information provided by the successful offeror to the appropriate office.

32.1110 Solicitation provision and contract clauses.

(a) Insert the clause at—

(1) 52.232-33, Payment by Electronic Funds Transfer—System for Award Management, in solicitations and contracts that include the provision at 52.204-7, System for Award Management, or an agency clause that requires a contractor to be registered in SAM and maintain registration until final payment, unless—

(i) Payment will be made through a third party arrangement (*see* 13.301 and paragraph (d) of this section); or

(ii) An exception listed in 32.1103(a) through (i) applies.

(2) (i) 52.232-34, Payment by Electronic Funds Transfer—Other than System for Award Management, in solicitations and contracts that require EFT as the method for payment but do not include the provision at 52.204-7, System for Award Management, or a similar agency clause that requires the contractor to be registered in SAM.

(ii) (A) If permitted by agency procedures, the contracting officer may insert in paragraph (b)(1) of the clause, a particular time after award, such as a fixed number of days, or event such as the submission of the first request for payment.

(B) If no agency procedures are prescribed, the time period inserted in paragraph (b)(1) of the clause must be "no later than 15 days prior to submission of the first request for payment."

(b) If the head of the agency has authorized, in accordance with 32.1106, to use a nondomestic EFT mechanism, insert in solicitations and contracts a clause substantially the same as 52.232-33 or 52.232-34 that clearly addresses the nondomestic EFT mechanism.

(c) If EFT information is to be submitted to other than the payment office in accordance with agency procedures, insert in solicitations and contracts the clause at 52.232-35, Designation of Office for Government Receipt of Electronic Funds Transfer Information, or a clause substantially the same as 52.232-35 that clearly informs the contractor where to send the EFT information.

(d) If payment under a written contract will be made by a charge to a Government account with a third party such as a Governmentwide commercial purchase card, insert the clause at 52.232-36, Payment by Third Party, in solicitations and contracts. Payment by a purchase card may also be made under a contract that does not contain the clause at 52.232-36, to the extent the contractor agrees to accept that method of payment. When the clause at 52.232-36 is included in a solicitation or contract, insert the clause at 52.232-33, Payment by Electronic Funds Transfer—System for Award Management, or 52.232-34, Payment by Electronic Funds Transfer—Other Than System for Award Management, as appropriate.

(e) If the contract or agreement provides for the use of delivery orders, and provides that the ordering office designate the method of payment for individual orders, insert in the solicitation and contract or agreement, the clause at 52.232-37, Multiple Payment Arrangements, and, to the extent they are applicable, the clauses at—

(1) 52.232-33, Payment by Electronic Funds Transfer—System for Award Management;

(2) 52.232-34, Payment by Electronic Funds Transfer—Other than System for Award Management; and

(3) 52.232-36, Payment by Third Party.

(f) If more than one disbursing office will make payment under a contract or agreement, the contracting officer, or ordering office (if the contract provides for choices between EFT clauses on individual orders or classes of orders), must include or identify the EFT clause appropriate for each office and must identify the applicability by disbursing office and line item.

(g) If the solicitation contains the clause at 52.232-34, Payment by Electronic Funds Transfer—Other than System for Award Management, and an offeror is required to submit EFT information prior to award—

(1) Insert in the solicitation the provision at 52.232-38, Submission of Electronic Funds Transfer Information with Offer, or a provision substantially the same; and

(2) For sealed bid solicitations, amend 52.232-38 to ensure that a bidder's EFT information—

(i) Is not a part of the bid to be opened at the public opening; and

(ii) May not be released to members of the general public who request a copy of the bid.

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Subpart 32.12 Fast Payment Procedure

32.1201 General.

(a) The fast payment procedure allows payment under limited conditions to a contractor prior to the Government's verification that supplies have been received and accepted. The procedure provides for payment for supplies based on the contractor's submission of an invoice that constitutes a certification that the contractor—

(1) Has delivered the supplies to a post office, common carrier, or point of first receipt by the Government; and

(2) Must replace, repair, or correct supplies not received at destination, damaged in transit, or not conforming to purchase agreements.

(b) The contracting officer must be primarily responsible for determining the amount of debts resulting from failure of contractors to properly replace, repair, or correct supplies lost, damaged, or not conforming to purchase requirements (see 32.602 and 32.603).

32.1202 Conditions for use.

Fast payment procedures may be used under the following conditions—

(a) The contract or order does not exceed the simplified acquisition threshold, except that executive agencies may permit higher dollar limitations for specified activities or items on a case-by-case basis.

(b) Deliveries of supplies are to occur at locations where there is both a geographical separation and a lack of adequate communications facilities between Government receiving and disbursing activities that will make it impractical to make timely payment based on evidence of Government acceptance.

(c) Title to the supplies will pass to the Government—

(1) Upon delivery to a post office or common carrier for mailing or shipment to destination; or

(2) Upon receipt by the Government if the shipment is by means other than Postal Service or common carrier;

(d) The supplier agrees to replace, repair, or correct supplies not received at destination, damaged in transit, or not conforming to purchase requirements;

(e) The contract or order will be firm-fixed-price; and

(f) A system is in place to—

(1) Document contractor performance under fast payment purchases;

(2) Provide timely feedback to the contracting officer in case of contractor deficiencies; and

(3) Identify suppliers that have a current history of abusing the fast payment procedure.

32.1203 Preparation and execution of orders.

When using fast payment procedures, include the following in the purchasing instrument:

(a) A requirement that the supplies be shipped transportation or postage prepaid.

(b) A requirement that invoices be submitted directly to the finance or other office designated in the order, or in the case of unpriced purchase orders, to the contracting officer (see 12.201(e)(2)).

(c) The following statement on the consignee’s copy:

Consignee's Notification to Purchasing Activity of Nonreceipt, Damage, or Nonconformance. The consignee shall notify the purchasing office promptly after the specified date of delivery of supplies not received, damaged in transit, or not conforming to specifications of the purchase order. Unless extenuating circumstances exist, the notification should be made not later than 60 days after the specified date of delivery.

32.1204 Contract clause.

Insert the clause at 52.232-90, Fast Payment Procedure, in solicitations and contracts when the conditions in 32.1202 are applicable and it is intended that the fast payment procedure be used in the contract (in the case of BPAs, the contracting officer may elect to insert the clause either in the BPA or in orders under the BPA).

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PART 33 PROTESTS, DISPUTES, AND APPEALS

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33.000 Scope of part.

This part outlines policies and procedures for filing protests and for processing contract disputes and appeals.

Subpart 33.1 - Protests

33.100 Purpose of the bid protest system.

(a) The bid protest system provides a prompt, fair, and transparent way to resolve disputes concerning federal procurement actions.

(b) The objectives of the protest system are to:

(1) Ensure protests are decided efficiently and without undue delay, to minimize disruption to contract award and performance;

(2) Support the effective and economical operation of the Government by correcting procurement errors, as quickly as possible;

(3) Deter and discourage abuse of the bid protest process by requiring clear and substantiated allegations of procurement impropriety;

(4) Safeguard the rights of interested parties to obtain independent review of procurement actions alleged to violate law, or regulation; and

(5) Promote integrity, competition, accountability, and public confidence in the federal acquisition system by using available, timely and appropriate remedies.

(c) All participants in the protest process, including protesters, agency officials, and intervenors, should act in a manner consistent with these purposes to help resolve protests fairly and quickly.

(d) The protest process is not intended to serve as a way for offerors to get post-award explanations, debriefings, or additional insight into the Government's acquisition decision. Interested parties should address questions regarding the evaluation, award rationale, or proposal deficiencies through established preaward or postaward communication procedures, including formal debriefings where applicable under FAR 15 or other relevant FAR parts.

(e) Protests should not be used by incumbent contractors as a way to disrupt transition or induce extensions of their current contracts when there is no reasonable prospect of success on the merits of the protest.

33.101 Applicability.

(a) This subpart applies to protests filed with an agency or the Government Accountability Office (GAO).

(b) This subpart, except for 33.100, does not apply to bid protest or dispute appeal authorities where the United States Court of Federal Claims has jurisdiction (see 28 U.S.C. 1491).

(c) This subpart does not apply to protests of small business status (see 13 CFR part 121).

33.102 Definitions.

As used in this subpart-

Day means a calendar day, unless otherwise specified. In the computation of any period-

(1) The day of the act, event, or default from which the designated period of time begins to run is not included; and

(2) The last day after the act, event, or default is included. However, if the last day is a Saturday, Sunday, or Federal holiday, or the place for filing is closed for all or part of the last day, then the deadline for filing is the next day the place is open.

Filed means the complete receipt of any document by an agency before its close of business. Documents received after close of business are considered filed as of the next day. Unless otherwise stated, the agency close of business is presumed to be 4:30 p.m., local time.

Interested Party for the purpose of filing a protest means an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.

Protest means a written objection by an interested party to any of the following:

(1) A solicitation or other request by an agency for offers for a contract for the procurement of property or services.

(2) The cancellation of the solicitation or other request.

(3) An award or proposed award of the contract.

(4) A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

33.103 General.

(a) *Consulting with legal counsel*. Whenever a contracting officer becomes aware of a protest on one of their acquisitions, they should consult with their designated legal advisor.

(b) *Agency action on protests*. If the head of an agency determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, then, according to 41 U.S.C. 3708, the head of the agency may—

(1) Take any action that could have been recommended by the Comptroller General had the protest been filed with the Government Accountability Office (see 31 U.S.C. 3554(b)(1)(A)-(H);

(2) Pay appropriate costs as provided in 31 U.S.C. 3554(c);

(3) (i) Require the contractor to reimburse the Government's costs, where a postaward protest is sustained due to the contractor's intentional or negligent misstatement, misrepresentation, or miscertification, as described in 52.233-3.

(ii) When a protest is sustained by GAO under circumstances that may allow the Government to seek reimbursement for protest costs, the contracting officer will determine whether the protest was sustained based on the contractor's negligent or intentional misrepresentation. If the protest was sustained on several issues, protest costs must be apportioned according to the costs attributable to the contractor's actions.

(iii) (A) The contracting officer must review the amount of the debt, degree of the awardee's fault, and costs of collection, to determine whether a demand for reimbursement ought to be made.

(B) If it is in the best interests of the Government to seek reimbursement, the contracting officer must notify the contractor in writing of the nature and amount of the debt, and the intention to collect by offset if necessary.

(C) Before issuing a final decision, the contracting officer must give the contractor an opportunity to inspect and copy agency records about the debt to the extent permitted by statute and regulation, and to request review of the matter by the head of the contracting activity.

(c) *Availability of funds*. (1) When a protest is filed with GAO regarding a solicitation, proposed award, or award of a contract, and the agency's contract funds available at the time the protest is filed would otherwise lapse, those funds must remain available for obligation for 100 days following the date of the final ruling on the protest (31 U.S.C. 1558).

(2) A ruling is considered final on the date on which the time allowed for filing an appeal or request for reconsideration has expired, or the date on which a decision is rendered on such appeal or request, whichever is later.

(d) *Stop work order.* Whenever the contracting officer is required or decides to suspend performance under this subpart, the contracting officer may issue a written stop-work order.

33.104 Protests to the agency.

33.104-1 Scope.

(a) This section implements Executive Order 12979, Agency Procurement Protests.

(b) The agency should provide for inexpensive, informal, procedurally simple, and quick resolution of protests. Where appropriate, the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel are acceptable protest resolution methods.

33.104-2 Preaward.

(a) *Filing*. Protests based on alleged apparent improprieties in a solicitation must be filed before bid opening or the closing date for receiving proposals. If no closing time has been established, or if no further submissions are anticipated, any alleged solicitation improprieties must be protested within 10 days of when the alleged impropriety was known or should have been known.

(b) Action upon receiving a protest before award. (1) A contract may not be awarded until the agency resolves the protest, unless a written justification is made for urgent and compelling reasons, or award is determined in writing to be in the best interest of the Government.

(2) If award is withheld pending agency resolution of the protest, the contracting officer will inform the offerors whose offers might become eligible for award of the contract. If appropriate to avoid the need to resolicit, the contracting officer should request that offerors extend the time to accept their proposals. If offers are not extended, then consideration should be given to proceeding with award pursuant to paragraph (b)(1) of this section.

33.104-3 Postaward.

(a) If a protest is received, within 10 days after contract award or within 5 days after a debriefing date offered to the protester under a timely debriefing request in accordance with 15.505 or 15.506, whichever is later, then the contracting

officer must immediately suspend performance, pending resolution of the protest within the agency, including any independent review by a higher level official, unless continued performance is justified.

(b) Continued performance may be justified upon a written finding that there are urgent and compelling reasons, or continued performance is determined in writing to be in the best interest of the Government.

33.104-4 Other procedures.

(a) *General*. These procedures are established to resolve agency protests effectively, to build confidence in the Government's acquisition system, and to reduce protests outside of the agency:

(1) Before submitting an agency protest, parties must use their best efforts to resolve concerns raised by an interested party at the contracting officer level through open and frank discussions.

(2) Protests must be concise and logically presented to facilitate review by the agency.

(3) Protests must include the following information. Failure to comply may result in dismissing the protest.

(i) Name, email address, and telephone number of the protester.

(ii) Solicitation or contract number.

(iii) Detailed statement of the legal and factual grounds for the protest, including a description of resulting prejudice to the protester.

(iv) Copies of relevant documents.

(v) Request for a ruling by the agency.

(vi) Statement as to the form of relief requested.

(vii) All information establishing that the protester is an interested party for the purpose of filing a protest.

(viii) All information establishing the timeliness of the protest.

(4) (i) Protests filed directly with the agency will be addressed to the contracting officer or other official designated to receive protests.

(ii) As soon as practicable after a protest is filed, the contracting officer must notify the head of the contracting activity, in accordance with agency procedures.

(5) (i) In accordance with agency procedures, interested parties may request an independent review of their protest at a level above the contracting officer; solicitations should advise potential bidders and offerors that this review is available.

(ii) Agency procedures and/or solicitations must-

(A) Notify potential bidders and offerors whether this independent review is available as an alternative to consideration by the contracting officer of a protest, or is available as an appeal of a contracting officer decision on a protest.

(B) Ensure that the protester receives a redacted copy of the source selection decision, if applicable, or if not already provided to the protester, within a reasonable time after the protester elects the independent review;

(C) Provide the protester an opportunity to submit a supplemental statement to the independent review official based on the documents provided, subject to timeliness requirements at 33.104-2 and 33.104-3.

(iii) Agencies must designate the official(s) who are to conduct this independent review, but the official(s) need not be within the contracting officer's supervisory chain. When possible, officials designated to conduct the independent review should not have been previously personally involved in the procurement.

(b) *Timeliness*. (1) The agency may consider the merits of any protest that is not filed in time for good cause shown, or where it determines that a protest raises issues significant to the agency's acquisition system.

(2) Filing an agency protest does not extend the time for obtaining a stay at GAO. Agencies may include, as part of the agency protest process, a voluntary suspension period when agency protests are denied and the protester subsequently files at GAO.

(3) If there is an agency appellate review of the contracting officer's decision on the protest, it will not extend GAO's timeliness requirements. Therefore, any subsequent protest to the GAO must be filed within 10 days of knowledge of initial adverse agency action (4 CFR 21.2(a)(3)).

(c) *Protest decisions*. (1) Agencies must make their best efforts to resolve agency protests within 35 days after the protest is received by the contracting officer or an official conducting an independent review requested according to paragraph (a)(5).

(2) Protest decisions must be well-reasoned, explain the agency position for sustaining or denying the protest, and be provided to the protester using a method that provides evidence of receipt.

33.105 Protests to GAO.

33.105-1 GAO Bid Protest Regulations.

Procedures for protests to GAO are found at 4 CFR Part 21, Bid Protest Regulations.

33.105-2 Preaward.

(a) If the agency receives notice of a protest from GAO before award, then a contract may not be awarded unless the head of the contracting activity authorizes contract award and performance.

(b) The head of the contracting activity, on a nondelegable basis, may authorize contract award and performance upon a written finding that—

(1) Urgent and compelling circumstances which significantly affect the interest of the United States will not allow waiting for a decision from GAO; and

(2) Award is likely to occur within 30 days of the written finding.

(c) An agency may not authorize contact award and performance until the agency has notified GAO of the finding in paragraph (b) of this section.

(d) When a protest against the making of an award is received and award will be withheld pending disposition of the protest, the contracting officer should inform the offerors whose offers might become eligible for award of the protest. If appropriate, those offerors should be requested, before the time for accepting their offers expires, to extend the time for acceptance to avoid the need for resolicitation. If offers are not extended, then consideration should be given to proceeding under paragraph (b) of this section.

33.105-3 Postaward.

(a) If a protest is likely after award, then the contracting officer may direct the contractor to stop performance within the time period contained in paragraph (b)(1) of this section if the contracting officer makes a written determination that—

(1) A protest is likely to be filed; and

(2) Delay of performance is, under the circumstances, in the best interests of the United States.

(b) (1) If the agency receives notice of a protest from the GAO within 10 days after contract award or within 5 days after a debriefing date offered to the protester for any debriefing that is required by 15.505 or 15.506, whichever is later, then the contracting officer must immediately suspend performance or terminate the awarded contract, unless the head of the contracting activity authorizes contract performance.

(2) The head of the contracting activity, on a nondelegable basis, may authorize contract performance, upon a written finding that—

(i) Contract performance will be in the best interests of the United States; or

(ii) Urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for the GAO's decision.

(c) An agency must not authorize contact performance until the agency has notified the GAO of the finding in paragraph (b)(2) of this section.

(d) When it is decided to suspend performance or terminate the awarded contract, the contracting officer should attempt to negotiate a mutual agreement on a no-cost basis.

(e) When the agency receives notice of a protest filed with the GAO after the dates contained in subparagraph (b)(1), the contracting officer does not have to suspend contract performance or terminate the awarded contract unless the contracting officer believes that an award may be invalidated and a delay in receiving the supplies or services is not prejudicial to the Government's interest.

33.105-4 Other procedures.

(a) *Agency report*. Upon notice that a protest has been filed with GAO, the contracting officer must immediately notify legal counsel and begin compiling the information necessary for the agency report that will be filed with GAO.

(b) *Notice to GAO*. If the agency has not fully implemented the GAO recommendations with respect to a solicitation for a contract or an award or a proposed award of a contract within 60 days of receiving the GAO recommendations, then the head of the contracting activity must report the failure to the GAO by 5 days later. The report must explain the reasons why the GAO's recommendation, exclusive of costs, has not been followed by the agency.

33.106 Protests at the U.S. Court of Federal Claims.

Procedures for protests at the U.S. Court of Federal Claims are set forth in the rules of the U.S. Court of Federal Claims, found at https://www.uscfc.uscourts.gov/filing-bid-protest.

33.107 Solicitation provision and contract clause.

(a) The contracting officer must insert the provision at 52.233-2, Service of Protest, in solicitations for contracts expected to exceed the simplified acquisition threshold.

(b) The contracting officer must insert the clause at 52.233-3, Protest After Award, in all solicitations and contracts. If a cost reimbursement contract is being considered, the contracting officer must use the clause with its *Alternate I*.

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Subpart 33.2 - Disputes and Appeals

33.200 Scope.

41 U.S.C. chapter 71, Contract Disputes, establishes procedures and requirements for asserting and resolving claims subject to the Disputes statute.

33.201 Definitions.

As used in this subpart—

Accrual of a claim means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury caused by the Government's action or the contractor's action must have occurred. However, monetary damages need not have been incurred.

Alternative dispute resolution (ADR) means any type of procedure or combination of procedures voluntarily used to resolve issues in controversy. These procedures may include, but are not limited to, conciliation, facilitation, mediation, fact-finding, minitrials, arbitration, and use of ombudsmen.

Defective certification means a certificate that alters or otherwise deviates from the language in 52.233-1(d)(2)(iii) or which is not executed by a person authorized to bind the contractor with respect to the claim. Failure to certify must not be deemed to be a defective certification.

Issue in controversy means a material disagreement between the Government and the contractor that (1) may result in a claim or (2) is all or part of an existing claim.

Misrepresentation of fact means a false statement of substantive fact, or any conduct that leads to the belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

33.202 Applicability.

(a) Except as specified in paragraph (b) below, this subpart applies to any express or implied contract covered by the Federal Acquisition Regulation.

(b) This subpart does not apply to any contract with-

(1) A foreign government or agency of that government; or

(2) An international organization or a subsidiary body of that organization, if the agency head determines that the application of the Contract Disputes statute to the contract would not be in the public interest.

(c) This subpart applies to all disputes with respect to contracting officer decisions on matters "arising under" or "relating to" a contract. Agency Boards of Contract Appeals (BCAs) (e.g., Armed Services Board of Contract Appeals or Civilian Board of Contract Appeals) authorized under the Disputes statute continue to have all of the authority they possessed before the Disputes statute about disputes arising under a contract, as well as authority to decide disputes relating to a contract.

(d) The clause at 52.233-1, Disputes, recognizes the "all disputes" authority established by the Disputes statute, and states certain requirements and limitations of the Disputes statute to guide contractors and contracting agencies. The clause is not intended to affect the rights and obligations of the parties as provided by the Disputes statute or to constrain the authority of the statutory agency BCAs in handling and deciding contractor appeals under the Disputes statute.

33.203 Relationship of the Disputes statute to Pub. L. 85-804.

(a) A contractor's allegation that it is entitled to rescission or reformation of its contract in order to correct or mitigate the effect of a mistake must be treated as a claim under the Dispute statute.

(b) A claim that is first submitted to the contracting officer for consideration under the Disputes statute and is either denied or not approved in its entirety under the Disputes statute may be presented by the contractor as a request for relief under Pub. L. 85-804 (50 U.S.C. 1431-1435) as implemented by subpart 50.1.

33.204 Policy.

As a matter of policy, the Government tries to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level. Reasonable efforts should be made to resolve controversies before submitting a claim.

33.205 Postaward.

33.205-1 Contractor claim.

(a) *Contractor claims against the Government.* (1) Contractor requirements for submission of claims are located at 52.233-1(d).

(2) The contracting officer must document in the contract file the date of receipt of a claim submitted by a contractor.

(b) *Government claims against a contractor.* The contracting officer must issue a written decision on any Government claim against a contractor within 6 years after accrual of the claim, unless the contracting parties agreed to a shorter time period, or the claim is based on a contractor claim involving fraud.

33.205-2 Contractor certification.

(a) Contractor requirements for certification of claims exceeding $100,000 are located at 52.233-1(d).

(b) Use the aggregate amount of both increased and decreased costs to determine when the dollar thresholds requiring certification are met (see example in 15.403-4(a)(1)(iii) regarding certified cost or pricing data).

(c) A defective certification does not deprive a court or an agency BCA of jurisdiction over that claim. Before the entry of a final judgment by a court or a decision by an agency BCA, the court or agency BCA must require a defective certification to be corrected.

33.205-3 Interest on claims.

(a) The Government must pay interest on a contractor's claim on the amount found due and unpaid from the date that—

(1) The contracting officer receives the claim (certified if required by 33.205-2(a)); or

(2) Payment otherwise would be due, if that date is later, until the date of payment.

(b) Simple interest on claims must be paid at the rate, fixed by the Secretary of the Treasury as provided in the Disputes statute, which applies to the period during which the contracting officer receives the claim and then at the rate that applies for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim. (See the clause at 52.232-17 for the right of the Government to collect interest on its claims against a contractor).

(c) Interest must be paid on claims having defective certifications starting on the date that the contracting officer initially receives the claim until the date the claim was paid, see 52.233-1(h).

33.205-4 Suspected fraudulent claims.

If the contractor is unable to support any part of the claim and evidence reveals that the inability is due to misrepresentation of fact or to fraud on the part of the contractor, the contracting officer must refer the matter to the agency official responsible for investigating fraud.

33.205-5 Contracting officer's authority.

(a) Contracting officers are authorized, within any specific limitations defined in their warrants, to decide or resolve all claims arising under or relating to a contract subject to the Disputes statute, except this authority does not extend to—

(1) A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine; or

(2) The settlement, compromise, payment or adjustment of any claim involving fraud.

(b) Contracting officers can use ADR procedures to resolve claims, according to agency policies and 33.205-8.

33.205-6 Contracting officer's decision.

(a) When a claim by or against a contractor cannot be satisfied or settled by mutual agreement and a decision on the claim is necessary, the contracting officer must—

(1) Review the facts relevant to the claim;

(2) Get help from legal and other advisors;

(3) Coordinate with the contract administration officer or contracting office, as appropriate; and

(4) Prepare a written decision that-

(i) Includes the contracting officer's decision and supporting rationale for the decision reached;

(ii) Substantially conveys the following:

"This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice must indicate that an appeal is intended, refer to this decision, and identify the contract by number.

With regard to appeals to the agency board of contract appeals, you may, solely at your election, proceed under the board's —

(A) (1) Small claim procedure for claims of $50,000 or less or, in the case of a small business concern (as defined in the Small Business Act and regulations under that Act), $150,000 or less; or

(B) (2) Accelerated procedure for claims of $100,000 or less.

Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in 41 U.S.C. 7102(d), regarding Maritime Contracts) within 12 months of the date you receive this decision"; and

(iii) Makes a demand for payment prepared according to 32.604 and 32.605 in all cases where the decision results in a finding that the contractor is indebted to the Government.

(b) The contracting officer must furnish a copy of the decision to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt. This requirement applies to decisions on claims initiated by or against the contractor.

(c) The contracting officer must issue the decision within the following statutory time limitations:

(1) For claims of $100,000 or less, 60 days after receiving a written request from the contractor that a decision be given within that period, or within a reasonable time after receipt of the claim if the contractor does not make such a request.

(2) For claims over $100,000, 60 days after receiving a certified claim; provided, however, that if a decision will not be issued within 60 days, the contracting officer must notify the contractor, within that period, of the time within which a decision will be issued.

(d) The contracting officer must issue a decision within a reasonable time, taking into account-

(1) The size and complexity of the claim;

(2) The adequacy of the contractor's supporting data; and

(3) Any other relevant factors.

(e) The contracting officer has no obligation to render a final decision on any claim exceeding $100,000 that contains a defective certification, if within 60 days after receiving the claim, the contracting officer notifies the contractor, in writing, of the reasons why any attempted certification was found to be defective.

(f) In the event of undue delay by the contracting officer in providing a decision on a claim, the contractor may request the tribunal concerned to direct the contracting officer to issue a decision in a specified time period that the tribunal decides.

(g) Any failure of the contracting officer to issue a decision within the required time periods will be deemed a decision by the contracting officer denying the claim and will authorize the contractor to file an appeal or suit on the claim.

(h) The amount determined payable under the decision, less any portion already paid, should be paid, if otherwise proper, without awaiting contractor action concerning appeal. Such payment must be without prejudice to the rights of either party.

33.205-7 Obligation to continue performance.

(a) (1) Before the passage of the Disputes statute, the obligation to continue performance applied only to claims arising under a contract. However, the Disputes statute, at 41 U.S.C. 7103(g), authorizes agencies to require a contractor to continue contract performance according to the contracting officer's decision pending a final resolution of any claim arising under, or relating to, the contract.

(2) (i) A claim arising under a contract is a claim that can be resolved under a contract clause, other than the clause at 52.233-1, Disputes, that provides for the relief sought by the claimant. However, relief for such a claim can also be sought under the clause at 52.233-1.

(ii) A claim relating to a contract is a claim that cannot be resolved under a contract clause other than the clause at 52.233-1. This distinction is recognized by the clause with its Alternate I (see 33.205-9).

(b) In all contracts that include the clause at 52.233-1, with its Alternate I, in the event of a dispute relating to the contract, the contracting officer must consider providing, through appropriate agency procedures, financing of the continued performance, provided that the Government's interest is properly secured.

33.205-8 Alternative dispute resolution (ADR).

(a) (1) Agencies are encouraged to use ADR procedures as much as possible. Certain factors, however, may make the use of ADR inappropriate (see 5 U.S.C. 572(b)).

(2) Except for arbitration conducted according to the Administrative Dispute Resolution Act (ADRA), (5 U.S.C. 571, et seq.), agencies have authority that is separate from that provided by the ADRA to use ADR procedures to resolve issues in controversy. Agencies may also choose to proceed under the authority and requirements of the ADRA.

(b) The objective of using ADR procedures is to increase the opportunity to relatively quickly and cheaply resolve an issue in controversy. Essential elements of ADR include—

(1) An issue in controversy;

(2) Both parties choose to participate in the ADR process;

(3) Both parties agree on alternative procedures and terms instead of formal litigation; and

(4) Officials of both parties who have the authority to resolve the issue in controversy choose to participate in the process.

(c) (1) If the contracting officer rejects a contractor's request for ADR proceedings, the contracting officer must give the contractor a written explanation citing one or more of the conditions in 5 U.S.C. 572(b) or such other specific reasons that ADR procedures are inappropriate to resolve the dispute.

(2) If a contractor rejects a request for ADR see 52.233-1(g).

(d) ADR procedures may be used at any time that the contracting officer has authority to resolve the issue in controversy. If a claim has been submitted, ADR procedures may apply to all or a portion of the claim. When ADR procedures are used after a contracting officer has issued their final decision, the contracting officer’s use of ADR procedures does not alter any of the time limitations or procedural requirements for filing an appeal of the contracting officer's final decision. The use of ADR procedures does not constitute a reconsideration of the final decision.

(e) When appropriate, a neutral person may be used to help resolve the issue in controversy using the procedures the parties chose.

(f) The confidentiality of ADR proceedings must be protected consistent with 5 U.S.C. 574.

(g) (1) A solicitation must not require arbitration as a condition of award, unless arbitration is otherwise required by law.

(2) An agreement to use arbitration must be in writing and must specify a maximum award that the arbitrator may issue, as well as any other conditions limiting the range of possible outcomes.

(h) Binding arbitration, as an ADR procedure, may be agreed to only as specified in agency guidelines. Such guidelines must provide advice on the appropriate use of binding arbitration and when an agency has authority to settle an issue in controversy through binding arbitration.

33.205-9 Contract clauses.

(a) Insert the clause at 52.233-1, Disputes, in solicitations and contracts, unless the conditions in 33.202(b) apply. If it is determined under agency procedures that continued performance is necessary pending resolution of any claim arising under or relating to the contract, the contracting officer must use the clause with its Alternate I.

(b) Insert the clause at 52.233-4 in all solicitations and contracts.

PART 34 - MAJOR SYSTEM ACQUISITION

Sec.

Subpart 34.1 - Postaward

34.100 Testing, Qualification and Use of Industrial Resources Developed Under Title III of the Defense Production Act.
34.101 Scope.
34.102 Definitions.
34.103 Policy.
34.104 Testing and qualification.
34.105 Contract clause.

Subpart 34.2 - Earned Value Management System

34.201 Policy.
34.202 Integrated Baseline Reviews.
34.203 Contract clause.

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Subpart 34.1 - Postaward

34.100 Testing, Qualification and Use of Industrial Resources Developed Under Title III of the Defense Production Act.

34.101 Scope.

This section describes policies and procedures for testing, qualification, and use of industrial resources manufactured or developed with Government assistance under Title III of the Defense Production Act (DPA) (50 U.S.C. 4531 et seq.). Title III of the Act authorizes Government assistance to encourage expansion of production capacity and the supply of industrial resources essential to national defense.

34.102 Definitions.

Item of supply, as used in this section, means any part or component that is part of a larger system. The item can be a small part, group of parts, or a complete unit. It also includes spare or replacement parts used during the system's life. This definition does not include packaging or labeling used for shipment or identification of an "item."

34.103 Policy.

The Government will generally pay the costs of any testing and qualification it needs to use an industrial resource manufactured or developed with assistance provided under Title III of the DPA.

34.104 Testing and qualification.

(a) (1) When notified that a Title III project contractor has requested testing and approval of a Title III industrial resource, the contracting officer will review the request according to agency procedures to determine if—

(i) The Title III industrial resource is being used or might be used in the manufacture or development of a major system or item of supply; and

(ii) The remaining quantities available for purchase justify incurring the cost of testing and qualification.

(2) The contracting officer may also consult with the Defense Production Act Office, Title III Program, located at Wright Patterson Air Force Base, Ohio 45433-7739.

(b) If both conditions at 34.104(a)(1) are met, the contracting officer must modify the contract to require the contractor to conduct testing.

(c) The Title III Program will provide the contractor enough of the Title III industrial resource to conduct the necessary tests.

34.105 Contract clause.

Insert the clause at 52.234-1, Industrial Resources Developed under Title III of the Defense Production Act, in all contracts for major systems and items of supply.

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Subpart 34.2 - Earned Value Management System

34.201 Policy.

(a) In accordance with OMB Circular A-11, agencies must require an Earned Value Management System (EVMS) in major acquisitions for development.

(b) For contracts with EVMS requirements, agencies must require contractor submission of monthly EVMS reports.

(c) EVMS requirements apply to subcontractors using the same rules as applied to the prime contractor.

(d) When a solicitation requires a contractor-proposed EVMS plan, agencies will determine adequacy of the plan prior to contract award.

34.202 Integrated Baseline Reviews.

When an EVMS is required, the agency will conduct an Integrated Baseline Review.

34.203 Contract clause.

Insert a clause that is substantially the same as the clause at FAR 52.234-4, Earned Value Management System, in solicitations and contracts that require a contractor to use an EVMS.

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PART 35 - RESEARCH AND DEVELOPMENT CONTRACTING

Sec.

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35.001 Definitions.
35.002 Policy.

Subpart 35.1 - Presolicitation

35.101 Solicitations.
35.102 Broad agency announcement.

Subpart 35.2 - Evaluation and Award

35.201 Evaluation for award.

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35.301 Scientific and technical reports.

Subpart 35.4 - Federally Funded Research and Development Centers

35.401 Definitions.
35.402 Policy.
35.403 Sponsoring agreements.
35.404 Establishing or changing an FFRDC.
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35.406 Limitation on the creation of new FFRDC's.
35.407 Reviewing FFRDC's.
35.408 Terminating an FFRDC.
35.409 Master list of FFRDC's.

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35.000 Scope of part.

(a) This part prescribes policies and procedures specifically for research and development (R&D) contracting.

(b) R&D integral to acquisition of major systems is covered in part 34. Independent research and development (IR&D) is covered in part 31.

35.001 Definitions.

As used in this subpart—

Applied research (1) means the effort that—

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

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

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

(2) When being used by contractors in cost principle applications, this term does not include efforts whose principal aim is the design, development, or testing of specific items or services to be considered for sale; these efforts are within the definition of "development," given below.

Development, means the systematic use of scientific and technical knowledge in the design, development, testing, or evaluation of a potential new product or service (or of an improvement in an existing product or service) to meet specific performance requirements or objectives. It includes the functions of design engineering, prototyping, and engineering testing; it excludes subcontracted technical effort that is for the sole purpose of developing an additional source for an existing product.

35.002 Policy.

(a) *Use of contracts.* Contracts must be used only when the principal purpose is the acquisition of supplies or services for the direct benefit or use of the Federal Government. Grants or cooperative agreements should be used when the principal purpose of the transaction is to stimulate or support research and development for another public purpose.

(b) *Cost sharing.* Cost sharing policies (which are not otherwise required by law) under Government contracts must be in accordance with part 16, part 42 and agency procedures.

Subpart 35.1 - Presolicitation

35.101 Solicitations.

(a) Reviewing too many R&D proposals from unqualified sources wastes time and money for both industry and the Government. Therefore, contracting officers should first send solicitations only to sources with the technical qualifications to perform the research or development work. Technical personnel should recommend potential sources that appear qualified, based on—

(1) Present and past performance of similar work;

(2) Professional stature and reputation;

(3) Position or expertise in their field;

(4) Ability to obtain and maintain the necessary professional and technical capability, including facilities, to perform the work; and

(5) Other relevant factors.

(b) Proposals must generally be solicited from technically qualified sources, including sources identified through synopses or other means of publicizing requirements. When soliciting all qualified sources is not practical, the contracting officer may select a reasonable number to solicit. To promote competition, the contracting officer must provide the solicitation to other apparently qualified sources.

(c) Solicitations must require offerors to—

(1) Describe their technical and management approach;

(2) Identify any technical uncertainties;

(3) Propose specific solutions to resolve uncertainties; and

(4) Propose any planned subcontracting of scientific or technical work.

(d) Solicitations may require proposals to be organized with technical sections grouped together for efficient review by technical experts (see part 15). Both the solicitation process and proposal evaluation should be designed to reduce costs for both offerors and the Government.

(e) R&D solicitations should include evaluation factors to identify the most technically competent offerors (see part 15) such as—

(1) The offeror's understanding of the scope of work;

(2) The quality of the offerors approach proposed to meet the scientific and technical objectives, or the merit of the ideas or concepts presented.

(3) The offeror's access to qualified engineering, scientific, or other technical staff.

(4) The offeror's experience is relevant.

(5) Any innovative ideas the offeror proposes in the specific scientific or technical field.

(6) The offeror's access to the necessary research, testing, laboratory, or shop facilities.

(f) Besides technical evaluation factors, the contracting officer must also consider management capability, as appropriate, including—

(1) Management capabilities, including cost control methods;

(2) Experience and past performance;

(3) Subcontracting practices; and

(4) Any other significant evaluation criteria (*e.g.*, unrealistically low cost estimates in proposals for cost-reimbursement or fixed-price incentive contracts.

(g) Although cost or price is not usually the deciding factor in selecting a contractor to perform R&D, it remains important. The final selection should be the offer that best satisfies the Government's requirement at a fair and reasonable cost.

(h) The contracting officer should ensure potential offerors completely understand the details of the work, especially the Government interpretation of the work statement. For complex requirements, the contracting officer should give potential offerors a chance to comment on the details of the requirements as contained in the work statement, the contract schedule, and any related specifications. This may be done at a preproposal conference (see part 15).

(i) When appropriate, solicitations should allow offerors to propose an alternative contract type (see part 16).

(j) When a potential contractor wants to discuss a new idea or product based on their privately-funded independent R&D work, Government personnel should be willing to discuss it. However, the potential contractor must be informed that these discussions do not create any obligation for the Government. In such situations, direct negotiation with the potential contractor without competition may be appropriate. Also refer to part 15 regarding unsolicited proposals.

(k) The Government may issue an exploratory request to identify existing ideas or prior work in a specific field of research. Any such request must clearly state that it does not impose any obligation on the Government or signify a firm intention to enter into a contract.

35.102 Broad agency announcement.

(a) *General.* This paragraph prescribes procedures for the use of the broad agency announcement (BAA) with Peer or Scientific Review (see part 6) for the acquisition of basic and applied research, as well as that part of development not related to developing a specific system or hardware procurement. The BAA technique must only be used when meaningful proposals with varying technical/scientific approaches are reasonably expected.

(b) The BAA and its supporting documentation must—

(1) Describe what research the agency is interested in, either for specific program needs or broad areas covering a range of agency requirements;

(2) Explain how proposals will be selected, the relative importance of each criteria, and the evaluation methodology;

(3) Specify the proposal due date; and

(4) Contain clear instructions for preparing and submitting proposals.

(c) Contracting officers must publicize the BAA through the Governmentwide point of entry (GPE) and, if authorized in accordance with part 5, may also be published in scientific, technical, or engineering periodicals, or other electronic platforms and communities used by the target audience. Publish the notice at least once per year.

(d) Use a peer or scientific review process to evaluate proposals. Written evaluation reports are required for each proposal; however, proposals are not required to be evaluated against each other since they are responding to broad research areas rather than a common work statement.

(e) Proposals should be selected based on—

(1) Technical merit;

(2) Importance to agency programs; and

(3) Availability of funds.

(f) Contracting officers must consider cost realism and reasonableness to the extent appropriate.

(g) Contracting officers do not need to publish a synopsis under part 5 for individual contracts awarded through a BAA. The notice published pursuant to paragraph (c) of this section fulfills the synopsis requirement.

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Subpart 35.2 - Evaluation and Award

35.201 Evaluation for award.

(a) R&D contracts should be awarded to the organization, including educational institutions, with the best ideas and highest level of expertise, but not such that the capabilities exceed the requirement.

(b) The contracting officer should use the procedures in part 15 to notify and debrief offerors.

(c) Evaluating a contractor's cost or price estimate serves multiple purposes: it determines whether the estimate is reasonable, reveals the offeror's understanding of the project, shows how the offeror perceives risks, and demonstrates the offeror's ability to organize and perform the work. Cost or price analysis is an effective tool for this evaluation as appropriate (see part 15).

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Subpart 35.3 - Postaward

35.301 Scientific and technical reports.

(a) R&D contracts must require contractors provide scientific and technical reports, consistent with the project's objectives. These reports serve as a permanent record of work completed under the contract.

(b) Agencies should share R&D contract results with other Government activities and the private sector. Contracting officers must follow agency regulations regarding national security, protection of data, and policies for sharing new technology. Reports should be sent to https://www.ntis.gov/contact-us/index.xhtml or -

National Technical Information Service (NTIS)
5301 Shawnee Road
Alexandria, VA 22312.

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Subpart 35.4 - Federally Funded Research and Development Centers

35.401 Definitions.

As used in this subpart—

Nonsponsor means any other organization, in or outside of the Federal Government, which funds specific work to be performed by the FFRDC and is not a party to the sponsoring agreement.

Primary sponsor means the lead agency responsible for managing, administering, or monitoring overall use of the FFRDC under a multiple sponsorship agreement.

Sponsor means the executive agency which manages, administers, monitors, funds, and is responsible for the overall use of an FFRDC. Multiple agency sponsorship is possible as long as one agency agrees to act as the "primary sponsor." In the event of multiple sponsors, "sponsor" refers to the primary sponsor.

35.402 Policy.

(a) This section explains Federal policy on establishing, using, reviewing, and terminating Federally Funded Research and Development Centers (FFRDCs) and related sponsoring agreements.

(b) An FFRDC meets special long-term research or development needs that cannot be met as effectively by existing Government or contractor resources. FFRDCs allow agencies to use private sector resources for work integral to the agency's mission. To fulfill its responsibilities, an FFRDC has special access to—

(1) Government and supplier data, including sensitive and proprietary information;

(2) Government employees; and

(3) Government facilities, equipment, and real property.

(c) The FFRDC must—

(1) Conduct business appropriately considering its special relationship with the Government;

(2) Operate in the public interest with objectivity and independence;

(3) Be free of organizational conflicts of interest; and

(4) Fully disclose its affairs to the sponsoring agency.

(d) FFRDCs must not use their privileged access to information or facilities to compete with the private sector. However, an FFRDC may perform work for agencies other than its sponsor under the Economy Act or other applicable laws when the work is not otherwise available from the private sector.

(e) FFRDCs are operated, managed, and/or administered by—

(1) A university or consortium of universities;

(2) A nonprofit organization; or

(3) An industrial firm, as an autonomous organization or as an identifiable separate operating unit of a parent organization.

(f) Long-term relationships between the Government and FFRDCs are encouraged to provide the continuity that attracts high-quality personnel. This relationship should help the FFRDC stay current in its field(s) of expertise, maintain its objectivity and independence, understand its sponsor's needs, and provide a quick response capability.

35.403 Sponsoring agreements.

(a) (1) When establishing an FFRDC, the Government and the FFRDC must create a written sponsorship agreement. This agreement serves three key purposes—

(i) Establishes a long-term relationship;

(ii) Defines the FFRDC's mission; and

(iii) Ensures regular evaluation of the FFRDC.

(2) Regardless of its form, the sponsor must clearly identify it as a sponsoring agreement.

(b) While specific content will vary based on circumstances, all sponsoring agreements or sponsoring agency policies and procedures must include the following requirements at a minimum—

(1) A clear statement of the FFRDC's purpose;

(2) Provisions for orderly termination or nonrenewal, including how to handle assets and liabilities. The agreement must clearly define ownership of capital assets in the event the relationship ends;

(3) A method to identify retained earnings (reserves) and a plan for using and disposing of these funds;

(4) A prohibition preventing the FFRDC from competing with non-FFRDCs for Federal contracts except for FFRDC operations. This restriction does not apply to the FFRDC's parent organization or other subsidiaries in their non-FFRDC

activities. The FFRDC may respond to requests for information, qualifications or capabilities unless restricted by the Sponsor; and

(5) Clear rules about whether the FFRDC may accept work from organizations other than its sponsor(s). If allowed, the agreement must outline—

(i) Procedures to follow for non-sponsor work; and

(ii) Any limitations on which non-sponsors may provide work (e.g., other Federal agencies, state or local governments, or non-profit organizations.)

(c) The sponsoring agreement or agency policies may also include other provisions as needed, such as—

(1) Cost elements requiring advance agreement when using cost-type contracts; and

(2) Factors affecting fee negotiations when the sponsor determines fee is appropriate.

(d) The agreement term must not exceed 5 years, but may be renewed after review in increments of up to 5 years.

35.404 Establishing or changing an FFRDC.

To establish an FFRDC, or change its basic purpose and mission, the sponsor must—

(a) Verify existing alternative sources cannot effectively meet the special research or development needs;

(b) Publish at least one notice to the Government Point of Entry 90 days or more before issuing the contract action, indicating the agency's intention, and requesting comments. Notice is not required when the action is required by law;

(c) Ensure the Government has expertise available to adequately and objectively evaluate the FFRDC's work;

(d) Notify the Executive Office of the President, Office of Science and Technology Policy, Washington, DC 20506;

(e) Establish controls to ensure the Government pays reasonable costs for services;

(f) Define the FFRDC's purpose and mission clearly enough to distinguish work appropriate for the FFRDC vs. work for non-FFRDCs;

(g) Maintain reasonable continuity in support levels, consistent with agency needs and the sponsoring agreement;

(h) Ensure the FFRDC—

(1) Is operated, managed, or administered by an autonomous organization or as an identifiably separate operating unit of a parent organization;

(2) Works in the public interest;

(3) Remains free from organizational conflict of interest; and

(4) Discloses its affairs (as an FFRDC) to the primary sponsor;

(i) Does not allow quantity production or manufacturing unless authorized by legislation; and

(j) Obtain approval from the head of the sponsoring agency.

35.405 Using an FFRDC.

(a) All work placed with the FFRDC must align with its purpose, mission, general scope of effort, or special competency of the FFRDC.

(b) When permitted by the sponsor, Federal agency may contract directly with the FFRDC, in which case that Federal agency is responsible for compliance with FAR Part 6. The nonsponsoring agency must-

(1) Provide the documentation regarding competition with domestic private industry required by part 17 to the sponsoring agency; and

(2) Prepare any required Economy Act determinations and findings (D&F) document and provide documentation required by part 17 to the sponsoring agency.

35.406 Limitation on the creation of new FFRDC's.

Pursuant to 10 U.S.C. 4126, the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, the Secretary of Homeland Security, and the Administrator of the National Aeronautics and Space Administration may not obligate or expend amounts appropriated to the Department of Defense for purposes of operating an FFRDC that was not in existence before June 2, 1986, until—

(a) The head of the agency submits a report to Congress describing the center's purpose, mission, and general scope of the center's effort; and

(b) A period of 60 days, beginning on the date such report is received by Congress, has elapsed.

35.407 Reviewing FFRDC's.

(a) Before extending an FFRDC contract or agreement, the sponsor must conduct a comprehensive review of its use and need. Coordinate the review with any co-sponsors. If the sponsor decides to end its sponsorship, it must inform other agencies that use the FFRDC of its decision and give them an opportunity to assume sponsorship.

(b) The head of the sponsoring agency must approve continuing or terminating sponsorship, based on the results of the review described below:

(1) An examination of the sponsor's special technical needs and mission requirements that are performed by the FFRDC to determine if and at what level they continue to exist.

(2) Consideration of alternative sources to meet the sponsor's needs.

(3) An assessment of the efficiency and effectiveness of the FFRDC in meeting the sponsor's needs, including the FFRDC's ability to maintain its objectivity, independence, quick response capability, currency in its field(s) of expertise, and familiarity with the needs of its sponsor.

(4) An assessment of the adequacy of the FFRDC management in ensuring a cost-effective operation.

(5) A determination that the criteria for establishing the FFRDC continue to be satisfied and that the sponsoring agreement is in compliance with the requirements of this subpart.

35.408 Terminating an FFRDC.

When a sponsor no longer needs the FFRDC, the sponsorship may be transferred to one or more Government agencies, if appropriately justified. If the FFRDC is not transferred to another Government agency, it must be phased out.

35.409 Master list of FFRDC's.

The National Science Foundation (NSF) maintains a master Government list of FFRDCs. Primary sponsors must provide information on each FFRDC, including sponsoring agreements, mission statements, funding data, and type of R&D being performed, to the NSF upon its request for such information.

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PART 36 - CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

Sec.

36.000 Scope of part.
36.001 Definition.
36.002 Policy.

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36.101 Construction.
36.101-1 Acquisition Strategy.
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36.102 Architect-Engineer Services.
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36.202-4 Short selection process for contracts not to exceed the simplified acquisition threshold.
36.202-5 Standard and optional forms.

Subpart 36.3 - Postaward

36.301 Responsibilities of contracting officers.

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36.000 Scope of part.

This part prescribes policies and procedures for construction, which includes dismantling, demolition or removal of improvements; and architect-engineer services.

36.001 Definition.

As used in this part—

Firm as it relates to architect-engineer services, means any individual, partnership, corporation, association, or other legal entity permitted by law to practice the professions of architecture or engineering.

36.002 Policy.

(a) Agencies must require the use of a project labor agreement for Federal construction projects with a total estimated construction cost at or above $35 million, unless an exception applies (see part 22).

(b) Contracting officers conducting market research for Federal construction contracts valued at or above $35 million, must ensure that the market research procedures (see part 10) involve a current and proactive examination of the market conditions in the project area to determine national, regional, and local entity interest in participating on a project that requires a project labor agreement, and to understand the availability of unions, and unionized and non-unionized contractors. Contracting officers may coordinate with agency labor advisors, as appropriate.

(c) The contracting officer must use one of the following acquisition procedures when contracting for the design and construction of a public building, facility, or work:

(1) Design-bid-build established under 40 U.S.C. chapter 11, Selection of Architects and Engineers.

(2) Two-phase design-build selection procedures authorized by 10 U.S.C. 3241 or 41 U.S.C. 3309.

(3) Another acquisition procedure authorized by law.

(d) Agencies must implement high-performance sustainable building design, construction, renovation, repair, commissioning, operation and maintenance, management, and deconstruction practices to ensure that—

(1) All new construction and modernization projects greater than 25,000 gross square feet are designed, constructed, and maintained to meet or exceed Government sustainable design and operations principles in accordance with the Council on Environmental Quality's Guiding Principles for Sustainable Federal Buildings and Associated Instructions (Guiding Principles) (available at https://www.sustainability.gov/pdfs/guiding_principles_for_sustainable_federal_buildings.pdf);

(2) All renovation projects of existing Federal buildings/facilities must use, to the greatest extent possible, Government sustainable design and operations principles for existing buildings in accordance with the Guiding Principles; and

(3) Rehabilitation of Federally-owned historic buildings utilizes best practices and technologies in retrofitting to promote long-term viability of the buildings.

Subpart 36.1 - Pre-solicitation

36.101 Construction.

36.101-1 Acquisition Strategy.

(a) The contracting officer will only use sealed bid procedures (see part 14) for a construction contract if the conditions in part 6 for use of sealed bidding are met. However, the contracting officer should not use sealed bidding if the contract will be performed outside the United States and its outlying areas.

(b) The following must be considered when determining the contract type and pricing structure and must be addressed in the acquisition plan.

(1) Generally, firm-fixed-price contracts must be used to acquire construction. They may be priced—

(i) on a lump-sum basis (when a lump sum is paid for the total work or defined parts of the work),

(ii) on a unit-price basis (when a unit price is paid for a specified quantity of work units), or

(iii) using a combination of the two methods.

(2) Lump-sum pricing must be used in preference to unit pricing except when—

(i) Large quantities of work such as grading, paving, building outside utilities, or site preparation are involved;

(ii) Quantities of work, such as excavation, cannot be estimated with sufficient confidence to permit a lump-sum offer without a substantial contingency;

(iii) Estimated quantities of work required may change significantly during construction; or

(iv) Offerors would have to expend unusual effort to develop adequate estimates.

(3) Fixed-price contracts with economic price adjustment may be used if such a provision is customary in contracts for the type of work being acquired, or when omission of an adjustment provision would preclude a significant number of firms from submitting offers or would result in offerors including unwarranted contingencies in proposed prices.

(4) In view of potential labor and administrative problems, cost-plus-fixed-fee, price-incentive, or other types of contracts with cost variation or cost adjustment features must not be permitted concurrently, at the same work site, with firm-fixed-price, lump sum, or unit price contracts except with the prior approval of the head of the contracting activity.

36.101-2 Use of two-phase design-build selection procedures.

(a) As authorized by 10 U.S.C. 3241 and 41 U.S.C. 3309, the two-phase design-build selection procedures may be used when the contracting officer determines in writing that this method is appropriate, based on the following:

(1) Three or more offers are anticipated.

(2) Design work must be performed by offerors before developing price or cost proposals, and a substantial expense will be incurred in preparing offers.

(3) That the contracting officer has considered:

(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 method.

(v) The capability of the agency to manage the two-phase selection process.

(vi) Other criteria established by the agency.

(b) Phase-one of the solicitation(s) must include—

(1) The scope of work;

(2) The phase-one evaluation factors, which must include—

(i) Technical approach (excluding detailed design or technical information);

(ii) Technical qualifications, such as—

(A) Specialized experience and technical competence;

(B) Capability to perform;

(C) Past performance of the offeror's team (including the architect-engineer and construction members); and

(iii) Other appropriate factors (excluding cost or price related factors);

(3) Phase-two evaluation factors (see paragraph (d) of this section); and

(4) A statement of the maximum number of offerors that will be selected to submit phase-two proposals. Unless the contracting officer determines in writing that a number greater than five is in the Government's interest, no more than five offerors can be selected for phase-two proposals.

(c) After evaluating phase-one proposals in accordance with the solicitation, the contracting officer must select the most highly qualified offerors and request those offerors submit phase-two proposals.

(d) Phase-two of the solicitation(s) must—

(1) Be prepared and evaluated in accordance with part 15;

(2) Include phase-two evaluation factors, such as design concepts and proposed technical solutions; and

(3) Require submission of separate technical and price proposals.

36.101-3 Scope of work.

(a) A scope of work must be included in the solicitation, and must:

(1) Define the project; and

(2) Provide prospective offerors with sufficient information regarding the Government's requirements.

(b) The scope of work may include criteria and preliminary design, budget parameters, and schedule or delivery requirements.

(c) If the agency contracts for development of the scope of work, it must use the procedures in sections 36.102 and 36.202.

36.101-4 Advance notices and solicitations.

As required by 15 U.S.C. 644(w), when the contracting officer anticipates the award of a contract to a small business pursuant to a solicitation for construction, the contracting officer must transmit to the Governmentwide point of entry (GPE) a solicitation notice (see part 5). The solicitation notice must include information regarding the agency's definitization of equitable adjustments for change orders under construction contracts, including:

(a) A description of agency policies or procedures, in addition to that outlined in part 43, that apply to definitization of equitable adjustments for change orders under construction contracts.

(b) Data on the agency's past performance, for the prior 3 fiscal years, regarding the time required to definitize equitable adjustments for change orders under construction contracts (see part 43). Agencies must provide the data shown in the following table, or provide the address of an agency-specific, publicly accessible website containing this information.

Table 1 to Paragraph (b)

Time to definitize after receipt of an adequate change order definitization proposal under construction contracts	Number of change order proposals definitized under construction contracts
30 days or less	
31 to 60 days	
61 to 90 days	
91 to 180 days	
181 to 365 days	
366 or more days	
After completion of contract performance via a contract modification addressing all undefinitized equitable adjustments received during contract performance	

36.101-5 Liquidated damages.

During acquisition planning the contracting officer must evaluate the need for liquidated damages in a construction contract in accordance with part 11 and agency policies.

36.101-6 Government cost estimate.

(a) An independent Government estimate (IGE) of the cost of construction must be prepared for any action expected to exceed the simplified acquisition threshold. The IGE must be prepared based on a detailed analysis of the requirements.

(b) The IGE must be given to the contracting officer before receipt of any proposals. When two-step sealed bidding is used, the independent Government estimate must be prepared when the contract requirements are definitized.

36.101-7 Clauses.

(a) The contracting officer must insert the clauses in Table 1 in solicitations and contracts when a fixed-price construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated, and the contract amount is expected to exceed the simplified acquisition threshold. The Table 1 clauses may be used for contracts valued at or below the simplified acquisition threshold.

Table 1 to Paragraph (a)

Clause	Title
52.236-2	Differing Site Conditions
52.236-3	Site Investigation and Conditions Affecting the Work
52.236-6	Superintendence by the Contractor
52.236-8	Other Contracts
52.236-9	Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements
52.236-10	Operations and Storage Areas
52.236-12	Cleaning Up

(b) The contracting officer must insert the clause at 52.236-5, Material and Workmanship, in solicitations and contracts for construction.

(c) The contracting officer must insert the clause at 52.236-7, Permits and Responsibilities, in solicitations and contracts when a fixed-price or cost-reimbursement construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated.

(d) (1) The contracting officer must insert the clause at 52.236-11, Use and Possession Prior to Completion, in solicitations and contracts when a fixed-price construction contract is contemplated, and the contract award amount is expected to exceed the simplified acquisition threshold.

(2) This clause may be inserted in solicitations and contracts when the contract amount is expected to be at or below the simplified acquisition threshold.

(e) The contracting officer must insert the clause at 52.236-13, Accident Prevention, in solicitations and contracts when a fixed-price construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated, and the contract amount is expected to exceed the simplified acquisition threshold.

(1) This clause may be inserted in solicitations and contracts when the contract amount is expected to be at or below the simplified acquisition threshold.

(2) The clause must be used with its Alternate I when a contract for services will involve:

(i) Work of a long duration or hazardous nature; or

(ii) Performance on a Government facility that on the advice of technical representatives involves hazardous materials or operations that might endanger the safety of the public and/or Government personnel or property.

(f) (1) The contracting officer must insert the clause at 52.236-14, Availability and Use of Utility Services, in solicitations and contracts when a fixed-price construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated, the contract is to be performed on Government sites, and the contracting officer decides that—

(i) The existing utility system(s) is adequate for the needs of both the Government and the contractor; and

(ii) Furnishing it is in the Government's interest.

(2) When this clause is used, the contracting officer must list the available utilities in the contract.

(g) (1) The contracting officer may insert the clause at 52.236-15, Schedules for Construction Contracts, in solicitations and contracts when a fixed-price construction contract is contemplated, the contract amount is expected to exceed the simplified acquisition threshold, and—

(i) The period of actual work performance exceeds 60 days; or

(ii) When work performance is expected to last less than 60 days and an unusual situation exists that warrants imposition of the requirements.

(2) Contracting officers should not insert the clause in paragraph (g)(1) of this section, in the same contract with clauses covering other management approaches for ensuring that a contractor makes adequate progress.

(h) The contracting officer may insert the clause at 52.236-16, Quantity Surveys, in solicitations and contracts when a fixed-price construction contract providing for unit pricing of items and for payment based on quantity surveys is contemplated. The clause must be used with its Alternate I if it is determined at a level above that of the contracting officer that—

(1) It is impracticable for Government personnel to perform the original and final surveys; and

(2) The Government wishes the contractor to perform these surveys.

(i) The contracting officer must insert the clause at 52.236-17, Layout of Work, in solicitations and contracts when a fixed-price construction contract is contemplated, and use of this clause is appropriate due to a need for accurate work layout and for siting verification during work performance.

(j) The contracting officer must insert the clause at 52.236-18, Work Oversight in Cost-Reimbursement Construction Contracts, in solicitations and contracts when a cost-reimbursement construction contract is contemplated.

(k) (1) The contracting officer must insert the clause at 52.236-21, Specifications and Drawings for Construction, in solicitations and contracts when a fixed-price construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated, and the contract amount is expected to exceed the simplified acquisition threshold.

(2) The contracting officer may insert the clause in paragraph (k)(1) of this section in solicitations and contracts when a fixed-price construction or a fixed-price contract for dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to be at or below the simplified acquisition threshold.

(3) When the Government needs record drawings, the contracting officer must—

(i) Use the clause with its Alternate I, if reproducible shop drawings are needed, or

(ii) Use the clause with its Alternate II, if reproducible shop drawings are not needed.

36.102 Architect-Engineer Services.

36.102-1 Public announcement.

The Government must publicly announce all requirements for architect-engineer services (see 40 U.S.C. 1101 et seq.).

36.102-2 Contracting procedures and competition.

(a) Contracting officers must acquire architect-engineer services by negotiation and select sources in accordance with this section.

(b) The procedures of this section are competitive procedures (see part 6).

(c) Agencies must encourage firms to submit annually an updated statement of qualifications and performance data on a Standard Form (SF) 330, Part II—General Qualifications.

(d) (1) Surveying is considered to be an architectural and engineering service and must be procured pursuant to sections 36.102 and 36.202 from registered surveyors or architects and engineers. Mapping associated with the research, planning, development, design, construction, or alteration of real property is considered to be an architectural and engineering service and must be procured pursuant to sections 36.102 and 36.202.

(2) Mapping services that are not connected to traditionally understood or accepted architectural and engineering activities, are not incidental to such architectural and engineering activities or have not in themselves traditionally been considered architectural and engineering services must be procured pursuant to provisions in parts 13, 14, and 15.

36.102-3 Government cost estimate.

(a) An independent Government estimate (IGE) of the cost of architect-engineer services must be prepared based on a detailed analysis of the requirements.

(b) The IGE must be given to the contracting officer before beginning negotiations for any action expected to exceed the simplified acquisition threshold.

36.102-4 Clauses.

(a) The contracting officer must insert the clause at 52.236-22, Design Within Funding Limitations, in fixed-price architect-engineer contracts except when—

(1) The head of the contracting activity determines in writing that cost limitations are secondary to performance considerations and additional project funding can be expected;

(2) The design is for a standard structure and is not intended for a specific location; or

(3) There is little or no design effort involved.

(b) The contracting officer must insert the clause at 52.236-23, Responsibility of the Architect-Engineer Contractor, in fixed-price architect-engineer contracts.

(c) The contracting officer must insert the clause at 52.236-24, Work Oversight in Architect-Engineer Contracts, in all architect-engineer contracts.

(d) The contracting officer must insert the clause at 52.236-25, Requirements for Registration of Designers, in architect-engineer contracts, except that it may be omitted when the design will be performed—

(1) Outside the United States and its outlying areas; or

(2) In a State or outlying area of the United States that does not have registration requirements for the particular field involved.

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Subpart 36.2 - Evaluation and award

36.201 Construction.

36.201-1 Limitations.

The contracting officer must not award a contract for construction—

(a) At a cost to the Government—

(1) In excess of statutory cost limitations, unless applicable limitations can be and are waived in writing for the particular contract; or

(2) Which, with allowances for Government-imposed contingencies and overhead, exceeds the statutory authorization.

(b) To the firm that designed the project or to the firm's subsidiaries or affiliates, unless approved by the agency head.

36.201-2 Standard and optional forms.

(a) Standard Form 1442, Solicitation, Offer, and Award (Construction, Alteration, or Repair), must be used to solicit and submit offers, and award construction or dismantling, demolition, or removal of improvements contracts expected to exceed the simplified acquisition threshold, and may be used for contracts at or below the simplified acquisition threshold. In all sealed bid solicitations, or when the Government otherwise requires a noncancellable offer acceptance period, the contracting officer must insert in the blank provided in Block 13D the number of calendar days that the offer must be available for acceptance after the date offers are due.

(b) Optional Form 347, Order for Supplies or Services, may be used for construction or dismantling, demolition, or removal of improvements contracts that are at or below the simplified acquisition threshold; provided, that the contracting officer includes the clauses required (see section 36.101-7) in the simplified acquisitions (see part 13).

(c) Contracting officers may use Optional Form 1419, Abstract of Offers—Construction, and Optional Form 1419A, Abstract of Offers—Construction, Continuation Sheet, or the automated equivalents to record offers submitted in response to a sealed bid solicitation (see part 14) and may also use them to record offers submitted in response to negotiated solicitations.

36.202 Architect and engineering services.

36.202-1 Evaluation.

(a) (1) Agencies must provide for one or more permanent or ad hoc architect-engineer evaluation boards—

(i) Which may include preselection boards when authorized by agency regulations;

(ii) Composed of members who—

(A) Collectively, have experience in architecture, engineering, construction, and Government and related acquisition matters;

(B) Are appointed from among highly qualified professional employees of the agency or other agencies; and

(C) If authorized by agency procedure, are private practitioners of architecture, engineering, or related professions.

(2) One Government member of each board must be designated as the chairperson.

(b) Under the general direction of the head of the contracting activity, an evaluation board must perform the following functions:

(1) For each proposed project, evaluate the firms' Standard Form (SF) 330, Part II—General Qualifications, together, if necessary, with data submitted on the SF 330, Part I—Contract-Specific Qualifications, either already on file with the agency or submitted regarding the proposed project.

(2) Conduct discussions with at least 3 firms to consider anticipated concepts and compare alternative methods for furnishing services.

(3) Prepare a selection report for the agency head or other designated selection authority recommending, in order of preference, at least three firms that are considered to be the most highly qualified to perform the required services. The report must include a description of the discussions and evaluation conducted by the board to allow the selection authority to review the considerations upon which the recommendations are based.

36.202-2 Selection authority.

(a) The final selection decision must be made by the agency head or a designated selection authority.

(b) The final selection must be made by reviewing and considering the selection report and advice of technical and staff representatives.

(1) The final selection must be a listing, in order of preference, of the firms considered most highly qualified to perform the work.

(2) The selection authority must not add firms to the selection report.

(3) If the firm listed as the most preferred is not the firm recommended as the most highly qualified, the selection authority must provide a written explanation of the reason for the preference for inclusion in the contract file.

(4) If the firms recommended in the report are not deemed to be qualified or the report is considered inadequate for any reason, the selection authority must record the reasons and return the report for appropriate revision.

(c) All firms on the final selection list are considered selected firms with which the contracting officer may negotiate.

36.202-3 Award.

(a) The contracting officer must negotiate a contract with the most highly qualified firm selected by the selection authority.

(b) (1) If the contracting officer is unable to negotiate a fair and reasonable contract with the firm selected by the selection authority, the contracting officer must—

(i) Formally terminate negotiations;

(ii) Proceed to negotiate a fair and reasonable contract with the next most qualified firm; and

(iii) The contracting officer must continue the process until a fair and reasonable agreement is reached.

(2) If unable to reach a fair and reasonable agreement after negotiating with the firms on the final selection list, the contracting officer must reject all bids and reissue the solicitation.

(c) During negotiations, the contracting officer is permitted to identify a specialized task and disclose the associated cost breakdown figures in the Government estimate, but only to the extent deemed necessary to arrive at a fair and reasonable price.

(d) Contracting officers must only award contracts for architect-engineer services to firms permitted by law to practice the professions of architecture or engineering.

(e) An architect-engineer contract must not be awarded to a firm during the period in which any of its principals or associates are participating as members of the awarding agency's evaluation board.

36.202-4 Short selection process for contracts not to exceed the simplified acquisition threshold.

When authorized by the agency, either or both of the short processes described in this subsection may be used to select firms for contracts not expected to exceed the simplified acquisition threshold. Otherwise, the procedures prescribed in 36.202-1, 36.202-2, and 36.202-3 must be followed.

(a) *Selection by the board.* The board must review and evaluate architect-engineer firms in accordance with 36.202-1, except that the selection report serves as the final selection list and must be provided directly to the contracting officer. The report serves as the authorization for the contracting officer to commence negotiations in accordance with 36.202-3.

(b) *Selection by the chairperson of the board.* When the board decides that formal action by the board is not necessary in connection with a particular selection, the following procedures must be followed:

(1) The chairperson of the board must perform the functions required in 36.202-1(b).

(2) The agency head or designated selection authority must review the report and approve it or return it to the chairperson for appropriate revision.

(3) Upon receipt of an approved report, the chairperson of the board must provide a copy of the report to the contracting officer which will serve as the authorization for the contracting officer to commence negotiations in accordance with 36.202-3.

36.202-5 Standard and optional forms.

(a) Contracting officers must use Standard Form (SF) 252, Architect-Engineer Contract, to award fixed-price contracts for architect-engineer services when the services will be performed in the United States or its outlying areas.

(b) The firm’s qualifications as listed in the SF 330, Part II—General Qualifications as well as the SF 330, Part I—Contract-Specific Qualifications, must be used to evaluate firms before awarding a contract for architect-engineer services:

(1) Use the SF 330, Part I—Contract-Specific Qualifications, to obtain information from an architect-engineer firm about its qualifications for a specific contract when the contract amount is expected to exceed the simplified acquisition threshold. Part I may be used when the contract amount is expected to be at or below the simplified acquisition threshold, if the contracting officer determines that its use is appropriate.

(2) Use the SF 330, Part II—General Qualifications, to obtain information from an architect-engineer firm about its general professional qualifications.

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Subpart 36.3 - Postaward

36.301 Responsibilities of contracting officers.

See part 42 for performing general contract administration functions. For construction and architect-engineer services there are additional functions including:

(a) *Performance and Deliverables.* (1) Contracting officers can, in writing, request the removal of any contractor employee deemed incompetent, careless, or otherwise objectionable (see 52.236-5).

(2) Contracting officers must provide the contractor with a list of work remaining to be performed or corrected for any portions of the work the Government intends to possess or use, prior to taking possession or using said work (see 52.236-11).

(3) Regarding schedules for construction contracts:

(i) The contracting officer may withhold approval of progress payments if the contractor fails to submit the required schedule.

(ii) (A) The contracting officer must determine whether the work is progressing with sufficient diligence to meet the contract's specified completion time; and

(B) May terminate the contractor's right to proceed with the work, or any separable part of it, per the default terms of the contract if the contractor fails to recover lost time (see 52.236-15).

(b) *Modifications.* (1) Upon receiving written notice of differing site conditions, the contracting officer must—

(i) Promptly investigate the site; and

(ii) Negotiate an equitable adjustment if the conditions materially differ, leading to an increase or decrease in the contractor's costs or performance time. Requests for an equitable adjustment will be allowed only if prior written notice is received or if submitted before final payment (see 52.236-2).

(2) If repairs are not made promptly to damaged existing vegetation, structures, equipment, utilities, or improvements; contracting officers may have the necessary work performed and charge the cost to the contractor (see 52.236-9).

(3) If stakes and marks are destroyed by the contractor, the contracting officer may replace them and deduct the cost from due or future payments (see 52.236-17).

(4) Regarding specifications and drawings for construction—

(i) The contracting officer must—

(A) Make a written determination in the case of a discrepancy in the figures, in the drawings, or in the specifications; and

(B) Approve or disapprove shop drawings, with reasons for disapproval if applicable.

(ii) If the contracting officer approves a shop drawing variation from the contract requirements that is minor or does not impact price or performance time, a contract modification will not be issued. For all other approved variations, the contracting officer must issue a contract modification (see 52.236-21).

(5) If a construction contract needs a modification due to architect-engineer design errors, the contracting officer must —

(i) Assess the architect-engineer's liability, with the advice of technical personnel and legal counsel;

(ii) Seek cost recovery if the amount exceeds administrative costs or if it benefits the Government; and

(iii) Include in the contract file a written statement detailing the recovery decision (see 52.236-23).

(c) *Compliance and Reporting.*

(1) Contracting officers must ensure compliance with the labor standards requirement of the contract (e.g., payroll reviews, on-site inspections, and employee interviews to determine compliance).

(2) Contracting officers should advise contractors to promptly execute and return any required payment and performance bonds to ensure a notice to proceed is issued to commence work in a timely manner (see part 28).

(3) Contracting officers must, if appropriate, give written consent for the contractor to abandon, without removal, temporary buildings and utilities. (see 52.236-10).

(4) If the contracting officer becomes aware of noncompliance with requirements or conditions that endanger public or Government personnel health or safety, the contracting officer—

(i) Must notify the contractor orally, then in writing, requesting immediate corrective action; and

(ii) May issue a stop-work order if the contractor fails to promptly take satisfactory corrective action. (see 52.236-13).

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PART 37 - SERVICE CONTRACTING

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37.000 Scope of part.

This part prescribes policy and procedures specific to the acquisition and management of services by contract. This part applies to all contracts and orders for services regardless of the contract type or kind of service being acquired.

37.001 Definition.

Service contract, as used in this part, means a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply. A service contract may be either a nonpersonal or personal contract. It can also cover services performed by either professional or nonprofessional personnel whether on an individual or organizational basis.

Subpart 37.1 - Performance-Based Acquisition

37.101 Presolicitation.

37.101-1 Policy.

When acquiring services, including acquisition of commercial services using the procedures in part 12, agencies must—

(a) Use performance-based acquisition methods to the maximum extent practicable, except for—

(1) Architect-engineer services acquired in accordance with 40 U.S.C. 1101 *et seq.* (see part 36);

(2) Construction (see part 36);

(3) Utility services (see part 41); or

(4) Services that are incidental to supply purchases; and

(b) Use the following order of precedence (Public Law 106-398, section 821(a)):

(1) A firm-fixed price performance-based contract or task order.

(2) A performance-based contract or task order that is not firm-fixed price.

(3) A contract or task order that is not performance-based.

37.102 Evaluation and award.

37.102-1 Procedures.

(a) Performance-based contracts must include a performance work statement (PWS).

(1) The PWS may be prepared by the Government or proposed by an offeror in response to a statement of objectives (SOO)(see 2.101) and included in the contract. While the SOO in a solicitation may be used to guide the development of the PWS, the SOO does not become part of the contract.

(2) The PWS must describe the outcome required rather than “how” that outcome is to be achieved or the estimated level of effort anticipated.

(3) The PWS must, to the maximum extent practicable, include meaningful and measurable performance standards. Such standards may be established by the Government or proposed by the offeror.

(b) When an offeror proposes performance standards in response to a SOO, agencies must—

(1) Evaluate whether the proposed standards meet agency needs;

(2) Identify methods for assessing contractor performance against the standards; and

(3) Incorporate both the accepted standards and assessment methods into the contract.

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Subpart 37.2 - Personal Services

37.201 Presolicitation.

37.201-1 Policy.

Agencies must not contract for personal services unless specifically authorized by statute (e.g., 5 U.S.C. 3109).

37.201-2 Characteristics of personal services contracts.

(a) A personal services contract exists when the Government supervises or controls contractor employees, or appears to do so, as if they were Government employees. This type of contract circumvents civil service laws that require the Government to competitively hire and appoint its own employees.

(b) The Government exercising relatively continuous supervision and control over multiple contractor personnel is frequently a key indicator of a personal services contract. However, judgment is required because service contracts often involve interaction with contractor employees—such as ordering and reviewing specific work—that do not constitute the type of supervision or control that would convert a contractor employee into a Government employee.

37.202 Postaward.

37.202-1 Avoiding personal services contracts.

When administering contracts, agencies must avoid making contractor personnel appear to be, in effect, Government employees, unless a statute provides otherwise.

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Subpart 37.3 - Inherently Governmental Functions

37.301 Presolicitation.

37.301-1 Policy.

(a) Agencies must not award a contract for the performance of an inherently governmental function (see part 7).

(b) Service contracts require special oversight if the contract work:

(1) Supports an inherently governmental function, including contracts providing recommendations, analyses, reports, or similar work products that can influence government decision-making; or

(2) May approach becoming inherently governmental because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the Government administers contractor performance.

(c) Agencies must carefully develop requirements for such work to ensure contracted functions do not expand into inherently governmental functions.

37.302 Postaward.

37.302-1 Contractor support to inherently governmental functions.

Agencies must actively administer contracts to ensure contract functions do not expand into inherently governmental functions, including—

(a) Assigning sufficient qualified Government employees to actively oversee contractor work and monitor for potential encroachment on inherently governmental functions, particularly when the work supports Government policy or decision-making.

(b) Requiring contractor personnel to identify themselves as contractors when attending meetings, answering government phones, or in any situation where their status might be unclear to the public or Congress, unless the agency determines no confusion or harm would result.

(c) Ensuring contractor-produced documents are clearly marked as contractor products or include appropriate disclosure of contractor involvement.

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Subpart 37.4 - Advisory and Assistance Services

37.401 Definition.

Covered personnel , as used in this subpart, means—

(1) An officer or an individual who is appointed in the civil service by one of the following acting in an official capacity:

(i) The President;

(ii) A Member of Congress;

(iii) A member of the uniformed services;

(iv) An individual who is an employee under 5 U.S.C. 2105;

(v) The head of a Government-controlled corporation; or

(vi) An adjutant general appointed by the Secretary concerned under 32 U.S.C. 709(c).

(2) A member of the Armed Services of the United States.

(3) A person assigned to a Federal agency who has been transferred to another position in the competitive service in another agency.

37.402 Presolicitation.

37.402-1 Policy.

When essential to the agency's mission, agencies may contract for advisory and assistance services (A&AS) to obtain—

(a) Management and professional support services;

(b) Studies, analyses, and evaluations (see 37.402-3 for limitations on evaluative work); or

(c) Engineering and technical services.

37.402-2 Prohibitions.

A&AS contracts must not be awarded for purposes of—

(a) Performing work of a policy-making, decision-making, or managerial nature which is the direct responsibility of agency officials;

(b) Bypassing or undermining personnel ceilings, pay limitations, or competitive employment procedures;

(c) Aiding in influencing or enacting legislation; or

(d) Obtaining professional or technical advice which is readily available within the agency or another Federal agency.

37.402-3 A & AS contracts for the evaluation of proposals.

Agencies must not contract for A & AS to conduct evaluations or analyses of any aspect of a proposal submitted for an initial contract award unless—

(a) The head of the agency has determined covered personnel with the required training and capabilities to perform the evaluation or analysis are not readily available in the agency or from another Federal agency (41 U.S.C. 1709).

(1) The head of the agency may consider the associated administrative burden when assessing the feasibility of using covered personnel from other agencies. Such considerations may include—

(i) The time and cost associated with searching for suitable personnel;

(ii) Potential travel costs;

(iii) The amount of such costs in relation to the acquisition value; and

(iv) Potential competing demands for the personnel in meeting the agency’s mission.

(2) The contracting officer must ensure, to the maximum extent practicable, any such determination is made prior to issuing the solicitation and in accordance with agency procedures. Once the solicitation is released, any determination of a need for A&AS support in analyzing proposals for the initial contract award must be made prior to granting the A&AS contractor access to any proposal material.

(b) The contractor is a Federally-Funded Research and Development Center (FFRDC) as authorized in 41 U.S.C. 1709(c) and the work placed under the FFRDC's contract meets the criteria of part 35; or

(c) Such functions are otherwise authorized by law.

37.402-4 Exclusions.

The following activities and programs are excluded or exempted from the definition of A&AS:

(a) Routine information technology services unless they are an integral part of a contract for the acquisition of advisory and assistance services.

(b) Architectural and engineering services as defined in 40 U.S.C. 1102.

(c) Research on theoretical mathematics and basic research involving medical, biological, physical, social, psychological, or other phenomena.

37.403 Evaluation and award.

37.403-1 Treatment of former Government employees.

Agencies must ensure A&AS is not contracted for on a preferential basis to former Government employees.

37.403-2 Avoiding A & AS use in evaluation of proposals.

When evaluating proposals for initial contract award, agencies must not use A & AS to support evaluation unless the conditions at 37.402-3 are satisfied.

37.404 Postaward.

37.404-1 Performance monitoring in A & AS contracts.

(a) Agencies must administer A & AS contracts with sufficient oversight to ensure prohibited practices at 37.402-2 are not performed.

(b) Agencies must not pay for A & AS evaluations or analyses of any aspect of a proposal submitted for an initial contract award unless the conditions at 37.402-3 are satisfied.

Subpart 37.5 - Child Care Services

37.501 Definition.

Child care services, as used in this subpart, means child protective services (including the investigation of child abuse and neglect reports), social services, health and mental health care, child (day) care, education (whether or not directly involved in teaching), foster care, residential care, recreational or rehabilitative programs, and detention, correctional, or treatment services.

37.502 Presolicitation.

37.502-1 Policy.

Ensure that contracts for nonpersonal child care services include requirements for criminal history background checks on employees who will perform child care services under the contract in accordance with 34 U.S.C. 20351 and agency procedures.

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Subpart 37.6 - Nonpersonal Health care services

37.601 Presolicitation.

37.601-1 Policy.

Agencies must ensure nonpersonal health care services contracts with physicians, dentists and other health care providers include indemnification and medical liability insurance.

37.601-2 Procedures.

To ensure adequate medical liability insurance is obtained, the contracting officer must insert the necessary value(s) in paragraph (a) of contract clause 52.237-7. Agencies determine the value(s) by considering the standard coverage prevailing within the local community for the specific medical specialty, or a higher amount if necessary to protect the Government's interests.

37.601-3 Contract clause.

Insert the clause at 52.237-7, Indemnification and Medical Liability Insurance, in solicitations and contracts for nonpersonal health care services.

37.602 Evaluation and award.

37.602-1 Evidence of insurability.

Before making award, the contracting officer must obtain proof that the apparent successful offeror will be able to obtain the required medical liability insurance (e.g., letter of intent from a reputable insurer, underwriting approval letter).

37.603 Postaward.

37.603-1 Evidence of insurance.

After contract award, but before performance begins, the contracting officer must obtain proof that the contractor holds an active policy for the required medical liability insurance.

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Subpart 37.7 - Dismantling, Demolition, or Removal of Improvements

37.701 Presolicitation.

37.701-1 Labor standards.

Contracts for dismantling of buildings, ground improvements, and other real property structures and for the removal of such structures or a portion of them (hereafter referred to as *dismantling, demolition, or removal of improvements*) must comply with one of two labor standards statutes. Service Contract Labor Standards (41 U.S.C. chapter 67) apply when the contract is solely for dismantling, demolition, or removal. However, if the Government plans any follow-on construction, alteration, or repair work of a public building or public work at the same location—even under a separate contract—then the Construction Wage Rate Requirements (40 U.S.C. chapter 31, subchapter IV) apply (see part 22).

37.701-2 Bonds or other security.

The standard bonding requirements (see part 28) in 40 U.S.C. chapter 31, subchapter III do not apply to contracts solely for dismantling, demolition, or removal of improvements. However, the contracting officer may require the contractor to furnish a performance bond or other security in an amount that the contracting officer considers adequate to—

(a) Ensure completion of the work;

(b) Protect property to be retained by the Government;

(c) Protect property to be provided as compensation to the contractor; and

(d) Protect the Government against damage to adjoining property.

37.701-3 Payments and title.

Agencies must structure contracts to carefully balance payment terms and title rights to protect the Government's interests.

(a) Contracts for dismantling or demolition may be structured so that either the Government pays the contractor for performing the work, or the contractor pays the Government for the right to salvage and remove the resulting materials.

(b) The contracting officer must evaluate all salvageable property to determine its usefulness to the Government. When property is worth more to the Government than its salvage value to the contractor, the contract must specifically designate it for Government retention. For all other property, which the contractor will own, the contracting officer must determine its fair market value. This valuation affects both payment structure and any potential termination compensation.

37.701-4 Solicitation provisions and contract clauses.

(a) Insert the clause at 52.237-4, Payment by Government to Contractor, in solicitations and contracts solely for dismantling, demolition, or removal of improvements whenever the contracting officer determines that the Government must make payment to the contractor in addition to any title to property that the contractor may receive under the contract. If the contracting officer determines that all material resulting from the dismantling or demolition work is to be retained by the Government, use the basic clause with its Alternate I.

(b) Insert the clause at 52.237-5, Payment by Contractor to Government in solicitations and contracts for dismantling, demolition, or removal of improvements whenever the contractor is to receive title to dismantled or demolished property and a net amount of compensation is due to the Government, except if the contracting officer determines that it would be advantageous to the Government for the contractor to pay in increments and the Government to transfer title to the contractor for increments of property only upon receipt of those payments.

(c) Insert the clause at 52.237-6, Incremental Payment by Contractor to Government, in solicitations and contracts for dismantling, demolition, or removal of improvements if—

(1) The contractor is to receive title to dismantled or demolished property and a net amount of compensation is due the Government; and

(2) The contracting officer determines that it would be advantageous to the Government for the contractor to pay in increments (e.g., to encourage greater competition or participation of small business concerns), and for the Government to transfer title to the contractor for increments of property only upon receipt of those payments.

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Subpart 37.8 - Other Service Considerations

37.801 Definitions.

As used in this subpart—

Adjusted hourly rate (including uncompensated overtime) is the rate that results from multiplying the hourly rate for a 40-hour work week by 40, and then dividing by the proposed hours per week which includes uncompensated overtime hours over and above the standard 40-hour work week. For example, 45 hours proposed on a 40-hour work week basis at $20 per hour would be converted to an uncompensated overtime rate of $17.78 per hour ($20.00 × *40/45 = $17.78).*

Uncompensated overtime means the hours worked without additional compensation in excess of an average of 40 hours per week by direct charge employees who are exempt from the Fair Labor Standards Act. Compensated personal absences such as holidays, vacations, and sick leave must be included in the normal work week for purposes of computing uncompensated overtime hours.

37.802 Presolicitation

37.802-1 Uncompensated overtime.

Agencies must ensure solicitations do not incentivize the use of uncompensated overtime (10 U.S.C. 4507).

37.802-2 Services of quasi-military armed forces.

Agencies must not contract with organizations that offer quasi-military armed forces for hire, or with their employees, regardless of the contract's character (5 U.S.C. 3108). An organization providing guard or protective services is not considered a quasi-military armed force, even though the guards are armed or the organization provides general investigative or detective services.

37.802-3 Foreign national severance cost limitations.

(a) Part 31 specifies cost allowability limitations for severance payments to foreign nationals under service contracts outside the United States. However, agencies may waive or except the cost limitations in certain circumstances (see 10 U.S.C. 3744 and 41 U.S.C. 4304).

(b) Waivers.

(1) The head of the agency may waive such severance cost limitations when the contract—

(i) Provides significant support services for members of the armed forces stationed or deployed outside the United States; or

(ii) Provides significant support for employees of an executive agency posted outside the United States; and

(iii) The head of the agency determines the conditions outlined in 52.237-8(b) are present.

(2) Waivers cannot be granted if the severance is a result of the curtailment or termination of basing rights of the United States military at the request of the host government (see part 31).

(3) Waivers may only be granted prior to contract award.

(c) Applicability. The Secretary of Defense may determine that the cost allowability limitations on severance do not apply in military banking contracts (10 U.S.C. 3744(a)(13) and (14)).

37.802-4 Use of private sector temporaries.

(a) Agencies may hire temporary help service firms to provide workers for short-term or occasional needs (5 U.S.C. 3109). These arrangements are not considered personal services contracts. However, agencies cannot use temporary help to avoid normal Federal hiring processes or replace existing Federal employees.

(b) All temporary help contracts must comply with the requirements in 5 CFR part 300, subpart E, Use of Private Sector Temporaries, and agency procedures.

(c) Contracting officers should consult with cognizant civilian personnel offices for expertise when exercising this authority.

37.802-5 Solicitation provisions and contract clauses.

(a) Insert the provision at 52.237-1, Site Visit, in solicitations for services to be performed on Government installations, unless the solicitation is for construction.

(b) Insert the clause at 52.237-2, Protection of Government Buildings, Equipment, and Vegetation, in solicitations and contracts for services to be performed on Government installations, unless a construction contract is contemplated.

(c) Insert the clause at 52.237-3, Continuity of Services, in solicitations and contracts for services, when—

(1) The services under the contract are considered vital to the Government and must be continued without interruption and when, upon contract expiration, a successor, either the Government or another contractor, may continue them; and

(2) The Government anticipates difficulties during the transition from one contractor to another or to the Government. Examples of instances where use of the clause may be appropriate are services in remote locations or services requiring personnel with special security clearances.

(d) Insert the provision at 52.237-8, Restriction on Severance Payments to Foreign Nationals, in solicitations that meet the criteria in 37.802-3(b).

(e) Insert the clause at 52.237-9, Waiver of Limitation on Severance Payments to Foreign Nationals when the head of an agency has granted a waiver pursuant to 37.802-3(b).

(f) Insert the provision at 52.237-10, Identification of Uncompensated Overtime, in solicitations valued above the simplified acquisition threshold, for professional or technical services to be acquired on the basis of the level of effort rather than performance outcome required.

37.803 Evaluation and award.

37.803-1 Evaluating uncompensated overtime.

Agencies must ensure an offeror's use of uncompensated overtime will not degrade the level of technical expertise required to meet Government requirements. When offerors propose uncompensated overtime, contracting officers must assess potential risks posed, including by—

(a) Using adjusted hourly rates instead of standard hourly rates for all proposed hours;

(b) Reviewing whether unrealistically low labor rates or costs might lead to poor quality or inadequate service; and

(c) Examining whether uncompensated overtime is distributed unevenly across skill levels or concentrated in critical technical positions.

37.803-2 Funding and term of service contracts.

(a) Contracts funded by annual appropriations must not extend beyond the end of the fiscal year of the appropriation except when authorized (see part 32).

(b) The head of the agency may enter into a contract, exercise an option, or place an order under a contract for severable services for a period that begins in one fiscal year and ends in the next fiscal year if the period of the contract awarded, option exercised, or order placed does not exceed one year (10 U.S.C. 3133 and 41 U.S.C. 3902). Funds made available for a fiscal year may be obligated for the total amount of an action entered into under this authority.

(c) Agencies with statutory multiyear authority should consider the use of this authority to encourage and promote economical business operations when acquiring services.

PART 38 - RESERVED

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PART 39 - ACQUISITION OF INFORMATION AND COMMUNICATION TECHNOLOGY

Sec.

39.001 Applicability.

Subpart 39.1 - Presolicitation

39.101 Management of risk.
39.102 Modular contracting.
39.103 Information technology services.
39.104 ICT accessibility standards.
39.104-1 Scope.
39.104-2 Policy.
39.104-3 Applicability.
39.104-4 Exceptions.
39.104-5 Exemptions.

Subpart 39.2 - Evaluation and Award

39.201 ICT accessibility standards for indefinite-quantity contracts.

Subpart 39.3 - Postaward

39.301 ICT accessibility standards for task orders or delivery orders.

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39.001 Applicability.

(a) (1) This part applies to acquiring information and communication technology (ICT), and supplies and services that use ICT.

(2) This part emphasizes strategies that promote faster acquisition and secure deployment of technology that is new or emerging.

(b) This part does not apply to acquiring information technology for national security systems; as defined in 40 U.S.C. 11103

Subpart 39.1 - Presolicitation

39.101 Management of risk.

(a) Before entering into an information technology contract, agencies should analyze risks, benefits, and costs. Reasonable risk taking is appropriate as long as risks are controlled and mitigated.

(b) Both contracting and program office officials are responsible for assessing, monitoring and controlling risk throughout the acquisition process.

39.102 Modular contracting.

(a) Agencies should use modular contracting (i.e., use one or more contracts to acquire information technology systems in successive, interoperable increments) to acquire major systems of information technology, to the maximum extent possible (see 41 U.S.C. 2308). Agencies may also use modular contracting to acquire non-major systems of information technology.

(b) When acquiring an information technology system (i.e., either a major system or non-major system), it may be divided into several smaller increments (see 41 U.S.C. 2308(c)) that—

(1) Are easier to manage individually than would be possible in one comprehensive acquisition;

(2) Address complex information technology objectives incrementally to enhance the likelihood of achieving workable systems or solutions for attainment of those objectives;

(3) Provide for delivery, implementation, and testing of workable systems or solutions in discrete increments, each of which comprises a system or solution that is not dependent on any subsequent increment in order to perform its principal functions; and

(4) Provide an opportunity for subsequent increments to take advantage of any evolution in technology or needs that occur during implementation and use of the earlier increments.

(c) To promote compatibility, each increment should comply with common or commercially acceptable information technology standards when available and appropriate, and be compatible with other (including earlier and later) increments.

(d) When using modular contracting, agencies should, to the maximum extent possible—

(1) Award a contract for an increment within 180 days after the date on which the solicitation is issued. If an award cannot be made within 180 days, agencies should consider cancelling the solicitation in accordance with 14.209 or 15.206(e).

(2) Schedule deliveries under the contract to occur within 18 months after the solicitation was issued.

39.103 Information technology services.

When acquiring information technology services, solicitations should not describe any minimum experience or educational requirements for proposed contractor personnel, unless the contracting officer determines that the needs of the agency—

(a) Cannot be met without that requirement; or

(b) Require using other than a performance-based acquisition (see subpart 37.6).

39.104 ICT accessibility standards.

39.104-1 Scope.

(a) This section implements section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), and the Architectural and Transportation Barriers Compliance Board's (U.S. Access Board) ICT accessibility standards at 36 CFR 1194.1.

(b) For further information on section 508 visit http://www.section508.gov.

39.104-2 Policy.

When acquiring ICT, agencies must ensure that—

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

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

39.104-3 Applicability.

(a) *General.* Unless an exception at 39.104-4 or an exemption at 39.104-5 applies, acquisitions for ICT supplies and services must meet the applicable ICT accessibility standards at 36 CFR 1194.1.

(b) *Commercial products and commercial services.* When acquiring commercial products and commercial services, an agency must comply with those ICT accessibility standards that can be met with supplies or services that are available in the commercial marketplace and that best address the agency's needs, but see 39.104-5(a)(3).

(c) *Legacy ICT.* Any component or portion of existing ICT (*i.e.,* ICT that was procured, maintained, or used on or before January 18, 2018) is not required to comply with the current ICT accessibility standards if it—

(1) Complies with an earlier standard issued according to section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), which is set forth in Appendix D to 36 CFR 1194.1); and

(2) Has not been altered (i.e., a change that affects interoperability, the user interface, or access to information or data) after January 18, 2018.

(d) *Alterations of legacy ICT.* When altering any component or portion of existing ICT, after January 18, 2018, the component or portion must be modified to conform to the current ICT accessibility standards in 36 CFR 1194.1.

39.104-4 Exceptions.

(a) The requirements in 39.104-2 do not apply to acquisitions for—

(1) *National security systems.* ICT operated by agencies as part of a national security system, as defined by 40 U.S.C. 11103(a);

(2) *Incidental contract items.* ICT acquired by a contractor incidental to a contract, *i.e.,* for in-house use by the contractor to perform the contract; or

(3) *Maintenance or monitoring spaces.* The portions of ICT that are operable parts (*i.e.,* hardware-based user controls for activating, deactivating, or adjusting ICT) or status indicators, and that are located in spaces frequented only by service personnel for maintenance, repair, or occasional monitoring of equipment.

(b) The contracting officer must receive, as a part of the requirements documentation, written confirmation from the requiring activity that an exception, in accordance with paragraph (a)(1), (2), or (3) of this section, applies to the ICT supply or service (see 7.105(b)(5)(iv)). This documentation must be maintained in the contract file.

39.104-5 Exemptions.

(a) Allowable exemptions. An agency may grant an exemption for the following:

(1) *Undue burden.* When an agency determines the acquisition of ICT conforming with all the applicable ICT accessibility standards would impose an undue burden on the agency, compliance with the ICT accessibility standards is only required to the extent that it would not impose an undue burden. In determining whether conformance to one or more ICT accessibility standards would impose an undue burden, an agency must consider the extent to which conformance would impose significant difficulty or expense considering the agency resources available to the program or component for which the ICT supply or service is being procured.

(2) *Fundamental alteration.* When an agency determines that acquisition of ICT that conforms with all applicable ICT accessibility standards would result in a fundamental alteration in the nature of the ICT, such acquisition is required to conform only to the extent that conformance will not fundamentally alter the nature of the ICT.

(3) *Nonavailability of conforming commercial products and commercial services.* Where there are no commercial products and commercial services that fully conform to the ICT accessibility standards, the agency must procure the supplies or service available in the commercial marketplace that best meets the ICT accessibility standards consistent with the agency's needs.

(b) *Alternative means of access.* An agency must provide individuals with disabilities access to and use of information and data by an alternative means to meet the identified needs when an exemption in paragraphs (a)(1), (2), or (3) of this section applies.

(c) *Documentation.* When an exemption applies, the contracting officer must obtain, as part of the requirements documentation, a written determination from the requiring activity explaining the basis for the exemption in paragraphs (a)(1), (2) or (3) of this section. Maintain this documentation in the contract file.

(1) *Undue burden.* A determination of undue burden must address why and to what extent compliance with applicable ICT accessibility standards constitutes an undue burden.

(2) *Fundamental alteration.* A determination of fundamental alteration must address the extent to which compliance with the applicable ICT accessibility standards would fundamentally alter the nature of the ICT.

(3) *Nonavailability of conforming commercial products and commercial services.* A determination of commercial products and commercial services nonavailability must include—

(i) A description of the market research performed;

(ii) A listing of the requirements that cannot be met; and

(iii) The rationale for determining that the ICT to be procured best meets the ICT accessibility standards in 36 CFR 1194.1, consistent with the agency's needs.

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Subpart 39.2 - Evaluation and Award

39.201 ICT accessibility standards for indefinite-quantity contracts.

(a) Confirming an exception (see 39.104-4) or determining an exemption (see 39.104-5) is not required before awarding of an indefinite-quantity contract, except for requirements that the initial award is to satisfy.

(b) The contract must identify which supplies and services the contractor indicates as compliant and show where to find full details of compliance (e.g., a contractor may provide a link to a vendor's website identifying supplies or services that are fully compliant with ICT accessibility standards.

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Subpart 39.3 - Postaward

39.301 ICT accessibility standards for task orders or delivery orders.

When issuing a task order or delivery order under an indefinite-quantity contract, the requiring activity and ordering activity must ensure compliance with the ICT accessibility standards. For a noncompliant ICT item, the requiring activity must document an exception (see 39.104-5) or exemption (see 39.104-5).

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PART 40 - INFORMATION SECURITY AND SUPPLY CHAIN SECURITY

Sec.

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40.000 Scope of part.

(a) This part addresses broad security requirements that apply to acquisitions of products and services. It outlines policies and procedures for managing information security and supply chain security when acquiring products and services that include, but are not limited to, information and communications technology (ICT).

(b) See parts 24 and 46 for more policies and procedures related to managing information security and supply chain security.

(c) Information and supply chain policies and procedures that are unrelated to security are covered in other parts of the FAR (*e.g.*, part 22 for labor and human trafficking risks).

40.001 Definition.

As used in this part—

Supply chain risk, as defined in 41 U.S.C. 4713(k), means the risk that any person may sabotage, maliciously introduce unwanted functionality, extract data, or otherwise manipulate the design, integrity, manufacturing, production, distribution, installation, operation, maintenance, disposition, or retirement of covered articles so as to surveil, deny, disrupt, or otherwise manipulate the function, use, or operation of the covered articles or information stored or transmitted on the covered articles.

Subpart 40.1 - Processing Supply Chain Risk Information

40.101 Definition.

As used in this subpart—

Supply chain risk information includes, but is not limited to, information that describes or identifies:

(1) Functionality and features of covered articles, including access to data and information system privileges;

(2) The user environment where a covered article is used or installed;

(3) The ability of a source to produce and deliver covered articles as expected;

(4) Foreign control of, or influence over, a source or covered article (e.g., foreign ownership, personal and professional ties between a source and any foreign entity, legal regime of any foreign country in which a source is headquartered or conducts operations);

(5) Implications to government mission(s) or assets, national security, homeland security, or critical functions associated with use of a covered source or covered article;

(6) Vulnerability of Federal systems, programs, or facilities;

(7) Market alternatives to the covered source;

(8) Potential impact or harm caused by the possible loss, damage, or compromise of a product, material, or service to an organization's operations or mission; and

(9) Likelihood of a potential impact or harm, or the possible exploitation of a system;

(10) Security, authenticity, and integrity of covered articles and their supply and compilation chains;

(11) Capacity to mitigate risks identified;

(12) Factors that may reflect upon the reliability of other supply chain risk information; and

(13) Any other considerations that would factor into analyzing the security, integrity, resilience, quality, trustworthiness, or authenticity of covered articles or sources.

40.102 Sharing supply chain risk information.

Executive agencies must share relevant supply chain risk information with the Federal Acquisition Security Council if the executive agency determines there is a reasonable basis to conclude a substantial supply chain risk associated with a source or covered article exists (see 41 CFR 201-1.201).

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Subpart 40.2 - Security Prohibitions and Exclusions

40.201 Definitions.

As used in this subpart—

American Security Drone Act-covered foreign entity means an entity included on a list developed and maintained by the Federal Acquisition Security Council (FASC) and published in the System for Award Management (SAM) at https://www.sam.gov (section 1822 of Pub. L. 118-31, 41 U.S.C. 3901 note prec.).

Backhaul means intermediate links between the core network, or backbone network, and the small subnetworks at the edge of the network (*e.g.*, connecting cell phones/towers to the core telephone network). Backhaul can be wireless (e.g., microwave) or wired (*e.g.*, fiber optic, coaxial cable, Ethernet).

Business operations means engaging in commerce in any form, including by acquiring, developing, maintaining, owning, selling, possessing, leasing, or operating equipment, facilities, personnel, products, services, personal property, real property, or any other apparatus of business or commerce.

Covered application means the social networking service TikTok or any successor application or service developed or provided by ByteDance Limited or an entity owned by ByteDance Limited.

Covered article, as defined in 41 U.S.C. 4713(k), means—

(1) Information technology, as defined in 40 U.S.C. 11101, including cloud computing services of all types;

(2) Telecommunications equipment or telecommunications service, as those terms are defined in section 3 of the Communications Act of 1934 (47 U.S.C. 153);

(3) The processing of information on a Federal or non-Federal information system, subject to the requirements of the Controlled Unclassified Information program (see 32 CFR part 2002); or

(4) Hardware, systems, devices, software, or services that include embedded or incidental information technology.

Covered foreign country means The People's Republic of China.

Covered telecommunications equipment or services means—

(1) Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities);

(2) For the purpose of public safety, security of Government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities);

(3) Telecommunications or video surveillance services provided by such entities or using such equipment; or

(4) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

FASCSA order means any of the following orders issued under the Federal Acquisition Supply Chain Security Act (FASCSA) that requires removing covered articles from executive agency information systems or excluding one or more named sources or named covered articles from executive agency procurement actions, as described in 41 CFR 201-1.303(d) and (e):

(1) The Secretary of Homeland Security may issue FASCSA orders that apply to civilian agencies, to the extent not covered by paragraph (2) or (3) of this definition. This type of FASCSA order may be referred to as a Department of Homeland Security (DHS) FASCSA order.

(2) The Secretary of Defense may issue FASCSA orders that apply to the Department of Defense (DoD) and national security systems other than sensitive compartmented information systems. This type of FASCSA order may be referred to as a DoD FASCSA order.

(3) The Director of National Intelligence (DNI) may issue FASCSA orders that apply to the intelligence community and sensitive compartmented information systems, to the extent not covered by paragraph (2) of this definition. This type of FASCSA order may be referred to as a DNI FASCSA order.

Federal Acquisition Security Council (FASC) means the Council established under 41 U.S.C. 1322(a).

Information technology, as defined in 40 U.S.C. 11101(6)—

(1) Means any equipment or interconnected system or subsystem of equipment, used in the automatic acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission,

or reception of data or information by the executive agency, if the equipment is used by the executive agency directly or is used by a contractor under a contract with the executive agency that requires the use—

(i) Of that equipment; or

(ii) Of that equipment to a significant extent in the performance of a service or the furnishing of a product;

(2) 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; but

(3) Does not include any equipment acquired by a Federal contractor incidental to a Federal contract.

Intelligence community, as defined by 50 U.S.C. 3003(4), means the following—

(1) The Office of the Director of National Intelligence;

(2) The Central Intelligence Agency;

(3) The National Security Agency;

(4) The Defense Intelligence Agency;

(5) The National Geospatial-Intelligence Agency;

(6) The National Reconnaissance Office;

(7) Other offices within DoD for the collection of specialized national intelligence through reconnaissance programs;

(8) The intelligence elements of the Army, the Navy, the Air Force, the Marine Corps, the Coast Guard, the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Department of Energy;

(9) The Bureau of Intelligence and Research of the Department of State;

(10) The Office of Intelligence and Analysis of the Department of the Treasury;

(11) The Office of Intelligence and Analysis of the Department of Homeland Security; or

(12) Such other elements of any department or agency as may be designated by the President or designated jointly by the Director of National Intelligence and the head of the department or agency concerned, as an element of the intelligence community.

Kaspersky Lab-covered article means any hardware, software, or service that—

(1) Is developed or provided by a Kaspersky Lab-covered entity;

(2) Includes any hardware, software, or service developed or provided in whole or in part by a Kaspersky Lab-covered entity; or

(3) Contains components using any hardware or software developed in whole or in part by a Kaspersky Lab-covered entity.

Kaspersky Lab-covered entity means—

(1) Kaspersky Lab;

(2) Any successor entity to Kaspersky Lab, including any change in name, *e.g.*, "Kaspersky";

(3) Any entity that controls, is controlled by, or is under common control with Kaspersky Lab; or

(4) Any entity of which Kaspersky Lab has a majority ownership.

Marginalized populations of Sudan means—

(1) Adversely affected groups in regions authorized to receive assistance under section 8(c) of the Darfur Peace and Accountability Act (Pub. L. 109-344) (50 U.S.C. 1701 note); and

(2) Marginalized areas in Northern Sudan described in section 4(9) of such Act.

National security system, as defined in 44 U.S.C. 3552, means any information system (including any telecommunications system) used or operated by an agency or by a contractor of an agency, or other organization on behalf of an agency—

(1) The function, operation, or use of which involves intelligence activities; involves cryptologic activities related to national security; involves command and control of military forces; involves equipment that is an integral part of a weapon or weapons system; or is critical to the direct fulfillment of military or intelligence missions, but does not include a system that is to be used for routine administrative and business applications (including payroll, finance, logistics, and personnel management applications); or

(2) Is protected at all times by procedures established for information that have been specifically authorized under criteria established by an Executive order or an Act of Congress to be kept classified in the interest of national defense or foreign policy.

Sensitive compartmented information means classified information concerning or derived from intelligence sources, methods, or analytical processes, which is required to be handled within formal access control systems established by the Director of National Intelligence.

Sensitive compartmented information system means a national security system authorized to process or store sensitive compartmented information.

Source means a non-Federal supplier, or potential supplier, of products or services, at any tier.

Subsidiary means an entity in which more than 50 percent of the entity is owned directly by a parent corporation or through another subsidiary of a parent corporation.

Unmanned aircraft means an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft (49 U.S.C. 44801(11)).

Unmanned aircraft system means an unmanned aircraft and associated elements (including communication links and the components that control the unmanned aircraft) that are required for the operator to operate safely and efficiently in the national airspace system (49 U.S.C. 44801(12)).

40.202 Prohibitions.

Agencies are prohibited from contracting, including renewing or extending contracts, with contractors that operate, provide, and/or use certain products or services that violate any of the following prohibitions (see the clause at 52.240-91 for details regarding the scope of each prohibition and whether there are any exceptions, exemptions, or waiver possibilities):

(a) *TikTok/ByteDance.* Covered Application (Section 102 of Division R of the Consolidated Appropriations Act, 2023 (Pub. L. 117-328));

(b) *Kaspersky.* Kaspersky Lab-covered article (Section 1634 of Division A of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91);

(c) *Drones.* Unmanned Aircraft Systems Manufactured or Assembled by American Security Drone Act—Covered Foreign Entities (American Security Drone Act of 2023, within the National Defense Authorization Act for Fiscal Year 2024 (Pub. L. 118-31, Div. A, Title XVIII, Subtitle B, 41 U.S.C. 3901 note prec.));

(d) *Telecommunications and Video Surveillance Equipment*. (Paragraphs (a)(1)(A) and (a)(1)(B) of section 889 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232));

(e) *Governmentwide Exclusion Orders*. FASCSA orders (sections 1823 and 1826 of Pub. L. 118-31, 41 U.S.C. 3901 note prec.);

(f) *Office of Foreign Assets Control (OFAC) Restrictions*. OFAC Restrictions (International Emergency Economic Powers Act (IEEPA) (50 U.S.C. 1701 et seq.));

(g) *Sudan Prohibition*. Accountability and Divestment Act of 2007 (Pub. L. 110-174); and

(h) *Iran Prohibitions*. Section 6(b)(1)(A) of Iran Sanctions Act (50 U.S.C. 1701 note) and section 6(b)(1)(B) of Iran Sanctions Act (50 U.S.C. 1701 note).

40.203 General Procedures.

40.203-1 Assessment of proposals.

Except where an exemption, exception, or waiver applies, the contracting officer should work with the program office or requiring activity to review proposals if needed to ensure they are not proposing delivery of a product or service in violation of the prohibitions in FAR 40.202, such as a FASC-prohibited unmanned aircraft system (drone).

40.203-2 Disclosures.

If the offeror submits a disclosure according to FAR 52.240-90, the contracting officer must follow agency procedures to determine if an exception or exemption applies with any prohibition, or if a waiver may be applicable in accordance with 40.203-3.

40.203-3 Waivers.

(a) An acquisition may be either fully or partially covered by a waiver. Partial waiver coverage occurs when only portions of the products or services being procured or provided by a source are covered by an applicable waiver. If the requiring activity notifies the contracting officer that the acquisition is partially covered by an approved individual waiver or class waiver, then the contracting officer must work with the program office or requiring activity to identify in the solicitation, request for quotation, or order the products or services that are subject to the waiver.

(b) The contracting officer, in accordance with agency procedures, must decide whether to pursue a waiver or to make award to an offeror that does not require a waiver. If a full or partial waiver is being pursued, then the contracting officer may not make an award until written approval is obtained that the waiver has been granted.

40.203-4 Reporting requirements.

If a contractor submits a report according to the clause at 52.240-91, the contracting officer must follow agency procedures to determine if an exception or exemption applies with any prohibition, or if a waiver may be applicable in accordance with 40.203-3.

40.204 Specific Procedures.

40.204-1 Procedures on FASCSA orders.

(a) *Identifying applicable FASCSA orders*. Whether FASCSA orders apply to a particular acquisition depends on the contracting office's agency, the scope of the FASCSA order, the funding, and whether the requirement involves certain types of information systems (see the definition of "FASCSA order" at 40.201). The contracting officer must coordinate with the program office or requiring activity to identify the FASCSA order(s) that apply to the acquisition as follows:

(1) Unless the program office or requiring activity instructs the contracting officer otherwise, FASCSA orders apply as follows:

(i) Contracts awarded by civilian agencies will be subject to DHS FASCSA orders.

(ii) Contracts awarded by DoD will be subject to DoD FASCSA orders. See paragraph (e)(1) of 52.240-91, Security Prohibitions and Exclusions.

(2) For acquisitions where the program office or the requiring activity instructs the contracting officer to select specific types of FASCSA orders, the contracting officer must select "yes" or "no" for each applicable type of FASCSA order. See paragraph (e)(1) of 52.240-91, Security Prohibitions and Exclusions, with its Alternate I.

(b) *Federal Supply Schedules, Governmentwide acquisition contracts, and multi-agency contracts specific procedures.*

(1) Applying FASCSA orders. An agency awarding this type of contract must apply FASCSA orders to the basic contract award. Ordering activity contracting officers may use this contract vehicle without taking further steps to identify applicable FASCSA orders in the order. The contracting officer awarding the basic contract would select "yes" for all FASCSA orders (i.e., "DHS FASCSA Order" "DoD FASCSA Order" and "DNI FASCSA Order") (see paragraph (e)(1) of 52.240-91, Security Prohibitions and Exclusions, with its Alternate I). If the contracting officer becomes aware of a newly issued applicable FASCSA order, then the agency awarding the basic contract must modify the basic contract to remove any covered article, or any products or services produced or provided by a source, prohibited by the newly issued FASCSA order.

(2) Interagency acquisitions. For an interagency acquisition (see subpart 17.5) where the funding agency differs from the awarding agency, the funding agency must determine the applicable FASCSA orders.

(c) *Updating the solicitation or contract for new FASCSA orders*. The contracting officer must update a solicitation or contract if the program office or requiring activity determines it needs to:

(1) Amend the solicitation to include FASCSA orders in effect after the date the solicitation was issued but before contract award; or

(2) Modify the contract to include FASCSA orders issued after the date of contract award.

(i) Any such modification should take place within a reasonable amount of time, but no later than 6 months from the program office or requiring activity's determination.

(ii) If the contract is not modified within the time specified in paragraph (c)(2)(i) of this section, then the contract file must be documented giving the reason why the contract could not be modified within this timeframe.

(d) *Agency specific procedures*. The contracting officer must follow agency procedures for implementing FASCSA orders not identified in SAM.

(e) *Waivers*.

(1) An executive agency required to comply with a FASCSA order may submit a request that the order or some of its provisions not apply to—

(i) The agency;

(ii) Specific actions of the agency or a specific class of acquisitions;

(iii) Actions of the agency for a period of time before compliance with the order is practicable; or

(iv) Other activities, as appropriate, that the requesting agency identifies.

(2) A request for waiver must be submitted by the executive agency in writing to the official that issued the order, unless other instructions for submission are provided by the applicable FASCSA order.

(3) The request for waiver must provide the following information for the issuing official to review and evaluate the request, including—

(i) Identification of the applicable FASCSA order;

(ii) A description of the exception sought, including, if limited to only a portion of the order, a description of the order provisions from which an exception is sought;

(iii) The name or a description sufficient to identify the covered article or the product or service provided by a source that is subject to the order from which an exception is sought;

(iv) Compelling justification for why an exception should be granted, such as the impact of the order on the agency's ability to fulfill its mission-critical functions, or considerations related to the national interest, including national security reviews, national security investigations, or national security agreements;

(v) Any alternative mitigations to be undertaken to reduce the risks addressed by the FASCSA order; and

(vi) Any other information requested by the issuing official.

40.204-2 Procedures on contracting for certain telecommunications and video surveillance services or equipment.

Identifying covered telecommunications equipment or services.

(a) Prohibitions on purchasing equipment, systems, or services produced or provided by entities identified in paragraphs (1) and (2) of the definition of "covered telecommunications equipment or services" (including known subsidiaries or affiliates) at 40.201 will be recorded in SAM (see 9.404).

(b) Prohibitions on purchasing equipment, systems, or services produced or provided by entities identified in paragraph (4) of the definition of "covered telecommunications equipment or services" (including known subsidiaries or affiliates) at 40.201 are recorded by DoD in SAM (see 9.404).

40.204-3 Procedures on Sudan Prohibition.

(a) *Waivers*.

(1) The President may waive the certification within the provision at 52.240-90(e) on a case-by-case basis if the President determines and certifies in writing to the appropriate congressional committees that it is in the national interest to do so.

(2) An agency seeking waiver of the requirement must submit the request to the Administrator of the Office of Federal Procurement Policy (OFPP), allowing sufficient time for review and approval. Upon receipt of the waiver request, OFPP must consult with the President's National Security Council and the Department of State to assess foreign policy aspects of making a national interest recommendation

(3) Agencies may request a waiver on an individual or class basis; however, waivers are not indefinite and can be cancelled if warranted.

(i) A class waiver may be requested only when the class of supplies is not available from any other source and it is in the national interest.

(ii) Prior to submitting the waiver request, the request must be reviewed and cleared by the agency head.

(iii) All waiver requests must include the following information:

(A) Agency name and point of contact name, telephone number, and email address;

(B) Offeror's name, complete mailing address, and point of contact name, telephone number, and email address;

(C) Description/nature of product or service;

(D) The total price and length of the contract;

(E) Justification, with market research demonstrating that no other offeror can provide the product or service and stating why the product or service must be procured from this offeror, as well as why it is in the national interest for the President to waive the prohibition on contracting with this offeror that conducts restricted business operations in Sudan, including consideration of foreign policy aspects identified in consultation(s) pursuant to 40.204-3(a)(2);

(F) Documentation regarding the offeror's past performance and integrity;

(G) Information regarding the offeror's relationship or connection with other firms that conduct prohibited business operations in Sudan; and

(H) Any humanitarian efforts engaged in by the offeror, the human rights impact of doing business with the offeror for which the waiver is requested, and the extent of the offeror's business operations in Sudan.

(4) The consultation in 40.204-3(a)(2) and the information in 40.204-3(a)(3)(iii) will be considered in determining whether to recommend that the President waive the certification within the provision at 52.240-90(e). In accordance with section 6(c) of the Sudan Accountability and Divestment Act of 2007, OFPP will semiannually submit a report to Congress, on April 15th and October 15th, on the waivers granted.

(b) Remedies. Upon the determination of a false certification within the provision at 52.240-90(e)—

(1) The contracting officer may terminate the contract;

(2) The suspending and debarring official may suspend the contractor in accordance with the procedures in part 9; and

(3) The suspending and debarring official may debar the contractor for a period not to exceed 3 years in accordance with the procedures in part 9.

40.204-4 Procedures on Iran Prohibitions.

(a) *Waivers*.

(1) An agency seeking a waiver of the representation and certifications in the provision at 52.240-90(f) or the prohibition in the clause at 52.240-91(d)(4), consistent with section 6(b)(5) of the Iran Sanctions Act or 22 U.S.C. 8551(b), respectively, and the Presidential Memorandum of September 23, 2010 (75 FR 67025), must submit the request to the Office of Federal Procurement Policy, allowing sufficient time for review and approval.

(2) Agencies may request a waiver on an individual or class basis; however, waivers are not indefinite and can be cancelled, if warranted.

(i) A class waiver may be requested only when the class of supplies or equipment is not available from any other source and it is in the national interest.

(ii) Prior to submitting the waiver request, the request must be reviewed and cleared by the agency head.

(3) In general, all waiver requests should include the following information:

(i) Agency name and point of contact name, telephone number, and email address.

(ii) Offeror's name, complete mailing address, and point of contact name, telephone number, and email address.

(iii) Description/nature of product or service.

(iv) The total price and length of the contract.

(v) Justification, with market research demonstrating that no other offeror can provide the product or service and stating why the product or service must be procured from this offeror.

(A) If the offeror exports sensitive technology to the government of Iran or any entities or individuals owned or controlled by, or acting on behalf or at the direction of, the government of Iran, provide rationale why it is in the national interest for the President to waive the prohibition on contracting with this offeror, as required by 22 U.S.C. 8551(b).

(B) If the offeror conducts activities for which sanctions may be imposed under section 5 of the Iran Sanctions Act or engages in any transaction that exceeds the certification transaction threshold within the provision at 52.240-90(f)(1)(iii) with Iran's Revolutionary Guard Corps or any of its officials, agents, or affiliates, the property and interests in property of which are blocked pursuant to the International Emergency Economic Powers Act, provide rationale why it is essential to the national security interests of the United States for the President to waive the prohibition on contracting with this offeror, as required by section 6(b)(5) of the Iran Sanctions Act.

(vi) Documentation regarding the offeror's past performance and integrity.

(vii) Information regarding the offeror's relationship or connection with other firms that—

(A) Export sensitive technology to the government of Iran or any entities or individuals owned or controlled by, or acting on behalf or at the direction of, the government of Iran;

(B) Conduct activities for which sanctions may be imposed under section 5 of the Iran Sanctions Act; or

(C) Conduct any transaction that exceeds the certification transaction threshold within the provision at 52.240-90(f)(1)(iii) with Iran's Revolutionary Guard Corps or any of its officials, agents, or affiliates, the property and interests in property of which are blocked pursuant to the International Emergency Economic Powers Act.

(viii) Describe —

(A) The sensitive technology and the entity or individual to which it was exported (i.e., the government of Iran or an entity or individual owned or controlled by, or acting on behalf or at the direction of, the government of Iran);

(B) The activities in which the offeror is engaged for which sanctions may be imposed under section 5 of the Iran Sanctions Act; or

(C) The transactions that exceed the certification transaction threshold within the provision at 52.240-90(f)(1)(iii) with Iran's Revolutionary Guard Corps or any of its officials, agents, or affiliates, the property and interests in property of which are blocked pursuant to the International Emergency Economic Powers Act.

(b) Remedies. Upon the determination of a false certification within the provision at 52.240-90(f)(1)(ii) or at 52.240-90(f)(1)(iii), the agency must take one or more of the following actions:

(1) The contracting officer terminates the contract in accordance with procedures in part 49, or for commercial products and commercial services, see part 12.

(2) The suspending and debarring official suspends the contractor in accordance with the procedures in part 9.

(3) The suspending and debarring official debars the contractor for a period of at least two years in accordance with the procedures in part 9.

40.205 Solicitation provision and contract clause.

(a) Insert the provision at 52.240-90, Security Prohibitions and Exclusions Representations and Certifications, in all solicitations.

(b) Except as prescribed in paragraph (c), insert the clause at 52.240-91, Security Prohibitions and Exclusions, in all solicitations and contracts.

(c) Insert the clause with its Alternate I in-

(1) Federal Supply Schedules, Governmentwide acquisition contracts, and multi-agency contracts; and

(2) Where the program office or the requiring activity instructs the contracting officer to select specific types of FASCSA orders.

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Subpart 40.3 - Safeguarding Information

40.300 Scope.

(a) This subpart provides policies and procedures for safeguarding classified information and Federal contract information.

(b) Part 27, Patents, Data, and Copyrights, contains policy and procedures for safeguarding classified information in patent applications and patents.

40.301 Definitions.

As used in this subpart—

Covered contractor information system means an information system that is owned or operated by a contractor that processes, stores, or transmits Federal contract information.

Federal contract information means information, not intended for public release, that is provided by or generated for the Government under a contract to develop or deliver a product or service to the Government, but not including information provided by the Government to the public (such as that on public Web sites) or simple transactional information, such as that necessary to process payments.

Information means 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 (Committee on National Security Systems Instruction (CNSSI) 4009).

Information system means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information (44 U.S.C. 3502).

Safeguarding means measures or controls that are prescribed to protect information systems.

40.302 Safeguarding classified information within industry.

40.302-1 National industrial security program.

This section provides policies and procedures to implement the National Industrial Security Program according to Executive Order 12829, January 6, 1993 (58 FR 3479, January 8, 1993), titled "National Industrial Security Program" (NISP). Executive Order 12829 amends Executive Order 10865, February 20, 1960 (25 FR 1583, February 25, 1960), entitled "Safeguarding Classified Information Within Industry," as amended by Executive Order 10909, January 17, 1961 (26 FR 508, January 20, 1961). This program safeguards Federal Government classified information. The following publications implement the program:

(a) *National Industrial Security Program Operating Manual* (NISPOM) (32 CFR part 117).

(b) DoD Manual 5220.22, Volume 2, National Industrial Security Program: Industrial Security Procedures for Government Activities.

40.302-2 Responsibilities of contracting officers.

(a) Review all proposed solicitations to determine whether offerors or contractors may require access to classified information.

(b) Nondefense agencies that have industrial security services agreements with the Department of Defense (DoD) and DoD components must use the Contract Security Classification Specification, DD Form 254. The contracting officer or authorized agency representative is the approving official for the DD Form 254 associated with the prime contract and must ensure the DD Form 254 is properly prepared, distributed by and coordinated with requirements and security personnel, according to agency procedures.

40.302-3 Contract clause.

(a) Insert the clause at 52.240-92, Security Requirements, in solicitations and contracts when the contract may require access to classified information.

(b) If a cost contract for research and development with an educational institution is considered, use the clause with its Alternate I.

(c) If a construction or architect-engineer contract where employee identification is required for security reasons is being considered, use the clause with its Alternate II.

40.303 Basic safeguarding of covered contractor information systems.

40.303-1 Applicability.

This section applies to all acquisitions, including acquisitions of commercial products or commercial services, other than commercially available off-the-shelf items, when a contractor's information system may contain Federal contract information.

40.303-2 Contract clause.

Insert the clause at 52.240-93, Basic Safeguarding of Covered Contractor Information Systems, in solicitations and contracts when the contractor or a subcontractor at any tier may have Federal contract information residing in or moving through its information system.

PART 41 - ACQUISITION OF UTILITY SERVICES

Sec.

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Subpart 41.1 - General

41.100 Scope of part.

This part prescribes policies, procedures, and contract format for the acquisition of utility services.

41.101 Definitions.

As used in this part,

Areawide contract means a contract entered into between the General Services Administration (GSA) and a utility service supplier to cover utility service needs of Federal agencies within the franchise territory of the supplier. Each areawide contract includes an "Authorization" form for requesting service, connection, disconnection, or change in service.

Authorization means the document executed by the ordering agency and the utility supplier to order service under an areawide contract.

Connection charge means all nonrecurring costs, whether refundable or nonrefundable, to be paid by the Government to the utility supplier for the required connecting facilities, which are installed, owned, operated, and maintained by the utility supplier (see Termination liability).

Federal Power and Water Marketing Agency means a Government entity that produces, manages, transports, controls, and sells electrical and water supply service to customers.

Franchise territory means a geographical area that a utility supplier has a right to serve based upon a franchise, a certificate of public convenience and necessity, or other legal means.

Intervention means action by GSA or a delegated agency to formally participate in a utility regulatory proceeding on behalf of all Federal executive agencies.

Rates may include rate schedules, riders, rules, terms and conditions of service, and other tariff and service charges, e.g., facilities use charges.

Separate contract means a utility services contract (other than a GSA areawide contract, an Authorization under an areawide contract, or an interagency agreement) to cover the acquisition of utility services.

Termination liability means a contingent Government obligation to pay a utility supplier the unamortized portion of a connection charge and any other applicable nonrefundable service charge as defined in the contract in the event the Government terminates the contract before the cost of connection facilities has been recovered by the utility supplier (see "Connection charge").

Utility service includes, but is not limited to, a continuous service such as furnishing electricity, natural or manufactured gas, water, sewerage, thermal energy, chilled water, steam, hot water, or high temperature hot water for use in the United States. Utility services does not include: any of the above when purchased for use in a foreign country, broadband internet, non-broadcast television, telecommunications services, information technology services, acquisitions of natural or manufactured gas when not purchased as utility services (i.e., when purchased as commodities), or acquisitions of rights in real property, acquisitions of public utility facilities, and on-site equipment needed for the facility's own distribution system, or construction/maintenance of Government-owned equipment and real property.

41.102 Applicability.

(a) Except as provided in paragraph (b) of this section, this part applies to the acquisition of utility services for the Government, including connection charges and termination liabilities.

(b) This part does not apply to—

(1) Utility services produced, distributed, or sold by another Federal agency. In those cases, agencies must use interagency agreements;

(2) Utility services obtained by purchase, exchange, or otherwise by a Federal power or water marketing agency incident to that agency's marketing or distribution program; or

(3) Third party financed shared-savings projects authorized by 42 U.S.C. 8287. However, agencies may utilize part 41 for any energy savings or purchased utility service directly resulting from implementation of a third party financed shared-savings project under 42 U.S.C. 8287 for periods not to exceed 25 years.

41.103 Statutory and delegated authority.

(a) *Statutory authority.* (1) The General Services Administration (GSA) is authorized by 40 U.S.C. 501 to prescribe policies and methods governing the acquisition and supply of utility services for Federal agencies. This authority includes related functions such as managing public utility services and representing Federal agencies in proceedings before Federal

and state regulatory bodies. GSA is authorized by 40 U.S.C. 501 to contract for utility services for periods not exceeding ten years.

(2) The Department of Defense (DOD) is authorized by 10 U.S.C. 3201(a) , and 40 U.S.C. 113(e)(3) to acquire utility services for military facilities.

(3) The Department of Energy (DOE) is authorized by the Department of Energy Organization Act (42 U.S.C. 7251, *et seq.*) to acquire utility services. DOE is authorized by the Atomic Energy Act of 1954, as amended (42 U.S.C. 2204), to enter into new contracts or modify existing contracts for electric services for periods not exceeding 25 years for uranium enrichment installations.

(b) *Delegated authority.* GSA has delegated its authority to enter into utility service contracts for periods not exceeding ten years to DOD and DOE, and for connection charges only, to the Department of Veteran Affairs. Contracting pursuant to this delegated authority must be consistent with the requirements of this part. Other agencies requiring utility service contracts for periods over one year, but not exceeding ten years, may request a delegation of authority from GSA at utilities@gsa.gov. In keeping with its statutory authority, GSA will, as necessary, conduct reviews of delegated agencies' acquisitions of utility services to ensure compliance with the terms of the delegation and applicable laws and regulations.

(c) Requests for delegations of contracting authority from GSA must include a certification from the acquiring agency's Senior Procurement Executive that the agency has—

(1) An established acquisition program;

(2) Personnel technically qualified to deal with specialized utilities problems; and

(3) The ability to accomplish its own pre-award contract review.

Subpart 41.2 - Acquiring Utility Services

41.201 Policy.

(a) Subject to paragraph (d) of this section, it is the policy of the Federal Government that agencies obtain required utility services from sources of supply which are most advantageous to the Government in terms of economy, efficiency, reliability, or service.

(b) Except for acquisitions at or below the simplified acquisition threshold, agencies must acquire utility services by a bilateral written contract, which must include the clauses required by 41.501, regardless of whether rates or terms and conditions of service are fixed or adjusted by a regulatory body. Agencies may not use the utility supplier's forms and clauses to avoid the inclusion of provisions and clauses required by 41.501 or by statute.

(d) (1) Section 8093 of the Department of Defense Appropriations Act of 1988, Pub. L. 100-202, provides that none of the funds appropriated by that Act or any other Act with respect to any fiscal year by any department, agency, or instrumentality of the United States, may be used for the purchase of electricity by the Government in any manner that is inconsistent with state law governing the providing of electric utility service, including state utility commission rulings and electric utility franchises or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements.

(2) The Act does not preclude—

(i) The head of a Federal agency from entering into a contract pursuant to 42 U.S.C.8287 (which pertains to the subject of shared energy savings including cogeneration);

(ii) The Secretary of a military department from entering into a contract pursuant to 10 U.S.C. 2922a (which pertains to contracts for energy or fuel for military installations including the provision and operation of energy production facilities); or

(iii) The Secretary of a military department from purchasing electricity from any provider when the utility or utilities having applicable state-approved franchise or other service authorizations are found by the Secretary to be unwilling or unable to meet unusual standards for service reliability that are necessary for purposes of national defense.

(3) Additionally, the head of a Federal agency may—

(i) Consistent with applicable state law, enter into contracts for the purchase or transfer of electricity to the agency by a non-utility, including a qualifying facility under the Public Utility Regulatory Policies Act of 1978;

(ii) Enter into an interagency agreement, pursuant to 41.206 and 17.5, with a Federal power marketing agency or the Tennessee Valley Authority for the transfer of electric power to the agency; and

(iii) Enter into a contract with an electric utility under the authority or tariffs of the Federal Energy Regulatory Commission.

(e) Prior to acquiring electric utility services on a competitive basis, the contracting officer must determine, with the advice of legal counsel, by a market survey or any other appropriate means, *e.g.* consultation with the state agency responsible for regulating public utilities, that such competition would not be inconsistent with state law governing the provision of electric utility service, including state utility commission rulings and electric utility franchises or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements. Proposals from alternative electric suppliers must provide a representation that service can be provided in a manner consistent with section 8093 of Public Law 100-202 (see 41.201(c)).

41.202 Procedures.

(a) Agencies must conduct market surveys and perform acquisition planning in order to promote and provide for full and open competition provided that the contracting officer determines that any resultant contract would not be inconsistent with applicable state law governing the provision of electric utility services. If competition for an entire utility service is not available, the market survey may be used to determine the availability of competitive sources for certain portions of the requirement. The scope of the term “entire utility service” includes the provision of the utility service capacity, energy, water, sewage, transportation, standby or back-up service, transmission and/or distribution service, quality assurance, system reliability, system operation and maintenance, metering, and billing.

(b) In performing a market survey, the contracting officer must consider, in addition to alternative competitive sources, use of the following:

(1) GSA areawide contracts;

(2) Separate contracts; and

(3) Interagency agreements.

(c) When a utility supplier refuses to execute a tendered contract, the agency must obtain a written definite and final refusal signed by a corporate officer or other responsible official of the supplier (or if unobtainable, document any unwritten refusal), and transmit this document, along with statements of the reasons for the refusal and the record of negotiations, to GSA at utilities@gsa.gov. Unless urgent and compelling circumstances exist, the contracting officer must notify GSA prior to acquiring utility services without executing a tendered contract. After such notification, the agency may proceed with the acquisition and pay for the utility service under the provisions of31 U.S.C. 1501(a)(8)—

(1) By issuing a purchase order; or

(2) By ordering the necessary utility service and paying for it upon the presentation of an invoice, provided that a determination is approved by the head of the contracting activity that a written contract cannot be obtained and that the issuance of a purchase order is not feasible.

(d) When obtaining service without a bilateral written contract, the contracting officer must establish a utility history file on each acquisition of utility service provided by a contractor. This utility history file must contain the following information:

(1) The unsigned, tendered contract and any related letter of transmittal.

(2) The reasons stated by the utility supplier for not executing the tendered contract, the record of negotiations, and a written definite and final refusal by a corporate officer or other responsible official of the supplier (or if unobtainable, documentation of unwritten refusal).

(3) Services to be furnished and the estimated annual cost.

(4) Historical record of any applicable connection charges.

(5) Historical record of any applicable ongoing capital credits.

(6) A copy of the applicable rate schedule.

(e) If the Government obtains utility service pursuant toparagraph (c) of this section, on an annual basis beginning from the date of final refusal, take action to execute a bilateral written contract. The contracting officer must document the utility history file with the efforts made and the agency must notify GSA, in writing at utilities@gsa.gov, if the utility continues to refuse to execute a bilateral contract.

41.203 GSA assistance.

(a) GSA will, upon request, provide technical and acquisition assistance, or will delegate its contracting authority for the furnishing of the services described in this part for any Federal agency, mixed-ownership Government corporation, the District of Columbia, the Senate, the House of Representatives, or the Architect of the Capitol and any activity under the Architect’s direction.

(b) Agencies, seeking assistance must provide upon request by GSA the information listed in 41.301.

41.204 GSA areawide contracts.

(a) *Purpose.* GSA enters into areawide contracts for use by Federal agencies. Areawide contracts provide a pre-established contractual vehicle for ordering utility services under the conditions inparagraph (c)(1) of this section.

(b) *Features.*

(1) Areawide contracts generally provide for ordering utility service at rates approved and/or established by a regulatory body and published in a tariff or rate schedule. However, agencies are permitted to negotiate other rates and terms and conditions of service with the supplier (seeparagraph (c) of this section). Rates other than those published may require the approval of the regulatory body.

(2) Areawide contracts are negotiated with utility service suppliers for the provision of service within the supplier's franchise territory or service area.

(3) Due to the regulated nature of the utility industry, as well as statutory restrictions associated with the procurement of electricity, competition is typically not available within the entire geographical area covered by an areawide contract, although it may be available at specific locations within the utility's service area. When competing suppliers are available, the provisions ofparagraph (c)(1) of this section apply.

(c) *Procedures for obtaining service.*

(1) Any Federal agency having a requirement for utility services within an area covered by an areawide contract must acquire services under that areawide contract unless—

(d) Service is available from more than one supplier; or

(e) The head of the contracting activity or designee otherwise determines that use of the areawide contract is not advantageous to the Government. If service is available from more than one supplier, service must be acquired using

competitive acquisition procedures. The determination required byparagraph (c)(1)(ii) of this section must be documented in the contract file with an information copy furnished to GSA at utilities@gsa.gov.

(1) Each areawide contract includes an authorization form for ordering service, connection, disconnection, or change in service. Upon execution of an authorization by the contracting officer and utility supplier, the utility supplier is required to furnish services, without further negotiation, at the current, applicable published or unpublished rates, unless other rates, and/or terms and conditions are separately negotiated by the Federal agency with the supplier.

(2) The contracting officer must execute the authorization, and attach it to a Standard Form (SF) 26, Award/Contract, along with any modifications such as connection charges, special facilities, or service arrangements. The contracting officer must also attach any specific fiscal, operational, and administrative requirements of the agency, applicable rate schedules, technical information and detailed maps or drawings of delivery points, details on Government ownership, maintenance, or repair of facilities, and other information deemed necessary to fully define the service conditions in the authorization/contract.

(f) *Notification.* Agencies must provide a copy of each SF 26 and executed authorization issued under an areawide contractto GSA at utilities@gsa.gov within 30 days after execution.

41.205 Separate contracts.

(a) In the absence of an areawide contract or interagency agreement, agencies must acquire utility services by separate contract subject to this part, and subject to agency contracting authority.

(b) If an agency enters into a separate contract, the contracting officer must document the contract file with the following information:

(1) The number of available suppliers.

(2) Any special equipment, service reliability, or facility requirements and related costs.

(3) The utility supplier's rates, connection charges, and termination liability.

(4) Total estimated contract value (including costs in paragraphs (b)(2) and (3) of this subsection).

(5) Any technical or special contract terms required.

(6) Any unusual characteristics of services required.

(c) If requesting GSA assistance with a separate contract, the requesting agency must furnish the technical and acquisition data specified in 41.205(b), 41.301, and such other data as GSA may deem necessary.

(d) A contract exceeding a 1-year period, but not exceeding tenyears (except pursuant to 41.103), may be justified, and is usually required, where any of the following circumstances exist:

(1) The Government will obtain lower rates, larger discounts, or more favorable terms and conditions of service.

(2) A proposed connection charge, termination liability, or any other facilities charge to be paid by the Federal Government will be reduced or eliminated.

(3) The utility service supplier refuses to render the desired service except under a contract exceeding a 1-year period.

41.206 Interagency agreements.

Agencies must use interagency agreements (*e.g.*, consolidated purchase, joint use, or cross-service agreements) when acquiring utility service or facilities from other Government agencies.

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Subpart 41.3 - Requests for Assistance

41.301 Requirements.

(a) Requests for delegations of GSA contracting authority, assistance with a proposed contract, and the submission of other information required by this part, must be sent or submitted to GSA at utilities@gsa.gov.

(b) Requests for contracting assistance for utility services must be sent not later than 120 days prior to the date new services are required to commence or an existing contract will expire. Requests for assistance must contain the following information:

(1) A technical description or specification of the type, quantity, and quality of service required, and a delivery schedule.

(2) A copy of any service proposal or proposed contract.

(3) Copies of all current published or unpublished rates of the utility supplier.

(4) Identification of any unusual factors affecting the acquisition.

(5) Identification of all available sources or methods of supply, an analysis of the cost effectiveness of each, and a statement of the ability of each source to provide the required services, including the location and a description of each available supplier's facilities at the nearest point of service, and the cost of providing or obtaining necessary backup and other ancillary services.

(c) For new utility service requirements, the agency must furnish the information inparagraph (a) of this section and the following as applicable:

(1) The date initial service is required.

(2) For the first 12 months of full service, estimated maximum demand, monthly consumption, other pertinent information (*e.g.*, demand side management, load or energy management, peak shaving, on site generation, load shaping), and annual cost of the service.

(3) Known or estimated time schedule for growth to ultimate requirements.

(4) Estimated ultimate maximum demand and ultimate monthly consumption.

(5) A simple schematic diagram or line drawing showing the meter locations, the location of the new utility facilities to be constructed on Federal property by the Federal agency, and any required new connection facilities on either side of the delivery point to be constructed by the utility supplier to provide the new services.

(6) Accounting and appropriation data to cover the required utility services and any connection charges required to be paid by the agency receiving such utility services.

(7) The following data concerning proposed facilities and related charges or costs:

(d) Proposed refundable or nonrefundable connection charge, termination liability, or other facilities charge to be paid by the agency, together with a description of the supplier's proposed facilities and estimated construction costs, and its rationale for the charge (*e.g.*, tariff provisions or policies).

(e) A copy of the acquiring agency's estimate to make its own connection to the supplier's facilities through use of its own resources or by separate contract. When feasible, the acquiring agency must provide its estimates to construct and operate its own utility facilities in lieu of participating in a cost-sharing construction program with the proposed utility supplier.

(f) For existing utility service, the agency must furnish GSA the information in paragraph (b) of this section and the following, as applicable:

(1) A copy of the most recent 12-months' service invoices.

(2) A tabulation, by month, for the most recent 12 months, showing the actual utility demands, consumption, connection charges, fuel adjustment charges, and the average monthly cost per unit of consumption.

(3) An estimate, by month, for the next 12 months, showing the estimated maximum demands, monthly consumption, other pertinent information (*e.g.*, demand side management, load or energy management, peak shaving, on site generation, load shaping), and annual cost of the service.

(4) Accounting and appropriation data to cover the costs for the continuation of utility services.

(5) A statement noting whether the transformer, or other system components, on either side of the delivery point are owned by the Federal agency or the utility supplier, and if the metering is on the primary or secondary side of the transformer.

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Subpart 41.4 - Administration

41.401 Monthly and annual review.

Agencies must review utility service invoices on a monthly basis and all utility accounts, with annual values exceeding the simplified acquisition threshold, on an annual basis. Annual reviews of accounts with annual values at or below the simplified acquisition threshold must be conducted when deemed advantageous to the Government. The purpose of the monthly review is to ensure the accuracy of utility service invoices. The purpose of the annual review is to ensure that the utility supplier is furnishing the services to each facility under the utility's most economical, applicable rate and to examine competitive markets for more advantageous service offerings. The annual review must be based upon the facility's usage, conditions and characteristics of service at each individual delivery point for the most recent 12 months. If a more advantageous rate is appropriate, the Federal agency must request the supplier to make such rate change immediately.

41.402 Rate changes and regulatory intervention.

(a) When a change is proposed to rates or terms and conditions of service to the Government, the agency must promptly determine whether the proposed change is reasonable, justified, and not discriminatory.

(b) If a change is proposed to rates or terms and conditions of service that may be of interest to other Federal agencies, and intervention before a regulatory body is considered justified, the matter must be referred to GSA. The agency may request from GSA a delegation of authority for the agency to intervene on behalf of the consumer interests of the Federal executive agencies.

(c) Pursuant to 52.241-7, Change in Rates or Terms and Conditions of Service for Regulated Services, if a regulatory body approves a rate change, any rate change must be made a part of the contract by unilateral contract modification or otherwise documented in accordance with agency procedures. The approved applicable rate must be effective on the date determined by the regulatory body and resulting rates and charges must be paid promptly to avoid late payment provisions. Copies of the modification containing the approved rate change must be sent to the agency's paying office or office responsible for verifying billed amounts.

(d) If the utility supplier is not regulated and the rates, terms, and conditions of service are subject to negotiation pursuant to the clause at 52.241-8, Change in Rates or Terms and Conditions of Service for Unregulated Services, any rate change must be made a part of the contract by contract modification, with copies sent to the agency's paying office or office responsible for verifying billed amounts.

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Subpart 41.5 - Solicitation Provision and Contract Clauses

41.501 Solicitation provision and contract clauses.

(a) Because the terms and conditions under which utility suppliers furnish service may vary from area to area, the differences may influence the terms and conditions appropriate to a particular utility's contracting situation. To accommodate requirements that are peculiar to the contracting situation, this section prescribes provisions and clauses on a "substantially the same as" basis which permits the contracting officer to prepare and utilize variations of the prescribed provision and clauses in accordance with agency procedures.

(b) Insert a provision substantially the same as the provision at 52.241-1, Electric Service Territory Compliance Representation, when proposals from alternative electric suppliers are sought.

(c) Insert in solicitations and contracts for utility services clauses substantially the same as the clauses at—

(1) 52.241-2, Order of Precedence—Utilities;

(2) 52.241-3, Scope and Duration of Contract;

(3) 52.241-4, Change in Class of Service;

(4) 52.241-5, Contractor's Facilities; and

(5) 52.241-6, Service Provisions.

(d) Insert clauses substantially the same as the clauses listed below in solicitations and contracts under the prescribed conditions—

(1) 52.241-7, Change in Rates or Terms and Conditions of Service for Regulated Services, when the utility services are subject to a regulatory body. (Except for GSA areawide contracts, insert in the blank space provided in the clause the name of the contracting officer. For GSA areawide contracts, the contracting officer must insert the following: "GSA and each areawide customer with annual billings that exceed $250,000.")

(2) 52.241-8, Change in Rates or Terms and Conditions of Service for Unregulated Services, when the utility services are not subject to a regulatory body.

(3) 52.241-9, Connection Charge, when a refundable connection charge is required to be paid by the Government to compensate the contractor for furnishing additional facilities necessary to supply service. (Use *Alternate I* to the clause if a nonrefundable charge is to be paid. When conditions require the incorporation of a nonrecurring, nonrefundable service charge or a termination liability, see paragraphs (d)(6) and(d)(4) of this section.)

(4) 52.241-10, Termination Liability, when payment is to be made to the contractor upon termination of service in conjunction with or in lieu of a connection charge upon completion of the facilities.

(5) 52.241-11, Multiple Service Locations (as defined in 41.101), when providing for possible alternative service locations, except under areawide contracts, is required.

(6) 52.241-12, Nonrefundable, Nonrecurring Service Charge, when the Government is required to pay a nonrefundable, nonrecurring membership fee, a charge for initiation of service, or a contribution for the cost of facilities construction. The Government may provide for inclusion of such agreed amount or fee as a part of the connection charge, a part of the initial payment for services, or as periodic payments to fulfill the Government's obligation.

(7) 52.241-13, Capital Credits, when the Federal Government is a member of a cooperative and is entitled to capital credits, consistent with the bylaws and governing documents of the cooperative.

(e) Depending on the conditions that are appropriate for each acquisition, the contracting officer must also insert in solicitations and contracts for utility services the provisions and clauses prescribed elsewhere in the FAR.

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Subpart 41.6 - Forms

41.601 Utility services forms.

(a) If acquiring utility services under other than an areawide contract, a purchase order or an interagency agreement, the Standard Form (SF) 33, Solicitation, Offer and Award; SF 26, Award/Contract; or SF 1447, Solicitation/Contract, must be used.

(b) The contracting officer must incorporate the applicable rate schedule in each contract, purchase order or modification.

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Subpart 41.7 - Formats

41.701 Formats for utility service specifications.

(a) The following specification formats for use in acquiring utility services are available from GSA at utilities@gsa.gov and may be used and modified at the agency's discretion:

(1) Electric service.

(2) Water service.

(3) Steam service.

(4) Sewage service.

(5) Natural gas service.

(b) Contracting officers may modify the specification format referenced in paragraph (a) of this section and attach technical items, details on Government ownership of equipment and real property and maintenance or repair obligations, maps or drawings of delivery points, and other information deemed necessary to fully define the service conditions.

(c) The specifications and attachments (see paragraph (b) of this section) must be inserted in Section C of the utility service solicitation and contract.

41.702 Formats for annual utility service review.

(a) Formats for use in conducting annual reviews of the following utility services are available from GSA at utilities@gsa.gov and may be used at the agency's discretion:

(1) Electric service.

(2) Gas service.

(3) Water and sewage service.

(b) Contracting officers may modify the annual utility service review format as necessary to fully cover the service used.

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PART 42 - CONTRACT ADMINISTRATION AND AUDIT SERVICES

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42.000 Scope of part.

This part prescribes policies and procedures for assigning and performing contract administration and contract audit services.

42.001 Interagency agreements.

(a) Agencies must use interagency agreements to prevent duplicate audits, reviews, inspections, and examinations of contractors or subcontractors by more than one agency.

(b) Subject to the fiscal regulations of the agencies and applicable interagency agreements, the requesting agency must pay the servicing agency for services rendered, in accordance with the Economy Act (31 U.S.C. 1535).

42.002 Cognizant Federal agency.

(a) The cognizant Federal agency is the agency with the largest dollar amount in negotiated contracts, including options, for each contractor business unit, except for educational institutions and nonprofits. The cognizant Federal agency for educational institutions (defined as institutions of higher education at 2 CFR part 200, subpart A, and 20 U.S.C. 1001) and nonprofit organizations (as defined in 2 CFR part 200), the cognizant Federal agency for indirect costs is determined by using the OMB Uniform Guidance at 2 CFR part 200, appendices III and IV, respectively.

(b) Once a Federal agency assumes cognizance for a contractor, it should remain the cognizant Federal agency for at least 5 years to ensure continuity and ease of administration.

Subpart 42.1 - Contract Audit Services

42.101 Contract audit responsibilities.

(a) The auditor is responsible for-

(1) Analyzing contractor financial records or other related data and advising the requesting activity on the acceptability of the contractor's incurred and estimated costs;

(2) Reviewing the financial and accounting aspects of the contractor’s cost control systems; and

(3) Performing other analyses and reviews that require access to the contractor’s financial and accounting records supporting proposed and incurred costs.

(b) Normally, the Defense Contract Audit Agency (DCAA) is the responsible Government audit agency. However, there may be instances where an agency other than DCAA desires cognizance of a particular contractor. In those instances, the two agencies must agree on the most efficient and economical approach to meet contract audit requirements. For educational institutions (defined as institutions of higher education in the OMB Uniform Guidance at 2 CFR part 200, subpart A, and 20 U.S.C. 1001) and nonprofit organizations (as defined in the OMB Uniform Guidance at 2 CFR part 200), audit cognizance will be determined according to the provisions of the OMB Uniform Guidance at 2 CFR part 200.

42.102 Assignment of contract audit services.

(a) Contracting officers may request audit services directly from the responsible audit agency listed in the Directory of Federal Contract Audit Offices. Requests must include a suspense date and identify any information needed by the contracting officer.

(b) The responsible audit agency may decline requests for services on a case-by-case basis if they lack adequate resources. Declinations must be in writing.

42.103 Contract audit services directory.

(a) DCAA maintains the Directory of Federal Contract Audit Offices. The directory identifies cognizant audit offices and the assigned contractors they have cognizance over. Contract Audit Offices must provide audit cognizance changes to DCAA for directory updates.

(b) To obtain the directory or information about audit offices, contact: Defense Contract Audit Agency, ATTN: CMO, Publications Officer, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

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Subpart 42.2 - Contract Administration Services

42.201 Contract administration responsibilities.

For each contract assigned for administration, the contract administration office (CAO) will-

(a) Perform the functions listed in 42.302(a) to the extent that they apply to the contract, except for the functions specifically withheld;

(b) Perform the functions listed in 42.302(b) only when and to the extent specifically authorized by the contracting officer; and

(c) Request supporting contract administration under 42.202(e) and (f) as required.

42.202 Assignment of contract administration.

(a) *Delegating functions.* Contracting officers may delegate contract administration or specialized support services through interagency agreements or by direct request to the cognizant CAO listed in the Contract Administration Services Directory (CASD). The delegation should include-

(1) The name and address of the CAO designated to perform the administration (this information must also be entered in the contract);

(2) Any specials instructions, including any functions withheld or any specific authorization to perform functions listed in 42.302 (b);

(3) A copy of the contract to be administered; and

(4) Copies of all contracting agency regulations or directives that are-

(i) Incorporated into the contract by reference; or

(ii) Otherwise, necessary to administer the contract, unless copies have been provided previously.

(b) *Special instructions.* As necessary, the contracting officer must advise the contractor (and other activities as appropriate) of any functions withheld from or additional functions delegated to the CAO.

(c) *Delegating additional functions*. For individual contracts or groups of contracts, the contracting officer may delegate additional functions beyond those listed in 42.302 to the CAO, provided that-

(1) Prior coordination with the CAO ensures the availability of required resources;

(2) In the case of authority to issue orders under provisioning procedures in existing contracts and under basic ordering agreements for items and services identified in the schedule, the head of the contracting activity or designee approves the delegation; and

(3) The delegation does not require the CAO to undertake new or follow-on acquisitions.

(d) *Rescinding functions.* The contracting officer at the requesting agency may rescind or recall a delegation to administer a contract or perform a contract administration function, except for the cognizant Federal agency functions identified in 42.302(a). The requesting agency must coordinate with the CAO to establish a reasonable transition period prior to rescinding or recalling the delegation.

(e) *Secondary delegations of contract administration.*

(1) A CAO that has been delegated administration of a contract function may request supporting contract administration from the cognizant CAO at the location. The request must-

(i) Be in writing;

(ii) Clearly state the specific administration functions to be performed; and

(iii) Be accompanied by a copy of pertinent contractual and other necessary documents.

(2) The prime contractor is responsible for managing its subcontracts. The CAO's review of subcontracts is normally limited to evaluating the prime contractor's management of the subcontracts (see part 44). Therefore, supporting contract administration may only be used for subcontracts when-

(i) The Government otherwise would incur undue cost;

(ii) Successful completion of the prime contract is threatened; or

(iii) It is authorized under paragraph (f) of this section or elsewhere in this regulation.

(f) *Special surveillance.* For major system acquisitions (see part 34), the contracting officer may designate certain high risk or critical subsystems or components for special surveillance in addition to requesting supporting contract administration. This surveillance must be conducted in a manner consistent with the policy of requesting that the cognizant CAO perform contract administration functions at a contractor's facility (see 42.002).

(g) *Refusing delegation of contract administration*. An agency may decline a request for contract administration services on a case-by-case basis if they lack adequate resources to accomplish the tasks. Declinations must be in writing.

42.203 Contract administration services directory.

The Defense Contract Management Agency (DCMA) maintains the CASD. The directory lists the contact information of those DCMA and other agency offices that offer contract administration services within designated geographic areas and at specified contractor locations. Federal agencies may access CASD on the Internet at https://piee.eb.mil/pcm/xhtml/unauth/index.xhtml.

Subpart 42.3 - Contract Administration Office Functions

42.301 General.

When a contract is assigned for administration under subpart 42.2, the contract administration office (CAO) will perform contract administration functions in accordance with 48 CFR Chapter 1, the contract terms, and, unless otherwise agreed to in an interagency agreement (see 42.001), the applicable regulations of the servicing agency.

42.302 Contract administration functions.

(a) The contracting officer normally delegates the following contract administration functions to a CAO. The contracting officer may retain any of these functions, except those in paragraphs (a)(5), (a)(9), (a)(11), and (a)(12) of this section, which must be performed by the cognizant Federal agency.

(1) Review the contractor’s compensation structure.

(2) Review the contractor’s insurance plans.

(3) Conduct post-award orientation conferences.

(4) Review and evaluate contractors' proposals under subpart 15.4 and, when the contracting officer will conduct negotiations, furnish comments and recommendations to that officer.

(5) Negotiate forward pricing rate agreements (see part 15 and subpart 42.13).

(6) Negotiate advance agreements pursuant to the contract cost principles in part 31.

(7) Determine the allowability of costs suspended or disapproved as required (see subpart 42.6), direct the suspension or disapproval of costs when there is reason to believe they should be suspended or disapproved, and approve final vouchers.

(8) Issue Notices of Intent to Disallow or not Recognize Costs (see subpart 42.6).

(9) Establish final indirect cost rates and billing rates for contractors meeting the criteria for contracting officer determination in subpart 42.5.

(10) Attempt to resolve issues in controversy, using alternative dispute resolution (ADR) procedures when appropriate (see part 33); prepare findings of fact; and issue decisions under the Disputes clause on matters in which the administrative contracting officer (ACO) has the authority to take definitive action.

(11) In connection with Cost Accounting Standards (CAS) (see part 30 and 48 CFR chapter 99)-

(i) Determine the adequacy of the contractor’s disclosure statements;

(ii) Determine whether disclosure statements are in compliance with CAS and part 31;

(iii) Determine the contractor’s compliance with CAS and disclosure statements, if applicable; and

(iv) Negotiate price adjustments and execute supplemental agreements under the CAS clauses at 52.230-2, 52.230-3, 52.230-4, 52.230-5, and 52.230-6.

(12) Determine the adequacy of the contractor’s accounting system. The contractor’s accounting system should be adequate during the entire period of contract performance. The adequacy of the contractor’s accounting system and its associated internal control system, as well as contractor compliance with the CAS, affects the quality and validity of the contractor data the Government relies on for contractor oversight.

(13) Review and approve or disapprove contractor requests for financing payments (see part 32).

(14) Make payments on assigned contracts when prescribed in agency acquisition regulations.

(15) Manage special bank accounts.

(16) Ensure the contractor notifies the contracting officer in a timely manner of any anticipated overrun or underrun of the estimated cost under cost-reimbursement contracts.

(17) Monitor the contractor’s financial condition and advise the contracting officer when it jeopardizes contract performance.

(18) Analyze quarterly limitation on payments statements and act in accordance with part 32 to recover overpayments from the contractor.

(19) Issue tax exemption forms.

(20) Ensure processing and execution of duty-free entry certificates.

(21) For classified contracts, administer delegated portions of the industrial security program delegated to the CAO (see part 40).

(22) Review and negotiate supplemental agreements in response to contractor work requests under maintenance, overhaul, modification, and repair contracts.

(23) Negotiate prices and execute supplemental agreements for spare parts and other items selected through provisioning procedures when prescribed by agency acquisition regulations.

(24) Negotiate and execute settlement of partial and complete contract terminations for convenience, unless stated otherwise by part 49.

(25) Negotiate and execute settlements of cancellation charges under multiyear contracts.

(26) Process and execute novation and change of name agreements under subpart 42.9.

(27) Perform property administration (see part 45).

(28) Perform necessary screening, redistribution, and disposal of contractor inventory.

(29) Issue contract modifications requiring the contractor to provide packing, crating, and handling services on excess Government property.

(30) When contractors request Government property-

(i) Evaluate contractor's requests for Government property and for changes to existing Government property, and provide appropriate recommendations to the contracting officer;

(ii) Ensure required screening of Government property before acquisition by the contractor;

(iii) Evaluate the use of Government property on a non-interference basis in accordance with the clause at 52.245-9, Use and Charges;

(iv) Ensure contractor payment of any rental due; and

(v) Modify contracts to reflect the addition of Government-furnished property and ensure appropriate consideration.

(31) Perform production support, surveillance, and status reporting, including timely reporting of potential and actual slippages in contract delivery schedules.

(32) Perform preaward surveys (see part 9).

(33) Advise and assist contractors regarding their priorities and allocations responsibilities and assist contracting offices in processing requests for special assistance and for priority ratings for privately owned capital equipment (see part 11).

(34) Monitor contractor industrial labor relations matters under the contract; apprise the contracting officer and, if designated by the agency, the cognizant labor relations advisor, of actual or potential labor disputes; and coordinate the removal of urgently required material from the strikebound contractor's plant upon instruction from, and authorization of, the contracting officer.

(35) Perform traffic management services, including issuance and control of Government bills of lading and other transportation documents.

(36) Review the adequacy of the contractor's traffic operations.

(37) Review and evaluate preservation, packaging, and packing.

(38) Ensure contractor compliance with contractual quality assurance requirements (see part 46).

(39) Ensure contractor compliance with contractual safety requirements.

(40) Perform engineering surveillance to assess compliance with contractual terms for schedule, cost, and technical performance in the areas of design, development, and production.

(41) Evaluate for adequacy and perform surveillance of contractor engineering efforts and management systems that relate to design, development, production, engineering changes, subcontractors, tests, management of engineering resources, reliability and maintainability, data control systems, configuration management, and independent research and development.

(42) Review and evaluate for technical adequacy, the contractor's logistics support, maintenance, and modification programs.

(43) Report to the contracting office any inadequacies noted in specifications.

(44) Perform engineering analyses of contractor cost proposals.

(45) Review and analyze contractor-proposed engineering and design studies and submit comments and recommendations to the contracting office, as required.

(46) Review engineering change proposals for proper classification, and when required, for need, technical adequacy of design, producibility, and impact on quality, reliability, schedule, and cost; submit comments to the contracting office.

(47) Assist in evaluating and make recommendations for acceptance or rejection of waivers and deviations.

(48) Evaluate and monitor the contractor's procedures for complying with procedures regarding restrictive markings on data.

(49) Monitor the contractor's value engineering program.

(50) Review, approve or disapprove, and maintain surveillance of the contractor's purchasing system (see part 44).

(51) Consent to the placement of subcontracts (see part 44).

(52) Review, evaluate, and approve plant or division-wide small, small disadvantaged, women-owned, veteran-owned, HUBZone, and service-disabled veteran-owned small business master subcontracting plans.

(53) Obtain the contractor's currently approved company- or division-wide plans for small, small disadvantaged, women-owned, veteran-owned, HUBZone, and service-disabled veteran-owned small business subcontracting for its commercial products. If there is no currently approved plan, assist the contracting officer in evaluating the plans for those products.

(54) Assist the contracting officer, upon request, in evaluating an offeror's proposed small, small disadvantaged women-owned, veteran-owned, HUBZone, and service-disabled veteran-owned small business subcontracting plans, including documentation of compliance with similar plans under prior contracts.

(55) By periodic surveillance, ensure the contractor's compliance with small, small disadvantaged, women-owned, veteran-owned, HUBZone, and service-disabled veteran-owned small business subcontracting plans and any labor surplus area contractual requirements; maintain documentation of the contractor's performance under and compliance with these plans and requirements; and provide advice and assistance to the firms involved, as appropriate.

(56) Maintain surveillance of flight operations.

(57) Assign and perform supporting contract administration.

(58) Ensure timely submission of required reports.

(59) Issue administrative changes, correcting errors or omissions in typing, contractor address, facility or activity code, remittance address, computations which do not require additional contract funds, and other such changes (see part 43).

(60) Administer and release shipments from the contractor's plants according to the shipping instructions. When applicable, the order of assigned priority must be followed; shipments within the same priority will be determined by date of the instruction.

(61) Obtain contractor proposals for any contract price adjustments resulting from amended shipping instructions. Review all amended shipping instructions on a periodic, consolidated basis to ensure that adjustments are timely. Except when the ACO has settlement authority, the ACO will forward the proposal to the contracting officer for contract modification. The ACO will not delay shipments pending completion and formalization of negotiations of revised shipping instructions.

(62) Negotiate and/or execute supplemental agreements making changes in packaging subcontractors or contract shipping points.

(63) Cancel unilateral purchase orders when rejected by the contractor. The CAO must notify the contracting officer when the purchase order is canceled.

(64) Negotiate and execute one-time supplemental agreements providing for the extension of contract delivery schedules up to 90 days on contracts with an assigned Criticality Designator of C (see 42.804). The CAO must provide notification that the contract delivery schedule is being extended to the contracting office. Subsequent extensions on any individual contract must have concurrence of the contracting office.

(65) Perform administrative closeout procedures (see part 4).

(66) Determine that the contractor has a drug-free workplace program and drug-free awareness program (see part 26).

(67) Support the program, product, and project offices for program reviews, program status, program performance and actual or anticipated program problems.

(68) Monitor the contractor's environmental practices for adverse impact on contract performance or contract cost, and for compliance with environmental requirements specified in the contract. ACO responsibilities include-

(i) Requesting environmental technical assistance, if needed;

(ii) Monitoring contractor compliance with specifications or other contractual requirements requiring the delivery, use, or furnishing of sustainable products in accordance with the clause at 52.223-23. This occurs as part of the quality assurance procedures set forth in part 46; and

(iii) As required in the contract, ensuring that the contractor complies with the reporting requirements relating to recovered material content (see 52.223-9) and biobased products (see 52.223-2) utilized in contract performance.

(69) Administer commercial financing provisions and monitor contractor security to ensure its continued adequacy to cover outstanding payments, when on-site review is required (see part 32).

(70) Deobligate excess funds after final price determination.

(71) Ensure that the contractor has implemented the requirements of 52.203-13, Contractor Code of Business Ethics and Conduct.

(b) The CAO may perform the following functions only when and to the extent specifically authorized by the contracting office:

(1) Negotiate and execute supplementals agreements incorporating contractor proposals resulting from change orders issued under the Changes clause. Before completing negotiations, coordinate any delivery schedule change with the contracting office.

(2) Negotiate prices and execute priced exhibits for unpriced orders issued by the contracting officer under basic ordering agreements.

(3) Negotiate and execute supplementals agreements changing contract delivery schedules.

(4) Negotiate and execute supplemental agreements providing for the deobligation of unexpended dollar balances considered excess to known contract requirements.

(5) Issue amended shipping instructions and, when necessary, negotiate and execute resultant supplemental agreements incorporating contractor proposals.

(6) Negotiate changes to interim billing prices.

(7) Negotiate and definitize adjustments to contract prices resulting from exercise of an economic price adjustment clause (see part 16).

(8) Issue change orders and negotiate and execute resulting supplemental agreements under contracts for ship construction, conversion, and repair.

(9) Execute supplementals agreements on firm-fixed-price supply contracts to reduce required line item quantities and deobligate excess funds when notified by the contractor of an inconsequential delivery shortage, but only when the action is —

(i) Determined to be in the best interests of the Government;

(ii) Supported by a written request of the contractor; and

(iii) A total downward contract price adjustment resulting from an inconsequential delivery shortage. This action must not exceed $250.00 or 5 percent of the contract price, whichever is less.

(10) Execute supplementals agreements to permit a change in place of inspection at origin specified in firm-fixed-price supply contracts awarded to nonmanufacturers, as deemed necessary to protect the Government's interests.

(11) Prepare evaluations of contractor performance in accordance with subpart 42.11.

(c) Any additional contract administration functions not listed in 42.302(a) and (b), or not otherwise delegated, remain the responsibility of the contracting office unless in accordance with 42.202 Assignment of contract administration(c).

Subpart 42.4 - Corporate Administrative Contracting Officer

42.401 General.

Contractors with more than one operational location (e.g., division, plant, or subsidiary) often have corporate-wide policies, procedures, and activities requiring Government review and approval and affecting the work of more than one administrative contracting officer (ACO). In these circumstances, the CFA may assign a corporate administrative contracting officer (CACO) to deal with corporate management and to perform selected contract administration functions on a corporate-wide basis.

42.402 Assignment and location.

(a) A CACO may be assigned only when the—

(1) Contractor has at least two locations with resident ACOs; or

(2) Agency head or designee approves the assignment. For this purpose ((a)(2) of this paragraph), a nonresident ACO is considered as resident if at least 75 percent of the ACO's effort is devoted to a single contractor. The agency head or designee may also designate a resident ACO to perform the CACO functions.

(b) Agencies must base decisions to initiate or discontinue a CACO assignment on such factors as the-

(1) Benefits of coordination and liaison at the corporate level;

(2) Volume of Government sales;

(3) Degree of control exercised by the contractor's corporate office over Government-oriented lower-tier operating elements; and

(4) Impact of corporate policies and procedures on those elements.

(c) The CASD referenced in 42.203 includes a listing of CACOs and the contractors to whom they are assigned responsibility.

42.403 Responsibilities.

(a) The CACO will perform, on a corporate-wide basis, the contract administration functions as designated by the responsible agency. Typical CACO functions include-

(1) The determination of final indirect cost rates for cost-reimbursement contracts;

(2) Establishment of advance agreements or recommendations on corporate/home office expense allocations; and

(3) Administration of CAS applicable to corporate-level and corporate-directed accounting practices.

(b) The CACO must-

(1) Fully utilize the responsible contract audit agency financial and advisory accounting services, including-

(i) Advice regarding the acceptability of corporate-wide policies; and

(ii) Advisory audit reports;

(2) Keep cognizant ACOs and auditors informed of important matters under consideration and determinations made; and

(3) Solicit advice and participation from cognizant ACOs and auditors as appropriate.

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Subpart 42.5 - Indirect Cost Rates

42.500 Scope of subpart.

This subpart prescribes policies and procedures for establishing-

(a) Billing rates; and

(b) Final indirect cost rates.

42.501 Definition.

Billing rate, as used in this subpart, means an indirect cost rate-

(1) Established temporarily for interim reimbursement of incurred indirect costs; and

(2) Adjusted as necessary until final indirect cost rates are established.

42.502 Purpose.

(a) Establishing final indirect cost rates under this subpart provides-

(1) Uniformity of approach with a contractor when more than one contract or agency is involved;

(2) Economy of administration; and

(3) Timely settlement under cost-reimbursement contracts.

(b) Establishing billing rates provides a method for interim reimbursement of indirect costs at estimated rates subject to adjustment during contract performance and at the time the final indirect cost rates are established.

42.503 General.

42.503-1 Policy.

(a) A single agency (see 42.505-1) is responsible for establishing final indirect cost rates for each business unit. These rates are binding on all agencies and their contracting offices, unless specifically prohibited by statute. Agencies cannot audit indirect cost rates when the audit objectives can reasonably be met by accepting the results of an audit by another department or agency of the Federal Government (10 U.S.C. 3841(e) and 41 U.S.C. 4706(e)).

(b) Contracting officers must use billing rates and final indirect cost rates to reimburse indirect costs under cost-reimbursement contracts and make progress payments under fixed-price contracts.

(c) To ensure compliance with 10 U.S.C. 3743(a) and 41 U.S.C. 4303(a) use final indirect cost rates for -

(1) Contract closeout for a business unit, unless the quick-closeout procedure in 42.507 is used. These final rates are binding for all cost-reimbursement contracts at the business unit, subject to any specific limitation in a contract or advance agreement; and

(2) Negotiating the final price of fixed-price incentive and fixed-price redeterminable contracts and in other situations requiring that indirect costs be settled before contract prices are established, unless the quick-closeout procedure in 42.507 is used.

42.503-2 Certificate of indirect costs.

(a) *General*. In accordance with 10 U.S.C. 3747 and 41 U.S.C. 4307, the Government must not accept a proposal or agree to establish final indirect cost rates unless the contractor certifies the costs are allowable.

(b) *Waiver of certification.*

(1) The agency head, or designee, may waive the certification requirement when-

(i) It is determined to be in the interest of the United States; and

(ii) The reasons for the determination are put in writing and made available to the public.

(2) A waiver may be appropriate for a contract with-

(i) A foreign government or international organization, such as a subsidiary body of the North Atlantic Treaty Organization;

(ii) A State or local government subject to the OMB Uniform Guidance at 2 CFR part 200, subpart E and appendices V and VII;

(iii) An educational institution (defined as an institution of higher education in the OMB Uniform Guidance at 2 CFR part 200, subpart A, and 20 U.S.C. 1001) subject to the OMB Uniform Guidance at 2 CFR part 200, subpart E and appendix III; and

(iv) A nonprofit organization (as defined in the OMB Uniform Guidance at 2 CFR part 200) subject to the OMB Uniform Guidance at 2 CFR part 200, subpart E and appendix IV.

(c) *Failure to certify*.

(1) If the contractor has not certified its proposal for final indirect cost rates and a waiver is not appropriate, the contracting officer may unilaterally establish the rates.

(2) Unilateral rates should be-

(i) Based on audited historical data or other available data if unallowable costs are excluded; and

(ii) Set low enough to ensure that unallowable costs are not reimbursed.

(d) *False certification*. Consult with legal counsel to determine appropriate action when a contractor's certificate of final indirect costs is thought to be false.

(e) *Penalties for unallowable costs*. 10 U.S.C. 3743 and 41 U.S.C.4303 prescribe penalties for submission of unallowable costs in final indirect cost rate proposals (see 42.508 for penalties and contracting officer responsibilities).

(f) *Contract clause*.

(1) Except as provided in paragraph (f)(2) of this section, use the clause at 52.242-4, Certification of Final Indirect Costs, in all solicitations and contracts which provide for establishment of final indirect cost rates.

(2) The Department of Energy may provide an alternate clause in its agency supplement for its Management and Operating contracts.

42.504 Billing rates.

(a) The contracting officer (or cognizant Federal agency official) or auditor responsible under 42.505 for establishing the final indirect cost rates must also determine the billing rates.

(b) The contracting officer (or cognizant Federal agency official) or auditor must establish billing rates on the basis of information resulting from recent review, previous rate audits or experience, or similar reliable data or experience of other contracting activities. When establishing billing rates, ensure that the billing rates are as close as possible to the final indirect cost rates anticipated for the contractor's fiscal period, as adjusted for any unallowable costs. When the contracting officer (or cognizant Federal agency official) or auditor determines that the dollar value of contracts requiring use of billing rates does not warrant submission of a detailed billing rate proposal, the billing rates may be established by making appropriate adjustments from the prior year's indirect cost experience to eliminate unallowable and nonrecurring costs and to reflect new or changed conditions.

(c) Once established, billing rates may be prospectively or retroactively revised by mutual agreement of the contracting officer (or cognizant Federal agency official) or auditor and the contractor at either party's request, to prevent substantial overpayment or underpayment. When agreement cannot be reached, the contracting officer (or cognizant Federal agency official) may unilaterally determine the billing rates.

(d) Do not construe the elements of indirect cost and the base or bases used in computing billing rates as determinative of the indirect costs to be distributed or of the bases of distribution to be used in the final settlement.

(e) When the contractor provides to the cognizant contracting officer the certified final indirect cost rate proposal in accordance with 42.505-1(b) or 42.505-2(b), the contractor and the Government may mutually agree to revise billing rates to reflect the proposed indirect cost rates, as approved by the Government to reflect historically disallowed amounts from prior years' audits, until the proposal has been audited and settled. The cognizant contracting officer (see 42.505-1(b)) or auditor (see 42.505-2(b)) will determine the historical decrement.

42.505 Final indirect cost rates.

(a) Establish final indirect cost rates based on-

(1) Contracting officer determination procedure (see 42.505-1), or

(2) Auditor determination procedure (see 42.505-2).

(b) Within 120 days (or longer period, if approved in writing by the contracting officer,) after, settlement of the final annual indirect cost rates for all years of a physically complete contract, the contractor must submit a completion invoice or voucher reflecting the settled amounts and rates. To determine whether a period longer than 120 days is appropriate, the contracting officer should consider whether there are extenuating circumstances, such as the following:

(1) Pending closeout of subcontracts awaiting Government audit.

(2) Pending contractor, subcontractor, or Government claims.

(3) Delays in the disposition of Government property.

(4) Delays in contract reconciliation.

(5) Any other pertinent factors.

(c)

(1) If the contractor does not submit a completion invoice or voucher within the time specified in paragraph (b) of this section, the contracting officer may-

(i) Determine the amounts due to the contractor under the contract; and

(ii) Record this determination in a unilateral modification to the contract.

(2) This contracting officer determination must be issued as a final decision in accordance with part 33.

42.505-1 Contracting officer determination procedure.

(a) *Applicability and responsibility*. Contracting officer determination will be used for the following, with the indicated cognizant contracting officer (or cognizant Federal agency official) responsible for establishing the final indirect cost rates:

(1) Business units of a multidivisional corporation under the cognizance of a corporate administrative contracting officer (CACO) (see subpart 42.4), with that officer responsible for the determination, assisted, as required, by the administrative contracting officers assigned to the individual business units. Negotiations may be conducted on a coordinated or centralized basis, depending upon the degree of centralization within the contractor's organization.

(2) Business units not under the cognizance of a CACO but having a resident ACO (see subpart 42.4), with that officer responsible for the determination. For this purpose, a nonresident ACO is considered as resident if they spend at least 75 percent of their time devoted to a single contractor.

(3) For business units not included in paragraph (a)(1) or (a)(2) of this subsection, the contracting officer (or cognizant Federal agency official) will determine whether the rates will be contracting officer or auditor determined.

(4) Educational institutions (see 42.505-3).

(5) State and local governments (see 42.505-4).

(6) Nonprofit organizations other than educational and state and local governments (see 42.505-5).

(b) *Procedures*.

(1) *Contractor proposal.* In accordance with the Allowable Cost and Payment clause at 52.216-7, the contractor must submit an adequate final indirect cost rate proposal to the cognizant contracting officer (or cognizant Federal agency official) and to the cognizant auditor.

(i) The required content of the proposal and supporting data will vary depending on such factors as business type, size, and accounting system capabilities. The contractor, contracting officer, and auditor must work together to make the proposal, audit, and negotiation process as efficient as possible.

(ii) Each contractor must submit the final indirect cost rate proposal within the six-month period following the expiration of each of its fiscal years. The contracting officer may grant, in writing, reasonable extensions, for exceptional circumstances only, when requested in writing by the contractor.

(iii) Upon receipt of the proposal—

(A) The cognizant auditor will review the adequacy of the contractor's proposal for audit in support of negotiating final indirect cost rates and a written description of any inadequacies to the contractor and contracting officer.

(B) If the auditor and contractor are unable to resolve the proposal's inadequacies identified by the auditor, the auditor will elevate the issue to the contracting office to resolve the inadequacies.

(iv) The proposal must be supported with adequate supporting data. Additional supporting data may be required after finding that the proposal is adequate in support of negotiating final indirect cost rates. See the clause at 52.216-7(d)(2) for the description of an adequate final indirect cost rate proposal and supporting data.

(2) *Audit*. Once a proposal has been determined to be adequate for audit in support of negotiating final indirect cost rates, the auditor will audit the proposal and prepare an advisory audit report to the contracting officer (or cognizant Federal agency official), including a listing of any relevant advance agreements or restrictive terms of specific contracts.

(3) *Negotiation team*. The contracting officer (or cognizant Federal agency official) heads the Government negotiating team. The team develops a negotiation position. The team includes:

(i) The cognizant auditor;

(ii) Technical or functional personnel as required.;

(iii) Contracting offices with significant dollar interest must be invited to participate in the negotiation and in the preliminary discussion of critical issues.;

(iv) Parties that have provided a significant input to the Government position should be invited to attend.

(4) *Negotiation position*. The team develops a negotiation position. Pursuant to 10 U.S.C. 3745 and 41 U.S.C.4305, the contracting officer will -

(i) Not resolve any questioned costs until obtaining-

(A) Adequate documentation on the costs; and

(B) The contract auditor's opinion on the allowability of the costs.

(ii) Whenever possible, invite the contract auditor to serve as an advisor at any negotiation or meeting with the contractor on the determination of the contractor's final indirect cost rates.

(5) The cognizant contracting officer must-

(i) Conduct negotiations;

(ii) Prepare a written indirect cost rate agreement conforming to the requirements of the contracts;

(iii) Prepare, sign, and place in the contractor general file a negotiation memorandum covering—

(A) The disposition of significant matters in the advisory audit report,

(B) Reconciliation of all costs questioned, with identification of items and amounts allowed or disallowed in the final settlement as well as the disposition of period costing or allocability issues,

(C) Reasons why any recommendations of the auditor or other Government advisors were not followed, and

(D) Identification of certified cost or pricing data submitted during the negotiations and relied upon in reaching a settlement; and

(iv) The contracting officer must promptly distribute executed copies of the indirect cost rate agreement to the contractor and to each affected contracting agency and include copies of the agreement in the contract file. The contracting officer must include a copy of the negotiation memorandum described in 42.501(b)(5)(iii) in the contract file and furnish, as appropriate, to the affected contracting offices and Government auditor.

(v) Notify the contractor of the individual costs which were considered unallowable and the respective amounts of the disallowance.

42.505-2 Auditor determination procedure.

(a) *Applicability and responsibility*.

(1) The cognizant Government auditor must establish final indirect cost rates for business units not covered in 42.505-1(a).

(2) Auditor determination may also be used for business units that are covered in 42.505-1(a) when the contracting officer (or cognizant Federal agency official) and auditor agree that the indirect costs can be settled with little difficulty and any of the following circumstances apply:

(i) The business unit primarily has fixed-price contracts, with only minor involvement in cost-reimbursement contracts.

(ii) The administrative cost of contracting officer determination would exceed the expected benefits.

(iii) The business unit does not have a history of disputes and there are few cost problems.

(iv) The contracting officer (or cognizant Federal agency official) and auditor agree that special circumstances require auditor determination.

(b) *Procedures*.

(1) The contractor must submit to the cognizant contracting officer (or cognizant Federal agency official) and auditor a final indirect cost rate proposal in accordance with 42.505-1(b)(1).

(2) Once a proposal has been determined to be adequate for audit in support of negotiating final indirect cost rates, the auditor will-

(i) Audit the proposal and prepare an advisory audit report, including a listing of any relevant advance agreements or restrictive terms of specific contracts. Copies of the audit report must be furnished to the affected contracting offices;

(ii) Seek agreement on indirect costs with the contractor;

(iii) Prepare an indirect cost rate agreement conforming to the requirements of the contracts. The agreement must be signed by the contractor and the auditor. A copy of the agreement must be distributed to the contractor and to each affected contracting agency;

(iv) If agreement with the contractor is not reached, forward the audit report to the contracting officer (or cognizant Federal agency official) identified in the Directory of Contract Administration Services Components (see 42.203), who will then resolve the disagreement; and

(v) Promptly distribute resultant documents.

42.505-3 Educational institutions.

(a) *General*.

(1) Postdetermined final indirect cost rates must be used to settle indirect costs for all cost-reimbursement contracts with educational institutions, unless predetermined final indirect cost rates are authorized and used (see paragraph (b) of this subsection).

(2) The OMB Uniform Guidance at 2 CFR part 200, appendix III assigns each educational institution (defined as an institution of higher education in the OMB Uniform Guidance at 2 CFR part 200, subpart A, and 20 U.S.C. 1001) to a single Government agency for the negotiation of indirect cost rates; all Federal agencies accept those rates. Cognizant Government agencies and educational institutions are listed in the CASD (see 42.202).

(3) The cognizant agency for indirect costs establishes billing rates and final indirect cost rates at the educational institutions, using the procedures at 42.505-1 (b).

(4) If the cognizant agency is unable to reach agreement with an institution, the cognizant agency will resolve disputes in accordance with agency procedures and the OMB Uniform Guidance.

(b) *Predetermined final indirect cost rates*.

(1) Agencies may use predetermined rates for cost-reimbursement research and development contracts with universities, colleges, or other educational institutions (41 U.S.C. 4708). If established, they extend to all the institution's Government contracts.

(2) In deciding whether the use of predetermined rates are appropriate, consider the stability of indirect costs and bases over a period of years and anticipated changes.

(3) Unless approved at a level in the cognizant agency higher than the contracting officer, do not use predetermined rates when-

(i) There has been no recent audit of the indirect costs;

(ii) There have been frequent or wide fluctuations in the indirect cost rates and the bases over a period of years; or

(iii) The estimated reimbursable costs for any individual contract are expected to exceed $1 million annually.

(4) If no predetermined rates exist for the institution's current fiscal year-

(i) The institution must provide the agency a proposal for predetermined rates.

(ii) If the proposal is found to be generally acceptable, the agency must negotiate the predetermined rates with the institution. The rates should be based on an audit of the institution's costs for the year immediately preceding year that the rates are being negotiated. If this is not possible, or, if not available, earlier audits, if determined appropriate by the cognizant agency may be used, but appropriate steps should be taken to identify and evaluate significant variations in costs incurred or in bases used that may have a bearing on the reasonableness of the proposed rates. However, in the case of smaller contracts (i.e., contracts that do not exceed the simplified acquisition threshold), an audit made at an earlier date is acceptable if-

(A) There have been no significant changes in the contractor's organization; and

(B) It is reasonably apparent that another audit would have little effect on the rates finally agreed upon and the potential for overpayment of indirect cost is relatively insignificant.

(5) If predetermined rates are used-

(i) The contracting officer must include the negotiated rates and bases in the contract Schedule; and

(ii) See part 16, which prescribes the clause at 52.216-15, Predetermined Indirect Cost Rates.

(6) Predetermined indirect cost rates are applicable for a period of not more than four years. The agency must obtain new rate proposals sufficiently in advance so that the new rates, based on current data, may be promptly negotiated near the beginning of the next fiscal year or other period agreed to by the parties (see paragraphs (b) and (d) of the clause at 52.216-15, Predetermined Indirect Cost Rates).

(7) Use billing rates for periods not covered by predetermined rates.

(8) The OMB Uniform Guidance at 2 CFR part 200, subpart E and appendix III, provides additional guidance on how long predetermined rates may be used.

42.505-4 State and local governments.

The OMB Uniform Guidance at 2 CFR part 200, subpart E and appendix V, concerning cost principles for state and local governments (see part 31) establishes the procedures for determining the cognizant agency for State and local government indirect costs associated with federally-funded programs and activities. Rates approved by the cognizant agency for indirect costs must be used by all Federal agencies that also award contracts to these same State and local governments.

42.505-5 Nonprofit organizations other than educational institutions and state and local governments.

The OMB Uniform Guidance at 2 CFR part 200, subpart E and appendix V, establishes the procedures for determining the cognizant agency for State and local government indirect costs associated with federally-funded programs and activities. Rates approved by the cognizant agency must be used by all Federal agencies.

42.506 Cost-sharing rates and limitations on indirect cost rates.

(a) *Rate ceilings in cost sharing*. Cost-sharing arrangements, when authorized, may call for the contractor to participate in the costs of the contract by accepting indirect cost rates lower than the anticipated actual rates. In such cases, a negotiated indirect cost rate ceiling may be incorporated into the contract for prospective application.

(b) *Other rate ceilings*. Other situations may warrant the use of final indirect cost rate ceilings, such as when the contractor-

(1) Is a new or recently reorganized company with no indirect cost history;

(2) Has rapidly increasing indirect cost rates due to declining sales without a commensurate decline in indirect expenses; or

(3) Seeks a competitive advantage by basing its proposal on unrealistically low indirect cost rates, likely to result in a cost overrun.

(c) When ceiling provisions are utilized, the contract must also provide that-

(1) The Government is not obligated to pay any additional amount should the final rates exceed the negotiated ceiling rates, and

(2) If final rates are less than the ceiling rates, the rates will be reduced to conform with the lower rates.

42.507 Quick-closeout procedure.

(a) The contracting officer responsible for contract closeout may negotiate the settlement of direct and indirect costs for a specific contract, task order, or delivery order prior to the determination of final indirect cost rates, as set forth 42.505, if-

(1) The contract, task order, or delivery order is physically complete;

(2) The amount of unsettled direct costs and indirect costs to be allocated to the contract, task order, or delivery order is relatively insignificant. Cost amounts will be considered relatively insignificant when the (total unsettled direct costs and indirect costs to be allocated to any one contract, task order, or delivery order does not exceed the lesser of $1,000,000 or 10 percent of the total contract amount).

(3) The contracting officer performs a risk assessment and determines quick-closeout procedures are appropriate. The risk assessment must include-

(i) Consideration of the contractor's accounting, estimating, and purchasing systems;

(ii) Other concerns of the cognizant contract auditors; and

(iii) Any other pertinent information, such as, documented history of Federal Government approved indirect cost rate agreements, changes to contractor's rate structure, volatility of rate fluctuations during affected periods, mergers or acquisitions, special contract provisions limiting contractor's recovery of otherwise allowable indirect costs under cost reimbursement or time-and-materials contracts; and

(4) Agreement can be reached on a reasonable estimate of allocable dollars.

(b) A determination of final indirect costs under the quick-closeout procedure provided for by the Allowable Cost and Payment clause at 52.216-7 is final for the contract it covers and no adjustment will be made to other contracts for over- or under-recoveries of costs allocated or allocable to the contract covered by the agreement.

(c) Indirect cost rates used in the quick closeout of a contract will not be considered a binding precedent when establishing the final indirect cost rates for other contracts.

42.508 Penalties for Unallowable Costs.

42.508-1 Scope.

(a) This section implements 10 U.S.C. 3743 and 41 U.S.C. 4303. It covers the assessment of penalties against contractors which include unallowable indirect costs in-

(1) Final indirect cost rate proposals; or

(2) The final statement of costs incurred or estimated to be incurred under a fixed-price incentive contract.

(b) This section applies to all contracts in excess of $1 million, except fixed-price contracts without cost incentives or any firm-fixed-price contracts for the purchase of commercial products or commercial services.

42.508-2 General.

(a) The following penalties apply to contracts covered by this section:

(1) If the indirect cost is expressly unallowable under a cost principle in the FAR, or an executive agency supplement to the FAR, that defines the allowability of specific selected costs, the penalty is equal to-

(i) The amount of the disallowed costs allocated to contracts that are subject to this section for which an indirect cost proposal has been submitted; plus

(ii) Interest on the paid portion, if any, of the disallowance.

(2) If the indirect cost was determined to be unallowable for that contractor before proposal submission, the penalty is two times the amount in paragraph (a)(1)(i) of this section.

(b) These penalties are in addition to other administrative, civil, and criminal penalties provided by law.

(c) Penalties may be assessed even if the unallowable costs were not paid to the contractor.

42.508-3 Responsibilities.

(a) The cognizant contracting officer is responsible for determining whether the penalties in 42.508-2(a) should be assessed and determining if such penalties should be waived pursuant to 42.508-6.

(b) The contract auditor is responsible for reviews and/or making determinations of final indirect cost proposals for contracts subject to this section, identifying costs that may be subject to penalty, and providing rationale and supporting documentation for any recommendations

(c) Both contracting officers and contract auditors have a duty to refer matters to the appropriate criminal investigative organization for review and coordination of remedies if there is evidence that the contractor knowingly submitted unallowable costs.

42.508-4 Assessing the penalty.

Unless a waiver is granted pursuant to 42.508-6, the cognizant contracting officer must-

(a) Assess the penalty in 42.508-2(a)(1), when the submitted cost is expressly unallowable under a cost principle in the FAR or an executive agency supplement that defines the allowability of specific selected costs; or

(b) Assess the penalty in 42.508-2(a)(2), when the submitted cost was determined to be unallowable for that contractor prior to submission of the proposal. Prior determinations of unallowability may be evidenced by-

(1) A DCAA Form 1, Notice of Contract Costs Suspended and/or Disapproved (see 48 CFR 242.705-2), or any similar notice which the contractor elected not to appeal and was not withdrawn by the cognizant Government agency;

(2) A contracting officer final decision which was not appealed;

(3) A prior executive agency Board of Contract Appeals or court decision involving the contractor, which upheld the cost disallowance; or

(4) A determination or agreement of unallowability under part 31.

(c) The contracting officer must issue a final decision (see part 33) which includes a demand for payment any penalty assessed under paragraph (a) or (b) of this section. The letter must state that the determination is a final decision under the Disputes clause of the contract. The demand for payment of the penalty is separate from a demand for repayment of any paid portion of the disallowed cost.

42.508-5 Computing Interest.

For 42.508-2(a)(1)(ii), compute interest on any paid portion of the disallowed cost as follows:

(a) Consider the overpayment to have occurred, and interest to have begun accumulating, from the midpoint of the contractor's fiscal year. Use an alternate equitable method if the cost was not paid evenly over the fiscal year.

(b) Use the interest rate specified by the Secretary of the Treasury pursuant to 41 U.S.C. 7109.

(c) Compute interest from the date of overpayment to the date of the demand letter for payment of the penalty.

(d) Determine the paid portion of the disallowed costs in consultation with the contract auditor.

42.508-6 Waiver of the penalty.

The cognizant contracting officer must waive the penalties at 42.508-2(a) when—

(a) The contractor withdraws the proposal before formal audit initiation (written notice to the contractor or an entrance conference with the contractor is held, indicating that audit work on a specific final indirect cost proposal has begun) and submits a revised proposal as required by 41 U.S.C. 4303(c) and 10 U.S.C. 3743(c).;

(b) The unallowable costs subject to the penalty are $10,000 or less; or

(c) The contractor demonstrates, to the cognizant contracting officer's satisfaction, that-

(1) It has established policies and personnel training and an internal control and review system that provide assurance that unallowable costs subject to penalties are precluded from being included in the contractor's final indirect cost rate proposals; and

(2) The unallowable costs subject to the penalty were inadvertently included into the proposal despite due care.

42.508-7 Contract clause.

Use the clause at 52.242-3, Penalties for Unallowable Costs, in all solicitations and contracts over $1 million except fixed-price contracts without cost incentives or any firm-fixed-price contract for the purchase of commercial products or commercial services. Generally, covered contracts are those which contain one of the clauses at 52.216-7, 52.216-16, or 52.216-17, or a similar clause from an executive agency's supplement to the FAR.

Subpart 42.6 - Disallowance of Costs

42.600 Scope of subpart.

This subpart prescribes policies and procedures for-

(a) Issuing notices of intent to disallow costs; and

(b) Disallowing costs already incurred during the course of performance.

42.601 Notice of intent to disallow costs.

(a) Contracting officers must make reasonable efforts to proactively address potentially unallowable costs with contractors. If unable to settle the matter through discussion, the cognizant contracting officer responsible for administering the contract may issue the contractor a written notice of intent to disallow specified costs incurred or planned for incurrence during the performance of the following contract types:

(1) Cost-reimbursement contracts.

(2) Cost-reimbursement portions of fixed-price contracts.

(3) Letter contracts that provides for reimbursement of costs.

(4) Time-and-material and labor-hour contracts.

(5) Fixed-price incentive contracts.

(b) A notice of intent to disallow such costs usually results from monitoring contractor costs. The purpose of the notice is to notify the contractor as early as practicable during contract performance that the cost is considered unallowable under the contract terms and to provide for timely resolution of any resulting disagreement. In case of disagreement, the contractor may submit to the contracting officer a written response. Any such response must be answered by withdrawal of the notice or by making a written decision within 60 days.

(c) As a minimum, the notice must-

(1) Refer to the contract's Notice of Intent to Disallow Costs clause;

(2) State the contractor's name and list the numbers of the affected contracts;

(3) Describe the costs to be disallowed, including estimated dollar value by item and applicable time periods, and state the reasons for the intended disallowance;

(4) Describe the potential impact on billing rates and forward pricing rate agreements;

(5) State the notice's effective date and the date by which written response must be received;

(6) List the recipients of copies of the notice; and

(7) Request the contractor to acknowledge receipt of the notice.

(d) The contracting officer issuing the notice must furnish copies to all contracting officers cognizant of any segment of the contractor's organization.

(e) If the notice involves elements of indirect cost, it must not be issued without coordination with the contracting officer or auditor having authority for final indirect cost settlement (see 42.505).

(f) In the event the contractor submits a response that disagrees with the notice (see paragraph (b) of this section), the contracting officer who issued the notice must either withdraw the notice or issue the written decision, except when elements of indirect cost are involved, in which case the contracting officer responsible under 42.505 for determining final indirect cost rates must issue the decision.

42.602 Contract clause.

The contracting officer must insert the clause at 52.242-1, Notice of Intent to Disallow Costs, in solicitations and contracts when a cost-reimbursement contract, a fixed-price incentive contract, or a contract providing for price redetermination is contemplated.

42.603 Disallowing costs after incurrence.

The contracting officer must apply the following procedures when disallowing costs which the contractor has already incurred:

(a) *Contracting officer receipt of vouchers*. Contracting officers should follow agency procedures when they receive vouchers directly from the contractor.

(b) *Auditor receipt of vouchers*.

(1) When authorized by agency regulations, the contract auditor may—

(i) Receive reimbursement vouchers directly from contractors,

(ii) Approve acceptable vouchers for payment, and

(iii) Suspend payment of questionable costs.

(2) The auditor must forward approved vouchers for payment to the cognizant contracting, finance, or disbursing officer, as appropriate under the agency's procedures.

(3) If a voucher raises allowability questions, the auditor may issue a notice of contract costs suspended and or disapproved to the contractor and the disbursing officer. A copy must be provided to the cognizant contracting officer. This action after informal discussion and when authorized by agency regulations, permits deduction from current payments for costs claimed but not considered reimbursable.

(4) If the contractor disagrees with the deduction from current payments, they may-

(i) Submit a written request to the cognizant contracting officer to consider whether the unreimbursed costs should be paid and discuss findings;

(ii) File a claim under the Disputes clause, which the cognizant contracting officer will process in accordance with agency procedures; or

(iii) Do both options listed above.

Subpart 42.7 – Bankruptcy

42.700 Scope of subpart.

This subpart prescribes policies and procedures for actions to be taken when a contractor enters into proceedings relating to bankruptcy. It requires contractors to notify the contracting officer upon filing a petition for bankruptcy and establishes minimum requirements for agencies to follow in the event of a contractor bankruptcy.

42.701 General.

The contract administration office must take prompt action to determine the potential impact of a contractor bankruptcy to protect the interests of the Government.

42.702 Procedures.

(a) When notified of bankruptcy proceedings, agencies must, at a minimum-

(1) Furnish the notice of bankruptcy to legal counsel and other appropriate agency offices (e.g., contracting, financial, property) and affected buying activities;

(2) Determine the amount of the Government's potential claim against the contractor (in assessing this impact, identify and review any contracts that have not been closed out, including those physically completed or terminated);

(3) Take actions necessary to protect the Government's financial interests and safeguard Government property; and

(4) Furnish pertinent contract information to the legal counsel representing the Government.

(b) The contracting officer will consult with legal counsel, whenever possible, prior to taking any action regarding the contractor's bankruptcy proceedings.

42.703 Solicitation provision and contract clause.

The contracting officer must insert the clause at 52.242-13, Bankruptcy, in all solicitations and contracts exceeding the simplified acquisition threshold.

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Subpart 42.8 - Production Surveillance and Reporting

42.801 General.

Production surveillance is a contract administration function used to determine contractor progress and to identify any factors that may delay performance. Production surveillance involves Government review and analysis of-

(a) Contractor performance plans, schedules, controls, and industrial processes; and

(b) The contractor's actual performance under them.

42.802 Applicability.

This subpart applies to all contracts other than construction contracts and Federal Supply Schedule contracts.

42.803 Surveillance requirements.

(a) The contract administration office determines the extent of production surveillance on the basis of-

(1) The criticality (degree of importance to the Government) assigned by the contracting officer (see 42.804) to the supplies or services; and

(2) Consideration of the following factors:

(i) Contract requirements for reporting production progress and performance.

(ii) The contract performance schedule.

(iii) The contractor's production plan.

(iv) The contractor's history of contract performance.

(v) The contractor's experience with the contract supplies or services.

(vi) The contractor's financial capability.

(vii) Any supplementary written instructions from the contracting office.

(b) Contracts at or below the simplified acquisition threshold should not normally require production surveillance.

(c) In planning and conducting surveillance, contract administration offices must make maximum use of any reliable contractor production control or data management systems.

(d) In performing surveillance, contract administration office personnel must avoid any action that may-

(1) Be inconsistent with any contract requirement; or

(2) Result in claims of waivers, of changes, or of other contract modifications.

42.804 Assignment of criticality designator.

Contracting officers must assign a criticality designator to each contract in the space for designating the contract administration office in the contract, as follows:

Criticality Designator	Criterion
A	Critical contracts, including DX-rated contracts (see part 11), contracts citing the authority in part 6 for unusual and compelling urgency, and contracts for major systems (see part 34).
B	Contracts (other than those designated "A") for items needed to maintain a Government or contractor production or repair line, to preclude out-of-stock conditions, or to meet user needs for nonstock items.
C	All contracts other than those designated "A" or "B".

42.805 Contract clause.

(a) Insert the clause at 52.242-2, Production Progress Reports, in solicitations and contracts when production progress reporting is required; unless a construction contract, or a Federal Supply Schedule contract is contemplated.

(b) When the clause at 52.242-2 is used, specify appropriate reporting instructions in the Schedule.

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Subpart 42.9 - Novation and Change-of-Name Agreements

42.900 Scope of subpart.

This subpart prescribes policies and procedures for-

(a) Recognition of a successor in interest to Government contracts when contractor assets are transferred;

(b) Recognition of a change in a contractor's name; and

(c) Execution of novation agreements and change-of-name agreements by the responsible contracting officer.

42.901 Responsibility for executing agreements.

The contracting officer responsible for processing and executing novation and change-of-name agreements will be determined as follows:

(a) If any of the affected contracts held by the transferor have been assigned to an administrative contracting officer (ACO) (see part 2 and 42.202 of this part), the responsible contracting officer will be-

(1) The assigned ACO; or

(2) The ACO responsible for the corporate office, if affected contracts are in more than one plant or division of the transferor.

(b) If none of the affected contracts held by the transferor have been assigned to an ACO, the contracting officer responsible for the largest unsettled (unbilled plus billed but unpaid) dollar balance of contracts will be the responsible contracting officer.

(c) If several transferors are involved, the responsible contracting officer is-

(1) The ACO administering the largest unsettled dollar balance; or

(2) The contracting officer designated by the agency having the largest unsettled dollar balance, if none of the affected contracts have been assigned to an ACO.

42.902 Processing agreements.

(a) If a contractor wishes the Government to recognize a successor in interest to its contracts or a name change, the contractor must submit a written request to the responsible contracting officer (see 42.901). If the contractor is an AbilityOne Nonprofit Agency, paragraphs (a) through (g) of this section do not apply. The Committee will provide a notice of change to the cognizant contracting officer for execution of an SF-30 in accordance with paragraph (h).

(b) The responsible contracting officer will-

(1) Identify and request that the contractor submit information necessary to evaluate the proposed agreement for recognizing a successor in interest or a name change. This information should include the items identified in 42.903(e) and (f) or 42.904(a), as applicable;

(2) Notify each contract administration office and contracting office affected by a proposed agreement for recognizing a successor in interest, and provide those offices with a list of all affected contracts; and

(3) Request submission of any comments or objections to the proposed transfer within 30 days after notification. Any submission should be accompanied by supporting documentation.

(c) Upon receipt of the necessary information, the responsible contracting officer will determine whether it is in the Government's interest to recognize the proposed successor in interest on the basis of-

(1) The comments received from the affected contract administration offices and contracting offices;

(2) The proposed successor's responsibility under part 9; and

(3) Any factor relating to the proposed successor's performance of Government contracts that the Government determines would impair the proposed successor's ability to perform the contract satisfactorily.

(d) The execution of a novation agreement does not preclude the use of any other method available to the contracting officer to resolve any other issues related to a transfer of contractor assets, including the treatment of costs.

(e) Any separate agreement between the transferor and transferee regarding the assumption of liabilities (e.g., long-term incentive compensation plans, cost accounting standards noncompliances, environmental cleanup costs, and final overhead costs) should be referenced specifically in the novation agreement.

(f) Before novation and change-of-name agreements are executed, the responsible contracting officer must ensure that Government counsel has reviewed them for legal sufficiency.

(g) The responsible contracting officer must-

(1) Forward a signed copy of the executed novation or change-of-name agreement to the transferor and to the transferee and

(2) Retain a signed copy in the case file.

(h) Following distribution of the agreement, the responsible contracting officer must-

(1) Prepare a Standard Form 30, Amendment of Solicitation/Modification of Contract, incorporating a summary of the agreement and attaching a complete list of contracts affected;

(2) Retain the original Standard Form 30 with the attached list in the case file;

(3) Send a signed copy of the Standard Form 30, with attached list to the transferor and to the transferee; and

(4) Send a copy of this Standard Form 30 with attached list to each contract administration office or contracting office involved, which will be responsible for further appropriate distribution.

42.903 Applicability of novation agreements.

(a) 41 U.S.C.6305 prohibits transfer of Government contracts from the contractor to a third party. The Government may, when in its interest, recognize a third party as the successor in interest to a Government contract when the third party's interest in the contract arises out of the transfer of-

(1) All the contractor's assets; or

(2) The entire portion of the assets involved in performing the contract. (See part 14 for the effect of novation agreements after bid opening but before award.) Examples of such transactions include, but are not limited to-

(i) Sale of these assets with a provision for assuming liabilities;

(ii) Transfer of these assets incident to a merger or corporate consolidation; and

(iii) Incorporation of a proprietorship or partnership, or formation of a partnership.

(b) A novation agreement is unnecessary when there is a change in the ownership of a contractor as a result of a stock purchase, with no legal change in the contracting party, and when that contracting party remains in control of the assets and is the party performing the contract. However, whether there is a purchase of assets or a stock purchase, there may be issues related to the change in ownership that appropriately should be addressed in a formal agreement between the contractor and the Government (see 42.902(e)).

(c) When it is in the Government's interest not to concur in the transfer of a contract from one company to another company, the original contractor remains under contractual obligation to the Government, and the contract may be terminated for reasons of default, should the original contractor not perform.

(d) When considering whether to recognize a third party as a successor in interest to Government contracts, the responsible contracting officer must identify and evaluate any significant organizational conflicts of interest in accordance with part 9. If the responsible contracting officer determines that a conflict of interest cannot be resolved but approving the novation request is in the Government's interest, a waiver request may be submitted in accordance with part 9.

(e) When a contractor asks the Government to recognize a successor in interest, the contractor must submit to the responsible contracting officer three signed copies of the proposed novation agreement and one copy each, as applicable, of the following:

(1) The document describing the proposed transaction, e.g., purchase or sale agreement or memorandum of understanding.

(2) A list of all affected contracts between the transferor and the Government, as of the date of sale or transfer of assets, showing for each, as of that date, the-

(i) Contract number and type;

(ii) Name and address of the contracting office;

(iii) Total dollar value, as amended; and

(iv) Approximate remaining unpaid balance.

(3) Evidence of the transferee's capability to perform.

(4) Any other relevant information requested by the responsible contracting officer.

(f) Except as provided in paragraph (g) of this section, the contractor must submit to the responsible contracting officer one copy of each of the following documents, as applicable, as the documents become available:

(1) An authenticated copy of the instrument effecting the transfer of assets (e.g., bill of sale, certificate of merger, contract, deed, agreement, or court decree).

(2) A certified copy of each resolution of the corporate parties' boards of directors authorizing the transfer of assets.

(3) A certified copy of the minutes of each corporate party's stockholder meeting necessary to approve the transfer of assets.

(4) An authenticated copy of the transferee's certificate and articles of incorporation, if a corporation was formed for the purpose of receiving the assets involved in performing the Government contracts.

(5) The opinion of legal counsel for the transferor and transferee stating that the transfer was properly effected under applicable law and the effective date of transfer.

(6) Balance sheets of the transferor and transferee as of the dates immediately before and after the transfer of assets, audited by independent accountants.

(7) Evidence that any security clearance requirements have been met.

(8) The consent of sureties on all contracts listed under paragraph (e)(2) of this section if bonds are required, or a statement from the transferor that none are required.

(g) If the Government has acquired the documents during its participation in the pre-merger or pre-acquisition review process, or the Government's interests are adequately protected with an alternative formulation of the information, the responsible contracting officer may modify the list of documents to be submitted by the contractor.

(h) When recognizing a successor in interest to a Government contract is consistent with the Government's interest, the responsible contracting officer must execute a novation agreement with the transferor and the transferee. It must ordinarily provide in part that-

(1) The transferee assumes all the transferor's obligations under the contract;

(2) The transferor waives all rights under the contract against the Government;

(3) The transferor guarantees performance of the contract by the transferee (a satisfactory performance bond may be accepted instead of the guarantee); and

(4) Nothing in the agreement will relieve the transferor or transferee from compliance with any Federal law.

(i) The responsible contracting officer must use the following format for agreements when the transferor and transferee are corporations, and all the transferor's assets are transferred. This format may be adapted to fit specific cases and may be used as a guide in preparing similar agreements for other situations.

NOVATION AGREEMENT

The ABC CORPORATION (Transferor), a corporation duly organized and existing under the laws of _____ [*insert State*] with its principal office in _____ [*insert city*]; the XYZ CORPORATION (Transferee), [*if appropriate add "formerly known as the EFG Corporation"*] a corporation duly organized and existing under the laws of _____ [*insert State*] with its principal office in _____ [*insert city*]; and the UNITED STATES OF AMERICA (Government) enter into this Agreement as of _____ [*insert the date transfer of assets became effective under applicable State law*].

(a) THE PARTIES AGREE TO THE FOLLOWING FACTS:

(1) The Government, represented by various Contracting Officers of the _____ [*insert name(s) of agency(ies)*], has entered into certain contracts with the Transferor, namely: _____ [*insert contract or purchase order identifications*]; [*or delete "namely" and insert "as shown in the attached list marked 'Exhibit A' and incorporated in this Agreement by reference."*]. The term *the contracts,* as used in this Agreement, means the above contracts and purchase orders and all other contracts and purchase orders, including all modifications, made between the Government and the Transferor before the effective date of this Agreement (whether or not performance and payment have been completed and releases executed if the Government or the Transferor has any remaining rights, duties, or obligations under these contracts and purchase orders). Included in the term *the contracts* are also all modifications made under the terms and conditions of these contracts and purchase orders between the Government and the Transferee, on or after the effective date of this Agreement.

(2) As of _____, 20__, the Transferor has transferred to the Transferee all the assets of the Transferor by virtue of a _____ [*insert term descriptive of the legal transaction involved*] between the Transferor and the Transferee.

(3) The Transferee has acquired all the assets of the Transferor by virtue of the above transfer.

(4) The Transferee has assumed all obligations and liabilities of the Transferor under the contracts by virtue of the above transfer.

(5) The Transferee is in a position to fully perform all obligations that may exist under the contracts.

(6) It is consistent with the Government's interest to recognize the Transferee as the successor party to the contracts.

(7) Evidence of the above transfer has been filed with the Government.

[*When a change of name is also involved; e.g., a prior or concurrent change of the Transferee's name, an appropriate statement shall be inserted (see example in paragraph (8) below)*].

(8) A certificate dated _____, 20__, signed by the Secretary of State of _____ [*insert State*], to the effect that the corporate name of EFG CORPORATION was changed to XYZ CORPORATION on _____, 20__, has been filed with the Government.

(b) IN CONSIDERATION OF THESE FACTS, THE PARTIES AGREE THAT BY THIS AGREEMENT—

(1) The Transferor confirms the transfer to the Transferee, and waives any claims and rights against the Government that it now has or may have in the future in connection with the contracts.

(2) The Transferee agrees to be bound by and to perform each contract in accordance with the conditions contained in the contracts. The Transferee also assumes all obligations and liabilities of, and all claims against, the Transferor under the contracts as if the Transferee were the original party to the contracts.

(3) The Transferee ratifies all previous actions taken by the Transferor with respect to the contracts, with the same force and effect as if the action had been taken by the Transferee.

(4) The Government recognizes the Transferee as the Transferor's successor in interest in and to the contracts. The Transferee by this Agreement becomes entitled to all rights, titles, and interests of the Transferor in and to the contracts as if the Transferee were the original party to the contracts. Following the effective date of this Agreement, the term *Contractor,* as used in the contracts, shall refer to the Transferee.

(5) Except as expressly provided in this Agreement, nothing in it shall be construed as a waiver of any rights of the Government against the Transferor.

(6) All payments and reimbursements previously made by the Government to the Transferor, and all other previous actions taken by the Government under the contracts, shall be considered to have discharged those parts of the Government's obligations under the contracts. All payments and reimbursements made by the Government after the date of this Agreement in the name of or to the Transferor shall have the same force and effect as if made to the Transferee and shall constitute a complete discharge of the Government's obligations under the contracts, to the extent of the amounts paid or reimbursed.

(7) The Transferor and the Transferee agree that the Government is not obligated to pay or reimburse either of them for, or otherwise give effect to, any costs, taxes, or other expenses, or any related increases, directly or indirectly arising out of or resulting from the transfer or this Agreement, other than those that the Government in the absence of this transfer or Agreement would have been obligated to pay or reimburse under the terms of the contracts.

(8) The Transferor guarantees payment of all liabilities and the performance of all obligations that the Transferee (i) assumes under this Agreement or (ii) may undertake in the future should these contracts be modified under their terms and conditions. The Transferor waives notice of, and consents to, any such future modifications.

(9) The contracts shall remain in full force and effect, except as modified by this Agreement. Each party has executed this Agreement as of the day and year first above written.

UNITED STATES OF AMERICA,

By _____

Title _____

ABC CORPORATION,

By _____

Title _____

[CORPORATE SEAL]

XYZ CORPORATION,

By _____

Title _____

[CORPORATE SEAL]

CERTIFICATE

I, _____, certify that I am the Secretary of ABC CORPORATION; that _____, who signed this Agreement for this corporation, was then _____ of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers.

Witness my hand and the seal of this corporation this _____ day of _____ 20__.

By

[CORPORATE SEAL]

CERTIFICATE

I, _____, certify that I am the Secretary of XYZ CORPORATION; that _____, who signed this Agreement for this corporation, was then _____ of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers.

Witness my hand and the seal of this corporation this _____ day of _____ 20__.

By

[CORPORATE SEAL]

42.904 Agreement to recognize contractor's change of name.

(a) If only a change of the contractor's name is involved and the Government's and contractor's rights and obligations remain unaffected, the parties must execute an agreement to reflect the name change. The contractor must forward to the responsible contracting officer three signed copies of the Change-of-Name Agreement, and one copy each of the following:

(1) The document effecting the name change, authenticated by a proper official of the State having jurisdiction.

(2) The opinion of the contractor's legal counsel stating that the change of name was properly effected under applicable law and showing the effective date.

(3) A list of all affected contracts and purchase orders remaining unsettled between the contractor and the Government, showing for each the contract number and type, and name and address of the contracting office. The contracting officer may request the total dollar value as amended and the remaining unpaid balance for each contract.

(b) The following suggested format for an agreement may be adapted for specific cases:

Change-of-Name Agreement

The ABC CORPORATION (Contractor), a corporation duly organized and existing under the laws of _____ [*insert State*], and the UNITED STATES OF AMERICA (Government), enter into this Agreement as of _____ [*insert date when the change of name became effective under applicable State law*].

(a) THE PARTIES AGREE TO THE FOLLOWING FACTS:

(1) The Government, represented by various Contracting Officers of the _____ [*insert name(s) of agency(ies)*], has entered into certain contracts and purchase orders with the XYZ CORPORATION, namely: _____ [*insert contract or purchase order identifications*]; [*or delete "namely" and insert "as shown in the attached list marked 'Exhibit A' and incorporated in this Agreement by reference."*]. The term the contracts, as used in this Agreement, means the above contracts and purchase orders and all other contracts and purchase orders, including all modifications, made by the Government and the Contractor before the effective date of this Agreement (whether or not performance and payment have been completed and releases executed if the Government or the Contractor has any remaining rights, duties, or obligations under these contracts and purchase orders).

(2) The XYZ CORPORATION, by an amendment to its certificate of incorporation, dated _____, 20__, has changed its corporate name to ABC CORPORATION.

(3) This amendment accomplishes a change of corporate name only and all rights and obligations of the Government and of the Contractor under the contracts are unaffected by this change.

(4) Documentary evidence of this change of corporate name has been filed with the Government.

(b) IN CONSIDERATION OF THESE FACTS, THE PARTIES AGREE THAT—

(1) The contracts covered by this Agreement are amended by substituting the name "ABC CORPORATION" for the name "XYZ CORPORATION" wherever it appears in the contracts; and

(2) Each party has executed this Agreement as of the day and year first above written.

UNITED STATES OF AMERICA,

By _____

Title _____

ABC CORPORATION,

By _____

Title _____

[CORPORATE SEAL]

CERTIFICATE

I, _____, certify that I am the Secretary of ABC CORPORATION; that _____, who signed this Agreement for this corporation, was then _____ of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers.

Witness my hand and the seal of this corporation this ____ day of _____ 20__.

By

[CORPORATE SEAL]

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Subpart 42.10 - Suspension of Work, Stop-Work Orders, and Government Delay of Work

42.1001 General.

Situations may occur during contract performance that cause the Government to order a suspension of work or result in a work stoppage.

42.1002 Suspension of work.

A suspension of work under a construction or architect-engineer contract may be ordered by the contracting officer for a reasonable period of time. If the suspension is unreasonable, the contractor may submit a written claim for increases in the cost of performance, excluding profit.

42.1003 Stop-work orders.

(a) Stop-work orders may be used, when appropriate, in any negotiated fixed-price or cost-reimbursement supply, research and development, or service contract if work stoppage may be required for reasons such as advancement in the state-of-the-art, production or engineering breakthroughs, or realignment of programs.

(b) Generally, a stop-work order will be issued only if it is advisable to suspend work pending a decision by the Government and a supplemental agreement providing for the suspension is not feasible. Issuance of a stop-work order must be approved at a level higher than the contracting officer. Stop-work orders will not be used in place of a termination notice after a decision to terminate has been made.

(c) Stop-work orders should include-

(1) A description of the work to be suspended;

(2) Instructions concerning the contractor's issuance of further orders for materials or services;

(3) Guidance to the contractor on action to be taken on any subcontracts; and

(4) Other suggestions to the contractor for minimizing costs.

(d) Promptly after issuing the stop-work order, the contracting officer should discuss the stop-work order with the contractor and modify the order, if necessary, in light of the discussion.

(e) As soon as feasible after a stop-work order is issued, but before its expiration, the contracting officer must take appropriate action to-

(1) Terminate the contract;

(2) Cancel the stop-work order (any cancellation of a stop-work order is subject to the same approvals as were required for its issuance); or

(3) Extend the period of the stop-work order if it is necessary and if the contractor agrees (any extension of the stop-work order must be done by a supplemental agreement).

42.1004 Government delay of work.

(a) The clause at 52.242-17, Government Delay of Work, provides for the administrative settlement of contractor claims that arise from delays and interruptions in the contract work caused by the acts, or failures to act, of the contracting officer. This clause is not applicable if the contract otherwise specifically provides for an equitable adjustment because of the delay or interruption, e.g., when the Changes clause is applicable.

(b) The clause does not authorize the contracting officer to order a suspension, delay, or interruption of the contract work and it must not be used as the basis or justification of such an order.

(c) If the contracting officer has notice of an unordered delay or interruption covered by the clause, the contracting officer must act to end the delay or take other appropriate action as soon as practicable.

(d) The contracting officer must retain in the file a record of all negotiations leading to any adjustment made under the clause, and related certified cost or pricing data, or data other than certified cost or pricing data.

42.1005 Contract clauses.

(a) Insert the clause at 52.242-14, Suspension of Work, in solicitations and contracts when a fixed-price construction or architect-engineer contract is contemplated. Contracting officers may reduce the 90-day period in the clause, as appropriate.

(b) (1) The contracting officer may, when contracting by negotiation, insert the clause at 52.242-15, Stop-Work Order, in solicitations and contracts for supplies, services, or research and development. Contracting officers may reduce the 90-day period in the clause, as appropriate.

(2) If a cost-reimbursement contract is contemplated, use the clause with its Alternate I.

(c) Insert the clause at 52.242-17, Government Delay of Work, in solicitations and contracts when a fixed-price contract is contemplated for supplies other than commercial or modified-commercial products. The clause use is optional when a fixed-price contract is contemplated for services, or for supplies that are commercial or modified-commercial products.

Subpart 42.11 - Contractor Performance Information

42.1100 Scope of subpart.

This subpart provides policies and establishes responsibilities for recording and maintaining contractor performance information.

42.1101 General.

(a) Past performance information (including the ratings and supporting narratives) is relevant information, for future purposes, regarding a contractor's actions under previously awarded contracts or orders. It includes, for example, the contractor's record of-

(1) Conforming to requirements and to standards of good workmanship;

(2) Forecasting and controlling costs;

(3) Adherence to schedules, including the administrative aspects of performance;

(4) Reasonable and cooperative behavior and commitment to customer satisfaction;

(5) Complying with the requirements of the small business subcontracting plan (see part 19), including:

(i) Favorable consideration of a mentor with an SBA-approved mentor-protégé agreement (see 13 CFR 125.9) that subcontracts to its protégé, and

(ii) That protégé is a covered territory business or that protégé's principal office is located in the Commonwealth of Puerto Rico (see 15 U.S.C. 632(ff));

(6) Reporting into databases (see part 4, and reporting requirements in the solicitation provisions and clauses referenced in part 9);

(7) Integrity and business ethics (see part 9); and

(8) Business-like concern for the interest of the customer.

(b) Agencies must monitor their compliance with the past performance evaluation requirements (see 42.1102) and use the Contractor Performance Assessment Reporting System (CPARS) metric tools to measure the quality and timely reporting of past performance information. CPARS is the official source for past performance information.

42.1102 Policy.

(a) *General.* Past performance evaluations must be prepared at least annually and at the time the work under a contract or order is completed. Interim evaluations are permissible.

(1) Past performance evaluations are required for contracts and orders as specified in paragraphs (b) through (f) of this section, including contracts and orders performed outside the United States.

(2) Past performance evaluations are completed for the entity, division, or unit that performed the contract or order.

(3) Agencies must enter past performance information into CPARS, the Governmentwide evaluation reporting tool for all past performance reports on contracts and orders. Instructions for submitting evaluations into CPARS are available at *http://www.cpars.gov/.*

(b) *Contracts.*

(1) Except as provided in paragraphs (e), (f), and (h) of this section, agencies must prepare evaluations of contractor performance for each contract and order that exceeds the simplified acquisition threshold and for each order that exceeds the simplified acquisition threshold.

(2) Agencies must prepare an evaluation if a modification to the contract causes the dollar amount to exceed the simplified acquisition threshold.

(c) *Orders under multiple-agency contracts.*

(1) Agencies must prepare an evaluation of contractor performance for each order that exceeds the simplified acquisition threshold that placed under a Federal Supply Schedule contract or placed under a task-order contract, or a delivery-order contract awarded by another agency (*i.e.,* Governmentwide acquisition contract or multi-agency contract).

(2)

(i) Agencies placing orders under their own multiple-agency contract must prepare evaluations for their own orders. This evaluation must not consider the requirements under paragraph (g) of this section.

(ii) Agencies must prepare an evaluation if a modification to an order causes the value to exceed the simplified acquisition threshold.

(d) *Orders under single-agency contracts.* For single-agency task-order and delivery-order contracts, the contracting officer may require performance evaluations for each order in excess of the simplified acquisition threshold when such

evaluations would produce more meaningful past performance information for source selection officials than that contained in the overall contract evaluation (e.g., when the scope of the basic contract is very broad and the nature of individual orders could be significantly different). This evaluation does not have to consider the requirements under paragraph (g) of this section unless the contracting officer deems it appropriate.

(e) *Construction contracts*. Agencies must prepare past performance evaluations for each construction contract of $900,000 or more, and for each construction contract terminated for default regardless of contract value. Past performance evaluations may also be prepared for construction contracts below $900,000.

(f) *Architect-engineer services contracts*. Past performance evaluations must be prepared for each architect-engineer services contract of $45,000 or more, and for each architect-engineer services contract that is terminated for default regardless of contract value. Past performance evaluations may also be prepared for architect-engineer services contracts below $45,000.

(g) *Content*. Past performance evaluations must include an assessment of the contractor's—

(1) Performance against, and efforts to achieve, the goals identified in the small business subcontracting plan when the contract includes the clause at 52.219-9, Small Business Subcontracting Plan; and

(2) Reduced or untimely payments (as defined in part 19), made to small business subcontractors, determined by the contracting officer to be unjustified. The contracting officer must—

(i) Consider and evaluate a contractor's written explanation for a reduced or an untimely payment when determining whether the reduced or untimely payment is justified; and

(ii) Determine that a history of unjustified reduced or untimely payments has occurred when the contractor has reported three or more occasions of unjustified reduced or untimely payments under a single contract within a 12-month period (see 42.1503(h)(1)(vi) and the evaluation ratings in Table 42-2). The following payment or nonpayment situations are not considered to be unjustified:

(A) There is a contract dispute on performance.

(B) A partial payment is made for amounts not in dispute.

(C) A payment is reduced due to past overpayments.

(D) There is an administrative mistake.

(E) Late performance by the subcontractor leads to later payment by the prime contractor.

(h) Agencies must promptly report other contractor information in accordance with 42.1103(g).

42.1103 Procedures.

(a) (1) Agencies must assign responsibility and management accountability for the completeness of past performance submissions. Agency procedures for the past performance evaluation system must—

(i) Generally, provide for input to the evaluations from the technical office, contracting office, program management office, and, where appropriate, quality assurance and end users of the product or service;

(ii) Identify and assign past performance evaluation roles and responsibilities to those individuals responsible for preparing and reviewing interim evaluations, if prepared, and final evaluations (e.g., contracting officers, contracting officer representatives, project managers, and program managers). Those individuals identified may obtain information for the evaluation of performance from the program office, administrative contracting office, audit office, end users of the product or service, and any other technical or business advisor, as appropriate; and

(iii) Address management controls and appropriate management reviews of past performance evaluations, to include accountability for documenting past performance on CPARS.

(b) (1) (i) The evaluation must include a clear, non-technical description of the principal purpose of the contract or order.

(ii) The evaluation must reflect how the contractor performed.

(iii) The evaluation must include clear relevant information that accurately depicts the contractor's performance and be based on objective facts supported by program and contract or order performance data.

(iv) Tailor each evaluation to the contract type, size, content, and complexity of the contractual requirements.

(2) Evaluation factors for each assessment must include, at a minimum, the following:

(i) Technical (quality of product or service);

(ii) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements);

(iii) Schedule/timeliness;

(iv) Management or business relations;

(v) Small business subcontracting, including reduced or untimely payments to small business subcontractors when part 19 requires a subcontracting plan (as applicable, see Table 42-2); and

(vi) Other (as applicable) (e.g., trafficking violations, tax delinquency, failure to report in accordance with contract terms and conditions, defective cost or pricing data, terminations, suspension and debarments, and failure to comply with limitations on subcontracting).

(3) Evaluation factors may include subfactors.

(4) Each factor and subfactor used must be evaluated and a supporting narrative provided. Each evaluation factor, as listed in this paragraph ((b)(2)), must be rated in accordance with a five-scale rating system (*i.e.,* exceptional, very good, satisfactory, marginal, and unsatisfactory). The ratings and narratives must reflect the definitions in the tables 42-1 or 42-2 of this section.

(c) (1) When the contract provides for incentive fees, the incentive-fee contract performance evaluation must be entered into CPARS.

(2) When the contract provides for award fee, the award fee-contract performance adjectival rating as described in part 16 must be entered into CPARS.

(d) (1) Agency evaluations of contractor performance, including both negative and positive evaluations, prepared under this subpart must be provided to the contractor as soon as practicable after completion of the evaluation. The contractor will receive a CPARS-system generated notification when an evaluation is ready for comment.

(2) Contractors must be afforded up to 14 calendar days from the date of notification of availability of the past performance evaluation to submit comments, rebutting statements, or additional information.

(3) While the evaluation is an agency decision, agencies must provide for review at a level above the contracting officer in the event of disagreements between the parties.

(4) Evaluations of contractor performance developed on contracts awarded prior to April 1, 2026 should be marked "Source Selection Information."

(5) Evaluations used in determining award or incentive fee payments may also be used to satisfy the requirements of this subpart.

(6) Agencies must provide a copy of the annual or final past performance evaluation to the contractor as soon as it is finalized.

(e) (1) Agencies must prepare and submit all past performance evaluations electronically in CPARS at *https://www.cpars.gov* .

(2) The agency must make the past performance evaluation, including any contractor response, including any contractor-submitted information (with indication whether agency review is pending), available to source selection officials in the CPARS system within 14 days after the contractor notification of the evaluation's availability for comment.

(3) Contractors must be given 14 calendar days from notification to submit comments, rebutting statements, or additional information.

(4) The Government must update CPARS with any contractor comments provided within the 14-day timeframe given to contractors in this paragraph (e), as well as any subsequent agency review of comments received.

(5) Past performance evaluations for classified contracts and special access programs must not be reported in CPARS but will be reported as stated in this subpart and in accordance with agency procedures.

(6) Agencies must ensure that appropriate management and technical controls are in place to ensure that only authorized personnel have access to the data and the information safeguarded in accordance with paragraph (d) of this section.

(f) Agencies must use the past performance information in CPARS that is within 3 years (6 years for construction and architect-engineer contracts) of the completion of performance of the evaluated contract or order, and information contained in responsibility/qualification reports in the System Award Management (SAM), at SAM.gov, e.g., terminations for default or cause.

(g) (1) Agencies use integrity records to support responsibility determinations, as addressed in part 9. Agencies must ensure information is accurately reported in the FAPIIS module of CPARS within 3 calendar days after a contracting officer —

(i) Issues a final determination that a contractor has submitted defective cost or pricing data;

(ii) Makes a subsequent change to the final determination concerning defective cost or pricing data pursuant to part 15;

(iii) Issues a final termination for cause or default notice;

(iv) Makes a subsequent withdrawal or a conversion of a termination for default to a termination for convenience;

(v) Receives a final determination after an administrative proceeding, in accordance with part 22, that substantiates an allegation of a violation of the trafficking in persons prohibitions in part 22 and 52.222-50(b); or

(vi) Determines that a contractor has a history of three or more unjustified reduced or untimely payments to small business subcontractors under a single contract within a 12-month period (see 42.1102(g)(2)).

(2) The information posted in accordance with this paragraph (g) is information relating to contractor performance but does not constitute a "past performance review", which would be exempted from public availability in accordance with section 3010 of the Supplemental Appropriations Act, 2010 (Pub. L. 111-212). Therefore, all such information posted in FAPIIS will be publicly available, unless covered by a disclosure exemption under the Freedom of Information Act (see part 9).

(3) Agencies must establish CPARS focal points who will register users to report data into the FAPIIS module of CPARS (available at *https://www.cpars.gov)*.

(4) The contracting officer must follow the procedures in part 9 when handling information that may be covered by a disclosure exemption under the Freedom of Information Act.

TABLE 42-1—EVALUATION RATINGS DEFINITIONS

Rating	Definition	Note
(a) Exceptional	Performance meets contractual requirements and exceeds many to the Government's benefit. The contractual performance of the element or sub-element being evaluated was accomplished with few minor problems for which corrective actions taken by the contractor were highly effective	To justify an Exceptional rating, identify multiple significant events and state how they were of benefit to the Government. A singular benefit, however, could be of such magnitude that it alone constitutes an Exceptional rating. Also, there should have been NO significant weaknesses identified.
(b) Very Good	Performance meets contractual requirements and exceeds some to the Government's benefit. The contractual performance of the element or sub-element being evaluated was accomplished with some minor problems for which corrective actions taken by the contractor were effective	To justify a Very Good rating, identify a significant event and state how it was a benefit to the Government. There should have been no significant weaknesses identified.
(c) Satisfactory	Performance meets contractual requirements. The contractual performance of the element or sub-element contains some minor problems for which corrective actions taken by the contractor appear or were satisfactory	To justify a Satisfactory rating, there should have been only minor problems, or major problems the contractor recovered from without impact to the contract/order. There should have been NO significant weaknesses identified. A fundamental principle of assigning ratings is that contractors will not be evaluated with a rating lower than Satisfactory solely for not performing beyond the requirements of the contract/order.

TABLE 42-1—EVALUATION RATINGS DEFINITIONS

Rating	Definition	Note
(d) Marginal	Performance does not meet some contractual requirements. The contractual performance of the element or sub-element being evaluated reflects a serious problem for which the contractor has not yet identified corrective actions. The contractor's proposed actions appear only marginally effective or were not fully implemented	To justify Marginal performance, identify a significant event in each category that the contractor had trouble overcoming and state how it impacted the Government. A Marginal rating should be supported by referencing the management tool that notified the contractor of the contractual deficiency (e.g., management, quality, safety, or environmental deficiency report or letter).
(e) Unsatisfactory	Performance does not meet most contractual requirements, and recovery is not likely in a timely manner. The contractual performance of the element or sub-element contains a serious problem(s) for which the contractor's corrective actions appear or were ineffective	To justify an Unsatisfactory rating, identify multiple significant events in each category that the contractor had trouble overcoming and state how it impacted the Government. A singular problem, however, could be of such serious magnitude that it alone constitutes an unsatisfactory rating. An Unsatisfactory rating should be supported by referencing the management tools used to notify the contractor of the contractual deficiencies (e.g., management, quality, safety, or environmental deficiency reports, or letters).

Note 1: Plus or minus signs may be used to indicate an improving (+) or worsening (−) trend insufficient to change the evaluation status.

Note 2: N/A (not applicable) should be used if the ratings are not going to be applied to a particular area for evaluation.

TABLE 42-2—EVALUATION RATINGS DEFINITIONS

[For the small business subcontracting evaluation factor, when 52.219-9 is used]

Rating	Definition	Note
(a) Exceptional	Exceeded all statutory goals or goals as negotiated. Had exceptional success with initiatives to assist, promote, and utilize small business (SB), small disadvantaged business (SDB), women-owned small business (WOSB), HUBZone small business, veteran-owned small business (VOSB) and service disabled veteran owned small business (SDVOSB). Complied with FAR 52.219-8, Utilization of Small Business Concerns. Exceeded any other small business participation requirements incorporated in the contract/order, including the use of small businesses in mission critical aspects of the program. Went above and beyond the required elements of the subcontracting plan and other small business requirements of the contract/order. Completed and submitted Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate and timely manner. Did not have a history of three or more unjustified reduced or untimely payments to small business subcontractors within a 12-month period.	To justify an Exceptional rating, identify multiple significant events and state how they were a benefit to small business utilization. A singular benefit, however, could be of such magnitude that it constitutes an Exceptional rating. Small businesses should be given meaningful and innovative work directly related to the contract, and opportunities should not be limited to indirect work such as cleaning offices, supplies, landscaping, etc. Also, there should have been no significant weaknesses identified.

TABLE 42-2—EVALUATION RATINGS DEFINITIONS

[For the small business subcontracting evaluation factor, when 52.219-9 is used]

Rating	Definition	Note
(b) Very Good	Met all of the statutory goals or goals as negotiated. Had significant success with initiatives to assist, promote and utilize SB, SDB, WOSB, HUBZone, VOSB, and SDVOSB. Complied with FAR 52.219-8, Utilization of Small Business Concerns. Met or exceeded any other small business participation requirements incorporated in the contract/order, including the use of small businesses in mission critical aspects of the program. Endeavored to go above and beyond the required elements of the subcontracting plan. Completed and submitted Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate and timely manner. Did not have a history of three or more unjustified reduced or untimely payments to small business subcontractors within a 12-month period.	To justify a Very Good rating, identify a significant event and state how it was a benefit to small business utilization. Small businesses should be given meaningful and innovative opportunities to participate as subcontractors for work directly related to the contract, and opportunities should not be limited to indirect work such as cleaning offices, supplies, landscaping, etc. There should be no significant weaknesses identified.
(c) Satisfactory	Demonstrated a good faith effort to meet all of the negotiated subcontracting goals in the various socio-economic categories for the current period. Complied with FAR 52.219-8, Utilization of Small Business Concerns. Met any other small business participation requirements included in the contract/order. Fulfilled the requirements of the subcontracting plan included in the contract/order. Completed and submitted Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate and timely manner. Did not have a history of three or more unjustified reduced or untimely payments to small business subcontractors within a 12-month period.	To justify a Satisfactory rating, there should have been only minor problems, or major problems the contractor has addressed or taken corrective action. There should have been no significant weaknesses identified. A fundamental principle of assigning ratings is that contractors will not be assessed a rating lower than Satisfactory solely for not performing beyond the requirements of the contract/order.

TABLE 42-2—EVALUATION RATINGS DEFINITIONS

[For the small business subcontracting evaluation factor, when 52.219-9 is used]

Rating	Definition	Note
(d) Marginal	Deficient in meeting key subcontracting plan elements. Deficient in complying with FAR 52.219-8, Utilization of Small Business Concerns, and any other small business participation requirements in the contract/order. Did not submit Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate or timely manner. Failed to satisfy one or more requirements of a corrective action plan currently in place; however, does show an interest in bringing performance to a satisfactory level and has demonstrated a commitment to apply the necessary resources to do so. Required a corrective action plan. Did not have a history of three or more unjustified reduced or untimely payments to small business subcontractors within a 12-month period.	To justify a Marginal rating, identify a significant event that the contractor had trouble overcoming and how it impacted small business utilization. A Marginal rating should be supported by referencing the actions taken by the Government that notified the contractor of the contractual deficiency.
(e) Unsatisfactory	Noncompliant with FAR 52.219-8 and 52.219-9, and any other small business participation requirements in the contract/order. Did not submit Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate or timely manner. Showed little interest in bringing performance to a satisfactory level or is generally uncooperative. Required a corrective action plan. Had a history of three or more unjustified reduced or untimely payments to small business subcontractors within a 12-month period.	To justify an Unsatisfactory rating, identify multiple significant events that the contractor had trouble overcoming and state how it impacted small business utilization. A singular problem, however, could be of such serious magnitude that it alone constitutes an Unsatisfactory rating. An Unsatisfactory rating should be supported by referencing the actions taken by the Government to notify the contractor of the deficiencies. When an Unsatisfactory rating is justified, the contracting officer must consider whether the contractor made a good faith effort to comply with the requirements of the subcontracting plan required by FAR 52.219-9 and follow the procedures outlined in FAR 52.219-16, Liquidated Damages-Subcontracting Plan.

Note 1: Plus or minus signs may be used to indicate an improving (+) or worsening (-) trend insufficient to change evaluation status.

Note 2: Zero percent is not a goal unless the contracting officer determined when negotiating the subcontracting plan that no subcontracting opportunities exist in a particular socio-economic category. In such cases, the contractor will be considered to have met the goal for any socio-economic category where the goal negotiated in the plan was zero.

42.1104 Contract clause.

Insert the clause at 52.242-5, Payments to Small Business Subcontractors, in all solicitations and contracts containing the clause at 52.219-9, Small Business Subcontracting Plan.

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Subpart 42.12 - Small Business Contract Administration

42.1201 General.

The contracting officer must make every reasonable effort to respond in writing within 30 days to any written request to the contracting officer from a small business concern regarding a contract administration matter. In the event the contracting officer cannot respond to the request within the 30-day period, the contracting officer must, within the period, communicate to the contractor a written notification of the specific date the contracting officer expects to respond. This provision does not apply to a request for a contracting officer decision under 41 U.S.C. chapter 71, Contract Disputes.

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Subpart 42.13 - Forward Pricing Rate Agreements

42.1301 Procedures.

(a) The contracting officer, administrative contracting officer (ACO), or the contractor may initiate a request for a forward pricing rate agreement (FPRA). Normally, FPRAs are negotiated only with contractors having a significant volume of Government contract proposals. The cognizant Federal agency should determine whether to establish an FPRA by considering whether the benefits to be derived from the agreement are commensurate with the effort of establishing and monitoring it.

(b) The ACO must obtain the contractor's forward pricing rate proposal and require that it include cost or pricing data that are accurate, complete, and current as of the date of submission, but must not require a certification (see part 15). The ACO must invite the cognizant contract auditor and contracting offices having a significant interest to participate in developing a Government objective and in the negotiations. Upon completing negotiations, the ACO must prepare a price negotiation memorandum (PNM) (see part 15) and forward copies of the PNM and FPRA to the cognizant auditor and to all contracting offices that are known to be affected by the FPRA.

(c) The FPRA must provide specific terms and conditions covering expiration, application, and data requirements for systematic monitoring to ensure the validity of the rates. The agreement must provide for cancellation at the choice of either party and must require the contractor to submit to the ACO and to the cognizant contract auditor any significant change in cost or pricing data used to support the FPRA.

(d) When an FPRA is invalid, the contractor should submit and negotiate a new proposal to reflect the changed conditions. If an FPRA has not been established or has been invalidated, the ACO will issue a forward pricing rate recommendation (FPRR) to buying activities with documentation to assist negotiators. In the absence of an FPRA or FPRR, the ACO must provide support to the contracting officer for rates utilized.

(e) The ACO may negotiate continuous updates to the FPRA. The FPRA will provide specific terms and conditions covering notification, application, and data requirements for systematic monitoring to ensure the validity of the rates.

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PART 43 - CONTRACT MODIFICATIONS

Sec.

Subpart 43.1 - Postaward

43.100 Scope of part.

Subpart 43.2 - General

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Subpart 43.4 - Forms

43.401 Use of forms.

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Subpart 43.1 - Postaward

43.100 Scope of part.

This part provides contract modification standards for the workforce to limit risk to the public and government. This part applies to all types of contracts including construction and architect-engineer contracts. This part does not apply to modifications for extraordinary contractual relief (see subpart 50.1).

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Subpart 43.2 - General

43.201 Definitions.

As used in this part—

Administrative change means a unilateral (see 43.203(b)) contract change, in writing, that does not affect the substantive rights of the parties (e.g., a change in the paying office or the appropriation data).

(1) For a solicitation amendment, change order, or administrative change, the effective date shall be the issue date of the amendment, change order, or administrative change.

(2) For a supplemental agreement, the effective date shall be the date agreed upon by the contracting parties.

(3) For a modification issued as a confirming notice of termination for the convenience of the Government, the effective date of the confirming notice shall be the same as the effective date of the initial notice.

(4) For a modification converting a termination for default to a termination for the convenience of the Government, the effective date shall be the same as the effective date of the termination for default.

(5) For a modification confirming the termination contracting officer's previous letter determination of the amount due in settlement of a contract termination for convenience, the effective date shall be the same as the effective date of the previous letter determination.

43.202 Policy.

(a) Only contracting officers acting within the scope of their authority may execute contract modifications on behalf of the Government. Other Government personnel shall not—

(1) Execute contract modifications;

(2) Act in such a manner as to cause the contractor to believe that they have authority to bind the Government; or

(3) Direct or encourage the contractor to perform work that should be the subject of a contract modification.

(b) Contract modifications, including changes that could be issued unilaterally, shall be priced before their execution if this can be done without adversely affecting the interest of the Government. If a significant cost increase could result from a contract modification and time does not permit negotiation of a price, at least a ceiling price shall be negotiated unless impractical.

43.203 Types of contract modifications.

Contract modifications are of the following types:

(a) *Bilateral.* A bilateral modification (supplemental agreement) is a contract modification that is signed by the contractor and the contracting officer. Bilateral modifications are used to—

(1) Make negotiated equitable adjustments resulting from the issuance of a change order;

(2) Definitize letter contracts; and

(3) Reflect other agreements of the parties modifying the terms of contracts.

(b) *Unilateral.* A unilateral modification is a contract modification that is signed only by the contracting officer. Unilateral modifications are used, for example, to—

(1) Make administrative changes;

(2) Issue change orders;

(3) Make changes authorized by clauses other than a changes clause (*e.g.,* Property clause, Options clause, or Suspension of Work clause); and

(4) Issue termination notices.

43.204 Notification of contract changes.

(a) When a contractor determines that the Government has made or may make a change in the contract that is not in writing and is not signed by the contracting officer, the contractor shall notify the Government in writing as soon as possible. This will permit the Government to evaluate the alleged change and—

(a) Confirm that it is a change, direct the mode of further performance, and plan for its funding;

(b) Countermand the alleged change; or

(c) Notify the contractor that no change is considered to have occurred.

43.205 Availability of funds.

(a) The contracting officer shall not execute a contract modification that causes or will cause an increase in funds without obtaining a certification of fund availability first, except for modifications to contracts that—

(1) Are conditioned on availability of funds (see 32.703-2); or

(2) Contain a limitation of cost or funds clause (see 32.704).

(b) The certification required by paragraph (a) of this section shall be based on the negotiated price, except for modifications executed before agreement on price, which may be based on the best available estimate of cost.

(c) In accordance with 10 U.S.C. 983, do not provide funds by contract or contract modification, or make contract payments, to an institution of higher education that has a policy or practice of hindering Senior Reserve Officer Training Corps units or military recruiting on campus as described at 9.110. The prohibition in this paragraph (c) does not apply to acquisitions at or below the simplified acquisition threshold or to acquisitions of commercial products, including commercially available off-the-shelf items, and commercial services.

43.206 Contract clause.

The contracting officer may insert a clause substantially the same as the clause at 52.243-7, Notification of Changes, in solicitations and contracts. The clause is available for use primarily in negotiated research and development or supply contracts for the acquisition of major weapon systems or principal subsystems. If the contract amount is expected to be less than $1,000,000, the clause shall not be used, unless the contracting officer anticipates that situations will arise where a contractor alleges that the Government has effected changes other than those identified in writing and signed by the contracting officer.

Subpart 43.3 - Change Orders

43.301 General.

(a) Generally, Government contracts contain a changes clause that permits the contracting officer to make unilateral changes, in designated areas, within the scope of the contract. These are accomplished by issuing written change orders on Standard Form 30, Amendment of Solicitation/Modification of Contract (SF 30), unless otherwise provided (see 43.401).

(b) Upon receipt of a change order, the contractor must continue performance of the contract as changed, except for cost-reimbursement or incrementally funded contracts where the contractor is not obligated to continue performance or incur costs beyond the limits established in the Limitation of Cost or Limitation of Funds clause (see 32.706-2).

(c) The contracting officer may issue a change order by electronic means without a SF 30 under unusual or urgent circumstances, *provided* that the message contains substantially the information required by the SF 30 and immediate action is taken to issue the SF 30.

43.302 Authority to issue change orders.

Change orders shall be issued by the contracting officer except when authority is delegated to an administrative contracting officer (see 42.202(c)).

43.303 Change order accounting procedures.

The following categories of direct costs normally are segregable and accountable under the terms of the Change Order Accounting clause at 52.243-6:

(a) Nonrecurring costs such as engineering costs and costs of obsolete or reperformed work.

(b) Costs of added distinct work caused by the change order such as new subcontract work, new prototypes, or new retrofit or backfit kits.

(c) Costs of recurring work such as labor and material costs.

43.304 Administration.

(a) *Change order documentation.* Documentation of unilaterally issued change orders that are later definitized through a bilateral supplement agreement contract modification requires two documents: the initial SF-30 change order and then the subsequent SF-30 supplemental agreement reflecting the resulting equitable adjustment in contract terms. If an equitable adjustment in the contract price or delivery terms or both can be agreed upon in advance, only a bilateral supplemental agreement contract modification (SF-30) need be issued. Administrative changes and change orders issued pursuant to a clause giving the Government a unilateral right to make a change (e.g., an option clause) require only the unilateral SF-30 change order.

(b) *Definitization.*

(1) (i) Contracting officers shall negotiate equitable adjustments resulting from change orders in the shortest practicable time.

(ii) Agencies shall, in accordance with agency procedures, record and maintain data regarding the time required to definitize equitable adjustments associated with change orders for construction. The definitization of an equitable adjustment begins when the contracting officer receives an adequate change order definitization proposal and ends when the contracting officer executes a contractual action to definitize the change order. The contracting officer shall ensure the data is recorded promptly in accordance with agency procedures. See 36.211(b).

(2) The contracting officer shall ensure that an appropriate cost analysis is made in consideration of the contractor's costs of the change.

(c) *Complete and final equitable adjustments.* To avoid subsequent controversies that may result from a supplemental agreement containing an equitable adjustment as the result of a change order, the contracting officer should—

(1) Ensure that all elements of the equitable adjustment have been presented and resolved; and

(2) Include, in the supplemental agreement, a release similar to the following:

CONTRACTOR'S STATEMENT OF RELEASE

In consideration of the modification(s) agreed to herein as complete equitable adjustments for the Contractor's _____ (describe) _____ "proposal(s) for adjustment," the Contractor hereby releases the Government from any and all liability

under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to the "proposal(s) for adjustment" (except for _____).

43.305 Contract clauses.

(a) (1) The contracting officer shall insert the clause at 52.243-1, Changes-Fixed-Price, in solicitations and contracts when a fixed-price contract for supplies is anticipated.

(2) If the requirement is for services, other than architect-engineer or other professional services, and no supplies are to be furnished, the contracting officer shall use the clause with its Alternate I.

(3) If the requirement is for services (other than architect-engineer services, transportation, or research and development) and supplies are to be furnished, the contracting officer shall use the clause with its Alternate II.

(4) If the requirement is for architect-engineer or other professional services, the contracting officer shall use the clause with its Alternate III.

(5) If the requirement is for transportation services, the contracting officer shall use the clause with its Alternate IV.

(6) If it is desired to include the clause in solicitations and contracts when a research and development contract is contemplated, the contracting officer shall use the clause with its Alternate V.

(b) (1) The contracting officer shall insert the clause at 52.243-2, Changes-Cost-Reimbursement, in solicitations and contracts when a cost-reimbursement contract for supplies is contemplated.

(2) If the requirement is for services and no supplies are to be furnished, the contracting officer shall use the clause with its Alternate I.

(3) If the requirement is for services and supplies are to be furnished, the contracting officer shall use the clause with its Alternate II.

(4) If the requirement is for construction, the contracting officer shall use the clause with its Alternate III.

(5) [Reserved]

(6) If it is desired to include the clause in solicitations and contracts when a research and development contract is contemplated, the contracting officer shall use the clause with its Alternate V.

(c) Insert the clause at 52.243-3, Changes-Time-and-Materials or Labor-Hours, in solicitations and contracts when a time-and-materials or labor-hour contract is anticipated. The contracting officer may vary the 30-day period in paragraph (c) of the clause according to agency procedures.

(d) The contracting officer shall insert the clause at 52.243-4, Changes, in solicitations and contracts for-

(1) Dismantling, demolition, or removal of improvements; and

(2) Construction, when a fixed-price contract is contemplated and the contract amount is expected to exceed the simplified acquisition threshold.

(e) The contracting officer shall insert the clause at 52.243-5, Changes and Changed Conditions, in solicitations and contracts for construction, when the contract amount is not expected to exceed the simplified acquisition threshold.

(f) The contracting officer may insert a clause, substantially the same as the clause at 52.243-6, Change Order Accounting, in solicitations and contracts for supply and research and development contracts of significant technical complexity, if numerous changes are anticipated. The clause may be included in solicitations and contracts for construction if deemed appropriate by the contracting officer.

Subpart 43.4 - Forms

43.401 Use of forms.

(a) (1) The Standard Form 30 (SF 30), Amendment of Solicitation/Modification of Contract, shall (except for the options stated in 43.401(a)(2) or actions processed under part 15) be used for—

(i) Any amendment to a solicitation;

(ii) Change orders issued under the Changes clause of the contract;

(iii) Any other unilateral contract modification issued under a contract clause authorizing such modification without the consent of the contractor;

(iv) Administrative changes such as the correction of typographical mistakes, changes in the paying office, and changes in accounting and appropriation data;

(v) Supplemental agreements (see 43.203); and

(vi) Removal, reinstatement, or addition of funds to a contract.

(2) The SF 30 may be used for-

(i) Modifications that change the price of contracts for the acquisition of petroleum as a result of economic price adjustment;

(ii) Termination notices; and

(iii) Purchase order modifications as specified in 13.302-3.

(3) If it is anticipated that a change will result in a price change, the estimated amount of the price change shall not be shown on copies of SF 30 furnished to the contractor.

(b) The Optional Form 336 (OF 336), Continuation Sheet, or a blank sheet of paper, may be used as a continuation sheet for a contract modification.

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PART 44 - SUBCONTRACTING POLICIES AND PROCEDURES

Sec.

44.000 Scope of part.
44.001 Definitions.

Subpart 44.1 - [Reserved]

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44.201-1 Consent requirements.
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44.201-4 Consent limitations.
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44.301 Contractors' purchasing systems reviews.
44.301-1 Objective.
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44.301-3 Responsibilities for granting, withholding or withdrawing approval.
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Subpart 44.4 - Subcontracts for Commercial Products and Commercial Services

44.401 Definition.
44.402 Requirements.
44.403 Contract clause.

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44.000 Scope of part.

(a) This part prescribes policies and procedures for consent to subcontracts or advance notification of subcontracts, and for review and approval of contractors' purchasing systems.

(b) The consent and advance notification requirements of subpart 44.2 do not apply to prime contracts for commercial products or commercial services.

44.001 Definitions.

As used in this part—

Contractor means the total contractor organization or a separate entity of it, such as an affiliate, division, or plant, that performs its own purchasing.

Contractor purchasing system review (CPSR) means the complete assessment of a contractor's purchasing of material and services, subcontracting, and subcontract management from developing the requirement through completing subcontract performance.

Subcontract means any contract as defined in subpart 2.1 entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

Subcontractor means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

Subpart 44.1 - [Reserved]

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Subpart 44.2 - Evaluation and award

44.201 Consent to subcontracts and requirements for advance notice.

44.201-1 Consent requirements.

(a) If the contractor has an approved purchasing system, consent is required for subcontracts specifically identified by the contracting officer in paragraph (d) of 52.244-2, Subcontracts. The contracting officer may require consent to subcontract to protect the Government because of the subcontract type, complexity, or value, or because the subcontract needs special surveillance.

(b) If the contractor does not have an approved purchasing system, consent to subcontract is required for certain subcontracts identified in paragraph (c) of 52.244-2, Subcontracts.

44.201-2 Advance notification requirements.

Under cost-reimbursement contracts, the contractor is required by statute to notify the contracting officer as follows:

(a) For the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration, unless the contractor maintains an approved purchasing system, 10 U.S.C. 3322(c) requires notification before the award of any cost-plus-fixed-fee subcontract, or any fixed-price subcontract that exceeds the greater of the simplified acquisition threshold or 5 percent of the total estimated cost of the contract.

(b) For civilian agencies other than the Coast Guard and the National Aeronautics and Space Administration, even if the contractor has an approved purchasing system, 41 U.S.C. 3905 requires notification before the award of any cost-plus-fixed-fee subcontract, or any fixed-price subcontract that exceeds either the simplified acquisition threshold or 5 percent of the total estimated cost of the contract.

44.201-3 Contracting officer's responsibilities.

(a) The contracting officer responsible for consent (see part 42 regarding delegation) must review the contractor's notification (*i.e.*, request to subcontract) and supporting data to ensure that the proposed subcontract is appropriate for the risks involved and consistent with current policy and sound business judgment.

(b) Careful and thorough review and consideration of the request to subcontract is necessary when—

(1) The contractor's purchasing system or performance is inadequate;

(2) Close working relationships or ownership affiliations between the contactor and subcontractor may preclude free competition or result in higher prices;

(3) Subcontracts are proposed for award on a noncompetitive basis, at prices that appear to be unreasonable, or at higher prices than those offered to the Government in comparable circumstances; or

(4) Subcontracts are proposed on a cost-reimbursement, time-and-materials, or labor-hour basis.

(c) If the advance notification or consent requirements were satisfied for certain subcontracts evaluated during negotiations, the contracting officer must identify those subcontracts in paragraph (j) of the clause at 52.244-2.

44.201-4 Consent limitations.

(a) The contracting officer's consent to a subcontract or approval of the contractor's purchasing system does not constitute a determination of the acceptability of the subcontract terms or price, or of the allowability of costs, unless the consent or approval specifies otherwise.

(b) Contracting officers must not consent to—

(1) Cost-reimbursement subcontracts if the fee exceeds the fee limitations in part 15;

(2) Subcontracts providing for payment on a cost-plus-a-percentage-of-cost basis;

(3) Subcontracts obligating the contracting officer to deal directly with the subcontractor; or

(4) Subcontracts that make the results of arbitration, judicial determination, or voluntary settlement between the prime contractor and subcontractor binding on the Government.

44.201-5 Contract clauses.

(a) (1) Insert the clause at 52.244-2, Subcontracts, in solicitations and contracts when contemplating—

(i) A cost-reimbursement contract;

(ii) A labor-hour, time-and-materials, or letter contract that exceeds the simplified acquisition threshold; or

(iii) A fixed-price contract that exceeds the simplified acquisition threshold under which unpriced contract actions (including unpriced modifications or unpriced delivery orders) are anticipated.

(2) If a cost-reimbursement contract is planned, for civilian agencies other than the Coast Guard and the National Aeronautics and Space Administration, use the clause with its Alternate I.

(3) Use of this clause is not required in—

(i) Fixed-price architect-engineer contracts; or

(ii) Contracts for mortuary services, refuse services, or shipment and storage of personal property, when an agency-prescribed clause on approval of subcontractors' facilities is required.

(b) The contracting officer may insert the clause at 52.244-4, Subcontractors and Outside Associates and Consultants (Architect-Engineer Services), in architect-engineer contracts.

(c) When contracting by negotiation, insert the clause at 52.244-5, Competition in Subcontracting, in solicitations and contracts when the contract amount is expected to exceed the simplified acquisition threshold, unless—

(1) A firm-fixed-price contract, awarded on the basis of adequate price competition or whose prices are set by law or regulation, is planned; or

(2) A time-and-materials, labor-hour, or architect-engineer contract is planned.

Subpart 44.3 - Postaward

44.301 Contractors' purchasing systems reviews.

44.301-1 Objective.

The objective of a contractor purchasing system review (CPSR) is to assess the efficiency and effectiveness with which the contractor spends Government funds and complies with Government policy when subcontracting. The review provides the basis for granting, withholding, or withdrawing approval of the contractor's purchasing system.

44.301-2 Requirements.

(a) The responsible contracting officer (see part 42 regarding delegation) must determine if a CPSR is needed based on factors such as the past performance of the contractor, and the volume, complexity and dollar value of subcontracts.

(b) If a determination is made under paragraph (a) to conduct a CPSR, at least every three years the contracting officer must determine whether a CPSR is needed.

(c) The contracting officer must monitor a contract to ensure that the contractor is effectively managing its purchasing program.

(d) Surveillance must be accomplished in accordance with a plan developed by the contracting officer with the assistance of subcontracting, audit, pricing, technical, or other specialists as necessary. The plan should cover pertinent phases of a contractor's purchasing system and pertinent operations that affect the contractor's purchasing and subcontracting.

44.301-3 Responsibilities for granting, withholding or withdrawing approval.

The contracting officer is responsible for granting, withholding, or withdrawing approval of a contractor's purchasing system, and must—

(a) Approve a purchasing system only after determining that the contractor's purchasing policies and practices are efficient and adequately protect the Government's interests; and

(b) Promptly notify the contractor in writing after granting, withholding, or withdrawing approval.

44.301-4 Notice.

(a) The notice granting purchasing system approval must include—

(1) Identification of the plant or plants covered by the approval;

(2) The effective date of approval; and

(3) A statement that system approval—

(i) Applies to all Federal Government contracts at that plant to the extent that cross-servicing arrangements exist;

(ii) Waives the contractual requirement for advance notification in fixed-price contracts, but not for cost-reimbursement contracts;

(iii) Waives the contractual requirement for consent to subcontracts in fixed-price contracts and for specified subcontracts in cost-reimbursement contracts but not for those subcontracts, if any, selected for special surveillance and identified in the contract Schedule; and

(iv) May be withdrawn at any time at the contracting officer's discretion.

(b) In certain circumstances, the contracting officer may require consent for certain subcontracts or classes of subcontracts even though the contractor's purchasing system is approved. The system approval notification must identify the class or classes of subcontracts requiring consent. When sufficient weaknesses in a particular area of subcontracting are identified, requiring consent to subcontract provides the contracting officer additional visibility. See 52.244-2(d).

44.301-5 Withholding or withdrawing approval.

(a) The contracting officer must withhold or withdraw approval of a contractor's purchasing system when major weaknesses exist or when the contractor is unable to provide enough information upon which to make an affirmative determination. The contracting officer may withdraw approval at any time based on a determination that the contractor's purchasing system has deteriorated or to protect the Government's interest.

(b) When approval is withheld or withdrawn, the contracting officer must notify the contractor in writing within 10 days after completing the review. The notice must specify the deficiencies that must be corrected to qualify the system for approval and request the contractor to furnish within 15 days a plan to correct the deficiencies. If the plan is accepted, the contracting

officer must make a follow-up review as soon as the contractor notifies the contracting officer that the deficiencies have been corrected.

(c) The contracting officer must withhold or withdraw approval when the contractor consistently does not comply with requirements.

Subpart 44.4 - Subcontracts for Commercial Products and Commercial Services

44.401 Definition.

Subcontract , as used in this subpart, includes a transfer of commercial products or commercial services between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

44.402 Requirements.

(a) *Preference*. Require contractors and subcontractors to incorporate, to the maximum extent practicable, commercial products, commercial services, or nondevelopmental items as components of items supplied to the agency.

(b) *Flowdown*. The clauses listed in the clause at 52.244-6, Subcontracts for Commercial Products and Commercial Services, flow down to subcontracts for commercial products and commercial services as indicated in the specific clause. Do not require a contractor or subcontractor to apply to any of its divisions, subsidiaries, affiliates, subcontractors, or suppliers that are furnishing commercial products, commercial components, or commercial services a clause that is not listed in 52.244-6.

(c) *Inapplicable laws*. A list of laws that do not apply to subcontracts for the acquisition of commercial products, including commercially available off-the-shelf items, or commercial services is available at www.acquisition.gov/inapplicablelaws.

44.403 Contract clause.

Insert the clause at 52.244-6, Subcontracts for Commercial Products and Commercial Services, in solicitations and contracts.

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PART 45 - GOVERNMENT PROPERTY

Sec.

45.000 Scope of part.

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45.000 Scope of part.

(a) This part prescribes policies and procedures for providing Government property to contractors; contractors' management and use of Government property; and reporting, redistributing, and disposing of contractor inventory.

(b) It does not apply to—

(1) Government property provided under any statutory leasing authority, except as to non-Government use of property under 45.301(f);

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

(3) Disposal of real property;

(4) Software and intellectual property; or

(5) Government property that is incidental to the place of performance, when the contract requires contractor personnel to be located on a Government site or installation, and when the property used by the contractor within the location remains accountable to the Government. Items considered to be incidental to the place of performance include, for example, office space, desks, chairs, telephones, computers, and fax machines.

Subpart 45.1 - General

45.101 Definitions.

As used in this part-

Cannibalize means to remove parts from Government property for use or for installation on other Government property.

Contractor-acquired property means property acquired, fabricated, or otherwise provided by the contractor for performing a contract and to which the Government has title.

Contractor inventory means-

(1) Any property acquired by and in the possession of a contractor or subcontractor under a contract for which title is vested in the Government and which exceeds the amounts needed to complete full performance under the entire contract;

(2) Any property that the Government is obligated or has the option to take over under any type of contract, *e.g.*, as a result either of any changes in the specifications or plans thereunder or of the termination of the contract (or subcontract thereunder), before completion of the work, for the convenience or at the option of the Government; and

(3) Government-furnished property that exceeds the amounts needed to complete full performance under the entire contract.

Contractor's managerial personnel means the contractor's directors, officers, managers, superintendents, or equivalent representatives who have supervision or direction of-

(1) All or substantially all of the contractor's business;

(2) All or substantially all of the contractor's operation at any one plant or separate location; or

(3) A separate and complete major industrial operation.

Demilitarization means rendering a product unusable for, and not restorable to, the purpose for which it was designed or is customarily used.

Discrepancies incident to shipment means any differences (*e.g.*, count or condition) between the items documented to have been shipped and items actually received.

Equipment means a tangible item that is functionally complete for its intended purpose, durable, nonexpendable, and needed for the performance of a contract. Equipment is not intended for sale, and does not ordinarily lose its identity or become a component part of another article when put into use. Equipment does not include material, real property, special test equipment or special tooling.

Government-furnished property means property in the possession of, or directly acquired by, the Government and subsequently furnished to the contractor for performance of a contract. Government-furnished property includes, but is not limited to, spares and property furnished for repair, maintenance, overhaul, or modification. Government-furnished property also includes contractor-acquired property if the contractor-acquired property is a deliverable under a cost contract when accepted by the Government for continued use under the contract.

Government property means all property owned or leased by the Government. Government property includes both Government-furnished property and contractor-acquired property. Government property includes material, equipment, special tooling, special test equipment, and real property. Government property does not include intellectual property and software.

Loss of Government property means unintended, unforeseen or accidental loss, damage, or destruction of Government property that reduces the Government's expected economic benefits of the property. Loss of Government property does not

include occurrences such as purposeful destructive testing, obsolescence, normal wear and tear, or manufacturing defects. Loss of Government property includes, but is not limited to-

(1) Items that cannot be found after a reasonable search;

(2) Theft;

(3) Damage resulting in unexpected harm to property requiring repair to restore the item to usable condition; or

(4) Destruction resulting from incidents that render the item useless for its intended purpose or beyond economical repair.

Material means property that may be consumed or expended during the performance of a contract, component parts of a higher assembly, or items that lose their individual identity through incorporation into an end-item. Material does not include equipment, special tooling, special test equipment or real property.

Nonseverable means property that cannot be removed after construction or installation without substantial loss of value or damage to the installed property or to the premises where installed.

Precious metals means silver, gold, platinum, palladium, iridium, osmium, rhodium, and ruthenium.

Production scrap means unusable material resulting from production, engineering, operations and maintenance, repair, and research and development contract activities. Production scrap may have value when re-melted or reprocessed, *e.g.*, textile and metal clippings, borings, and faulty castings and forgings.

Property means all tangible property, both real and personal.

Property Administrator means an authorized representative of the contracting officer appointed in accordance with agency procedures, responsible for administering the contract requirements and obligations relating to Government property in the possession of a contractor.

Property records means the records created and maintained by the contractor in support of its stewardship responsibilities for the management of Government property.

Provide means to furnish, as in Government-furnished property, or to acquire, as in contractor-acquired property.

Real property See Federal Management Regulation 102-71.20 (41 CFR 102-71.20).

Sensitive property means property potentially dangerous to the public safety or security if stolen, lost, or misplaced, or that shall be subject to exceptional physical security, protection, control, and accountability. Examples include weapons, ammunition, explosives, controlled substances, radioactive materials, hazardous materials or wastes, or precious metals.

Unit acquisition cost means-

(1) For Government-furnished property, the dollar value assigned by the Government and identified in the contract; and

(2) For contractor-acquired property, the cost derived from the contractor's records that reflect consistently applied generally accepted accounting principles.

45.102 Policy.

(a) Contractors are ordinarily required to furnish all property necessary to perform Government contracts.

(b) Contracting officers must provide property to contractors only when it is clearly demonstrated-

(1) To be in the Government's best interest;

(2) That the overall benefit to the acquisition significantly outweighs the increased cost of administration, including ultimate property disposal;

(3) That providing the property does not substantially increase the Government's assumption of risk; and

(4) That Government requirements cannot otherwise be met.

(c) The contractor's inability or unwillingness to supply its own resources is not sufficient reason for the furnishing or acquisition of property.

(d) "Exception". Property provided under contracts for repair, maintenance, overhaul, or modification is not subject to the requirements of paragraph (b) of this section.

(e) Government property, other than foundations and similar improvements necessary for installing special tooling, special test equipment, or equipment, must not be installed or constructed on contractor-owned real property in such fashion as to become nonseverable, unless the head of the contracting activity determines that such installation or construction is necessary and in the Government's interest.

45.103 General.

(a) Agencies must—

(1) Allow and encourage contractors to use voluntary consensus standards (see FAR part 11) and industry-leading practices and standards to manage Government property in their possession;

(2) Eliminate to the maximum practical extent any competitive advantage a prospective contractor may have by using Government property;

(3) Ensure maximum practical reutilization of contractor inventory for government purposes;

(4) Require contractors to use Government property already in their possession to the maximum extent practical in performing Government contracts;

(5) Charge appropriate rentals when the property is authorized for use on other than a rent-free basis; and

(6) Require contractors to justify retaining Government property not needed for contract performance and to declare property as excess when no longer needed for contract performance.

(b) Agencies will not generally require contractors to establish property management systems that are separate from a contractor's established procedures, practices, and systems used to account for and manage contractor-owned property.

45.104 Responsibility and liability for Government property.

(a) Generally, contractors are not held liable for loss of Government property under the following types of contracts:

(1) Cost-reimbursement contracts.

(2) Time-and-material contracts.

(3) Labor-hour contracts.

(4) Fixed-price contracts awarded on the basis of submission of certified cost or pricing data.

(b) A prime contractor that provides Government property to a subcontractor must not be relieved of any responsibility to the Government that the prime contractor may have under the terms of the prime contract.

(c) Any monies received as financial restitution from the contractor for Government property loss must be credited to the Treasury of the United States as miscellaneous receipts, unless otherwise authorized by statute (31 U.S.C. 3302(b)).

45.105 Contractors' property management system compliance.

(a) The agency responsible for contract administration must conduct an analysis of the contractor's property management policies, procedures, practices, and systems. This analysis must be accomplished as frequently as conditions warrant, in accordance with agency procedures.

(b) The property administrator must notify the contractor in writing when the contractor's property management system does not comply with contractual requirements, must request prompt correction of deficiencies, and must request from the contractor a corrective action plan, including a schedule for correction of the deficiencies. If the contractor does not correct the deficiencies in accordance with the schedule, the contracting officer must notify the contractor, in writing, that failure to take the required corrective action(s) may result in-

(1) Revocation of the Government's assumption of risk for loss of Government property; and/or

(2) The exercise of other rights or remedies available to the contracting officer.

(c) If the contractor fails to take the required corrective action(s) in response to the notification provided by the contracting officer in accordance with paragraph (b) of this section, the contracting officer must notify the contractor in writing of any Government decision to apply the remedies described in paragraphs (b)(1) and (b)(2) of this section.

(d) When the property administrator determines that a reported case of loss of Government property is a risk assumed by the Government, the property administrator must notify the contractor in writing that it is granted relief of stewardship responsibility and liability in accordance with 52.245-1(f)(1)(vii). Where the property administrator determines that the risk of loss of Government property is not assumed by the Government, the property administrator must request that the contracting officer hold the contractor responsible and liable.

45.106 Transferring accountability.

Government property must be transferred from one contract to another only when firm requirements exist under the gaining contract (see 45.102). Such transfers must be documented by modifications to both gaining and losing contracts. Once transferred, all property must be considered Government-furnished property to the gaining contract. The warranties of suitability of use and timely delivery of Government-furnished property do not apply to property acquired or fabricated by the contractor as contractor-acquired property that is subsequently transferred to another contract with the same contractor.

45.107 Contract clauses.

(a) (1) Except as provided in paragraph (d) of this section, the contracting officer must insert the clause at 52.245-1, Government Property, in-

(i) All cost-reimbursement and time-and-material type solicitations and contracts, and labor-hour solicitations when property is expected to be furnished for the labor-hour contracts.

(ii) Fixed-price solicitations and contracts when the Government will provide Government property.

(iii) Contracts or modifications awarded under FAR part 12 procedures where Government property that exceeds the simplified acquisition threshold, as defined in FAR 2.101, is furnished or where the contractor is directed to acquire property for use under the contract that is titled in the Government.

(2) The contracting officer must use the clause with its Alternate I in contracts other than those identified in FAR 45.104(a), Responsibility and Liability for Government Property.

(3) The contracting officer must use the clause with its Alternate II when a contract for the conduct of basic or applied research at nonprofit institutions of higher education or at nonprofit organizations whose primary purpose is the conduct of scientific research (see 35.014) is contemplated.

(b) The contracting officer must also insert the clause at 52.245-2, Government Property (Installation Operation Services), in fixed-price service contracts to be performed on a Government installation when Government-furnished property will be provided for initial provisioning only and the Government is not responsible for repair or replacement.

(c) The contracting officer shall insert the clause at 52.245-9, Use and Charges, in solicitations and contracts when the clause at 52.245-1 is included.

(d) Purchase orders for property repair need not include a Government property clause when the unit acquisition cost of Government property to be repaired does not exceed the simplified acquisition threshold, unless other Government property (not for repair) is provided.

Subpart 45.2 - Solicitation and Evaluation Procedures

45.201 Solicitation.

(a) The contracting officer must insert a listing of the Government property to be offered in all solicitations where Government-furnished property is anticipated (see 45.102). The listing must include at a minimum-

(1) The name, part number and description, manufacturer, model number, and National Stock Number (if needed for additional item identification tracking and management, and disposition);

(2) Quantity/unit of measure;

(3) Unit acquisition cost;

(4) Unique-item identifier or equivalent (if available and necessary for individual item tracking and management); and

(5) A statement as to whether the property is to be furnished in an "as-is" condition and instructions for physical inspection.

(b) When Government property is offered for use in a competitive acquisition, solicitations should specify that the contractor is responsible for all costs related to making the property available for use, such as payment of all transportation, installation or rehabilitation costs.

(c) The solicitation must describe the evaluation procedures to be followed, including rental charges or equivalents and other costs or savings to be evaluated, and must require all offerors to submit the following information with their offers-

(1) A list or description of all Government property that the offeror or its subcontractors propose to use on a rent-free basis. The list must identify the accountable contract under which the property is held and the authorization for its use (from the contracting officer having cognizance of the property);

(2) The dates during which the property will be available for use (including the first, last, and all intervening months) and, for any property that will be used concurrently in performing two or more contracts, the amounts of the respective uses in sufficient detail to support prorating the rent;

(3) The amount of rent that would otherwise be charged in accordance with 52.245-9, Use and Charges; and

(4) A description of the offeror's property management system, plan, and any customary commercial practices, voluntary consensus standards, or industry-leading practices and standards to be used by the offeror in managing Government property.

45.202 Evaluation procedures.

(a) The contracting officer must consider any potentially unfair competitive advantage that may result from an offeror or contractor possessing Government property. This must be done by adjusting the offers by applying, for evaluation purposes only, a rental equivalent evaluation factor as specified in 52.245-9.

(b) The contracting officer must ensure the offeror’s property management plans, methods, practices, or procedures for accounting for property are consistent with the requirements of the solicitation.

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Subpart 45.3 - Authorizing the Use and Rental of Government Property

45.301 Use and rental.

This subpart prescribes policies and procedures for contractor use and rental of Government property.

(a) Government property generally must be provided on a rent-free basis in performance of the contract under which it is accountable or otherwise authorized.

(b) Rental charges, to the extent authorized do not apply to Government property that is left in place or installed on contractor-owned property for mobilization or future Government production purposes; however, rental charges must apply to that portion of property or its capacity used for non-government commercial purposes or otherwise authorized for use.

(c) The contracting officer cognizant of the Government property may authorize the rent-free use of property in the possession of nonprofit organizations when used for research, development, or educational work and-

(1) The use of the property is in the national interest;

(2) The property will not be used for the direct benefit of a profit-making organization; and

(3) The Government receives some direct benefit, such as rights to use the results of the work without charge, from its use.

(d) In exchange for consideration as determined by the cognizant contracting officer(s), the contractor may use Government property under fixed-price contracts other than the contract to which it is accountable. When, after contract award, a contractor requests the use of Government property, the contracting officer must obtain a fair rental or other adequate consideration if use is authorized.

(e) The cognizant contracting officer(s) may authorize the use of Government property on a rent-free basis on a cost type Government contract other than the contract to which it is accountable.

(f) In exchange for consideration as determined by the cognizant contracting officer, the contractor may use Government property for commercial use. Prior approval of the Head of the Contracting Activity is required where non-Government use is expected to exceed 25 percent of the total use of Government and commercial work performed.

45.302 Contracts with foreign governments or international organizations.

Requests by, or for the benefit of, foreign Governments or international organizations to use Government property must be processed in accordance with agency procedures.

45.303 Use of Government property on independent research and development programs.

The contracting officer may authorize a contractor to use the property on an independent research and development (IR&D) program, if-

(a) Such use will not conflict with the primary use of the property or enable the contractor to retain property that could otherwise be released;

(b) The contractor agrees not to claim reimbursement against any Government contract for the rental value of the property; and

(c) A rental charge for the portion of the contractor's IR&D program cost allocated to commercial work is deducted from the claim for reimbursement of any agreed-upon Government share of the contractor's IR&D costs.

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Subpart 45.4 - Title to Government Property

45.401 Title to Government-furnished property.

The Government retains title to all Government-furnished property until properly disposed of, as authorized by law or regulation. Property that is leased by the Government and subsequently furnished to the contractor for use must be considered Government-furnished property under the clause 52.245-1, Government Property.

45.402 Title to contractor-acquired property.

(a) Title vests in the Government for all property acquired or fabricated by the contractor in accordance with the financing provisions or other specific requirements for passage of title in the contract. Under fixed-price type contracts, in the absence of financing provisions or other specific requirements for passage of title in the contract, the contractor retains title to all property acquired by the contractor for use on the contract, except for property identified as a deliverable end item. If a deliverable item is to be retained by the contractor for use after inspection and acceptance by the Government, it must be made accountable to the contract through a contract modification listing the item as Government-furnished property.

(b) Under cost type and time-and-material contracts, the Government acquires title to all property to which the contractor is entitled to reimbursement, in accordance with paragraph (e)(3) of clause 52.245-1.

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Subpart 45.5 - Support Government Property Administration

45.501 Prime contractor alternate locations.

The property administrator assigned to the prime contract may request support property administration from another contract administration office, for purposes of evaluating prime contractor management of property located at subcontractors and alternate locations.

45.502 Subcontractor and alternate prime contractor locations.

(a) To ensure subcontractor compliance with Government property administration requirements, and with prime contractor consent, the property administrator assigned to the prime contract may request support property administration from another contract administration office. If the prime contractor does not provide consent to support property administration at subcontractor locations, the property administrator must refer the matter to the contracting officer for resolution.

(b) The prime property administrator must accept the findings of the delegated support property administrator and advise the prime contractor of the results of property management reviews, including deficiencies found with the subcontractor's property management system.

(c) Prime contractor consent is not required for support delegations involving prime contractor alternate locations.

45.503 Support property administrator findings.

In instances where the prime contractor does not concur with the findings of the support Property Administrator, the prime property administrator must immediately refer the matter to the contracting officer.

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Subpart 45.6 - Reporting, Reutilization, and Disposal

45.600 Scope of subpart.

This subpart establishes policies and procedures for the reporting, reutilization, and disposal of contractor inventory excess to contracts and of property that forms the basis of a claim against the Government (*e.g.*, termination inventory under fixed-price contracts).

45.601 [Reserved]

45.602 Reutilization of Government property.

This section is applicable to the reutilization, including transfer and donation, of Government property that is not required for continued performance of a Government contract. Except for 45.602-1, this section does not apply to scrap other than scrap aircraft parts.

45.602-1 Inventory disposal schedules.

(a) Plant clearance officers should review and accept, or return for correction, inventory disposal schedules within 10 days following receipt from a contractor. Schedules that are completed in accordance with the instructions for Standard Form 1428 should be accepted.

(b) Plant clearance officers must—

(1) Use Standard Form 1423 to verify, in accordance with agency procedures, accepted schedules within 20 days following acceptance;

(2) Require the contractor to correct any discrepancies found during verification;

(3) Require the contractor to correct any failure to complete predisposal requirements of the contract; and

(4) Provide the contractor disposition instructions for property identified on an acceptable inventory disposal schedule within 120 days. A failure to provide timely disposition instructions may entitle the contractor to an equitable adjustment.

(c) (1) The contractor may request the plant clearance officer's approval to remove the Government property from an inventory schedule.

(2) Plant clearance officers should approve removal of Government property from an inventory schedule when-

(i) The contractor wishes to purchase a contractor-acquired or contractor-produced item at unit acquisition cost and credit the contract;

(ii) The contractor is able to return unused property to the supplier at fair market value and credit the contract (less, if applicable, a reasonable restocking fee that is consistent with the supplier's customary practices);

(iii) The Government has authorized the contractor to use the property on another Government contract; or

(iv) The contractor has requested continued use of the Government property, and the contracting officer has authorized its retention and further use.

45.602-2 Reutilization priorities.

Plant clearance officers must initiate reutilization actions for all property not meeting the abandonment or destruction criteria of 45.603(b). Authorized methods, listed in descending order from highest to lowest priority, are-

(a) Reuse within the owning agency;

(b) Transfer of educationally useful equipment to schools and nonprofit organizations (see Executive Order 12999, Educational Technology: Ensuring Opportunity For All Children In The Next Century, April 17, 1996, and 15 U.S.C. 3710(i));

(c) Report to GSA for reuse within the Federal Government or donation as surplus property;

(d) Dispose of the following property in accordance with agency procedures without reporting to GSA:

(1) Property determined appropriate for abandonment or destruction (see Federal Management Regulation (FMR) 102-36.305, 41 CFR 102-36.305).

(2) Property furnished to nonappropriated fund activities (see FMR 102-36.165, 41 CFR 102-36.165).

(3) Foreign excess personal property (see FMR 102-36.380, 41 CFR 102-36.380).

(4) Scrap, except aircraft in scrap condition.

(5) Perishables, defined for the purposes of this section as any personal property subject to spoilage or decay.

(6) Trading stamps and bonus goods.

(7) Hazardous waste or toxic and hazardous materials.

(8) Controlled substances.

(9) Property dangerous to public health and safety.

(10) Classified items or property determined to be sensitive for reasons of national security; and

(e) Dispose of nuclear materials (see 45.603-3(b)(5)) in accordance with the Nuclear Regulatory Commission, applicable state licenses, applicable Federal regulations, and agency regulations.

45.602-3 Screening.

The screening period begins upon the plant clearance officer's acceptance of an inventory disposal schedule. The plant clearance officer must determine whether standard or special screening is appropriate and initiate screening actions.

(a) *Standard screening*. The standard screening period is 46 days.

(1) *First through twentieth day-Screening by the contracting agency*. The contracting agency has 20 days to screen property reported on the inventory disposal schedule for: other use within the agency; transfer of educationally useful equipment to other Federal agencies that have expressed a need for the property; and transfer of educationally useful equipment to schools and nonprofit organizations if a Federal agency has not expressed a need for the property. Excess personal property, meeting the conditions of 45.603, may be abandoned, destroyed, or donated to public bodies. No later than the 21st day, the plant clearance officer must submit four copies of the revised schedules and Standard Form (SF) 120, Report of Excess Personal Property, or an electronic equivalent to GSA (see 41 CFR 102-36.215).

(2) *Twenty-first through forty-sixth day (21 days concurrent screening plus 5 days donation processing)*.- (i) *Screening by other Federal agencies*. GSA will normally honor requests for transfers of property on a first-come-first-served basis through the 41st day. When a request is honored, the GSA regional office must promptly transmit to the plant clearance officer an approved transfer order that includes shipping instructions.

(ii) *Screening for possible donation*. Screening for donation is also completed during days 21 through 41. Property is not available for allocation to donees until after the completion of screening. Days 42 through 46 are reserved for GSA to make such allocation.

(3) *Screening period transfer request*. If an agency receives an intra-agency transfer request during the screening periods described in paragraph (a)(2) of this section, the plant clearance officer must request GSA approval to withdraw the item from the inventory disposal schedule.

(b) *Special screening requirements*.- (1) *Special tooling and special test equipment without commercial components*. Agencies must follow the procedures in paragraph (a) of this section. This property owned by the Department of Defense (DoD) or the National Aeronautics and Space Administration (NASA) may be screened for reutilization only within these agencies.

(2) *Special test equipment with commercial components*.- (i) Agencies must complete the screening required by paragraph (a) of this section. If an agency has no further need for the property and the contractor has not expressed an interest in using or acquiring the property by annotating the inventory disposal schedule, the plant clearance officer must forward the inventory disposal schedule to the GSA regional office that serves the region in which the property is located.

(ii) If the contractor has expressed an interest in using the property on another Government contract, the plant clearance officer must contact the contracting officer for that contract. If the contracting officer concurs with the proposed use, the contracting officer for the contract under which the property is accountable must transfer the property's accountability to that contract. If the contracting officer does not concur with the proposed use, the plant clearance officer must deny the contractor's request and must continue the screening process.

(iii) If the property is contractor-acquired or produced, and the contractor or subcontractor has expressed an interest in acquiring the property, and no other party expresses an interest during agency or GSA screening, the property may be sold to the contractor or subcontractor at acquisition cost.

(3) *Printing equipment*. Agencies must report all excess printing equipment to the Public Printer, Government Publishing Office, 732 North Capitol Street, NW, Washington, DC 20401, after screening within the agency (see 44 U.S.C. 312). If the Public Printer does not express a need for the equipment within 21 days, the agency must submit the report to GSA for further use and donation screening as described in paragraph (a) of this section.

(4) *Non-nuclear hazardous materials, hazardous wastes, and classified items*. These items must be screened in accordance with agency procedures. Report non-nuclear hazardous materials to GSA if the agency has no requirement for them.

(5) *Nuclear materials*. The possession, use, and transfer of certain nuclear materials are subject to the regulatory controls of the Nuclear Regulatory Commission (NRC). Contracting activities must screen excess nuclear materials in the following categories:

(i) *By-product material*. Any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to producing or using special nuclear material.

(ii) *Source material*. Uranium or thorium, or any combination thereof, in any physical or chemical form; or ores that contain by weight one-twentieth of 1 percent (0.05 percent) or more of uranium, thorium, or any combination thereof. Source material does not include special nuclear material.

(iii) *Special nuclear material*. Plutonium, Uranium 233, Uranium enriched in the isotope 233 or in the isotope 235, any other material that the NRC determines to be special nuclear material (but not including source material); or any material artificially enriched by any nuclear material.

45.602-4 Interagency property transfer costs.

Agencies whose property is transferred to other agencies must not be reimbursed for the property in any manner unless the circumstances of FMR 102-36.285 (41 CFR102-36.285) apply. The agency receiving the property must pay any transportation costs that are not the contractor's responsibility and any costs to pack, crate, or otherwise prepare the property for shipment. The contract administration office must process appropriate contract modifications. To accelerate plant clearance, the receiving agency must promptly furnish funding data, and transfer or shipping documents to the contract administration office.

45.603 Abandonment or destruction of personal property.

(a) When contractor inventory is processed through the reutilization screening process prescribed in 45.602-2 without success, and provided the property has no commercial value, does not require demilitarization, and does not constitute a danger to public health or welfare, plant clearance officers or other authorized officials may without further approval-

(1) Direct the contractor to destroy the property;

(2) Abandon non-sensitive property at the contractor's or subcontractor's premises; or

(3) Abandon sensitive property at the contractor's or subcontractor's premises, with contractor consent.

(b) Provided a Government reviewing official at least one level higher than the plant clearance officer or other agency authorized official approves, plant clearance officers or other agency authorized officials may authorize the abandonment, or order the destruction of other contractor inventory at the contractor's or subcontractor's premises, in accordance with FMR 102-36.305 through 325 (41 CFR 102-36.305-325) and consistent with the following:

(1) The property is not considered sensitive, does not require demilitarization, has no commercial value or reutilization, transfer or donation potential, and does not constitute a danger to public health or welfare.

(2) The estimated cost of continued care and handling of the property (including advertising, storage and other costs associated with making the sale), exceed the estimated proceeds from its sale.

(c) In lieu of abandonment or its authorized destruction, the plant clearance officer or authorized official may authorize the donation of property including unsold surplus property to public bodies, provided that the property is not sensitive property, does not require demilitarization, and it does not constitute a danger to public health or welfare. The Government will not bear any of the costs incident to such donations.

(d) Unless the property qualifies for one of the exceptions under FMR 102-36.330 (41 CFR 102-36.330), the plant clearance officer or requesting official will ensure prior public notice of such actions of abandonment or destruction consistent with FMR 102-36.325 (41 CFR 102-36.325).

45.604 Sale of surplus personal property.

45.604-1 Sales procedures.

Surplus personal property that has completed screening in accordance with 45.602-3(a) must be sold in accordance with the policy for the sale of surplus personal property contained in the Federal Management Regulation, at part 102-38 (41 CFR part 102-38). Agencies may specify implementing procedures.

45.604-2 Use of GSA sponsored sales centers.

Agencies may use sales center services. Use of such centers for sale of surplus property is authorized when in the best interest of the Government, consistent with contract terms and conditions.

45.604-3 Proceeds from sales of surplus property.

Proceeds of any sale are to be credited to the Treasury of the United States as miscellaneous receipts, unless otherwise authorized by statute or the contract or any subcontract thereunder authorizes the proceeds to be credited to the price or cost of the work (40 U.S.C. 571 and 574).

45.604-4 Sale of property pursuant to the exchange/sale authority.

Agencies should consider the sale of property pursuant to the exchange/sale authority in FMR 102-39 (41 CFR part 102-39) when agencies are acquiring or plan to acquire similar products and other requirements of the authority are satisfied.

45.605 Inventory disposal reports.

The plant clearance officer must promptly prepare an SF1424, Inventory Disposal Report, following disposition of the property identified on an inventory disposal schedule and the crediting of any related proceeds. The report must identify any lost or otherwise unaccounted for property and any changes in quantity or value of the property made by the contractor after submission of the initial inventory disposal schedule. The report must be provided to the administrative contracting officer or, for termination inventory, to the termination contracting officer, with a copy to the property administrator.

45.606 Contractor scrap procedures.

(a) The property administrator should, in coordination with the plant clearance officer, ensure that contractor scrap disposal processes, methods, and practices allow for effective, efficient, and proper disposition and are properly documented in the contractor's property management procedures.

(b) Absent contract terms and conditions to the contrary, the Government may abandon parts removed and replaced from property as a result of normal maintenance actions or removed from property as a result of the repair, maintenance, overhaul, or modification process.

PART 46 - QUALITY ASSURANCE

Sec.

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46.000 Scope of part.

This part prescribes policies and procedures to ensure that supplies and services acquired under Government contract conform to the contract's quality and quantity requirements. Included are inspection, acceptance, warranty, and other measures associated with quality requirements.

Subpart 46.1 - General

46.101 Definitions.

As used in this part-

Acceptance means the act of an authorized representative of the Government by which the Government, for itself or as agent of another, assumes ownership of existing identified supplies tendered or approves specific services rendered as partial or complete performance of the contract.

Conditional acceptance means acceptance of supplies or services that do not conform to contract quality requirements, or are otherwise incomplete, that the contractor is required to correct or otherwise complete by a specified date.

Contract quality requirements means the technical requirements in the contract relating to the quality of the product or service and those contract clauses prescribing inspection, and other quality controls incumbent on the contractor, to assure that the product or service conforms to the contractual requirements.

Counterfeit item means an unlawful or unauthorized reproduction, substitution, or alteration that has been knowingly mismarked, misidentified, or otherwise misrepresented to be an authentic, unmodified item from the original manufacturer, or a source with the express written authority of the original manufacturer or current design activity, including an authorized aftermarket manufacturer. Unlawful or unauthorized substitution includes used items represented as new, or the false identification of grade, serial number, lot number, date code, or performance characteristics.

Critical item means an item, the failure of which is likely to result in hazardous or unsafe conditions for individuals using, maintaining, or depending upon the item; or is likely to prevent performance of a vital agency mission.

Critical nonconformance means a nonconformance that is likely to result in hazardous or unsafe conditions for individuals using, maintaining, or depending upon the supplies or services; or is likely to prevent performance of a vital agency mission.

Design activity means an organization, Government or contractor, that has responsibility for the design and configuration of an item, including the preparation or maintenance of design documents. Design activity could be the original organization, or an organization to which design responsibility has been transferred.

Government contract quality assurance means the various functions, including inspection, performed by the Government to determine whether a contractor has fulfilled the contract obligations pertaining to quality and quantity.

Major nonconformance means a nonconformance, other than critical, that is likely to result in failure of the supplies or services, or to materially reduce the usability of the supplies or services for their intended purpose.

Minor nonconformance means a nonconformance that is not likely to materially reduce the usability of the supplies or services for their intended purpose, or is a departure from established standards having little bearing on the effective use or operation of the supplies or services.

Off-the-shelf item means an item produced and placed in stock by a contractor, or stocked by a distributor, before receiving orders or contracts for its sale. The item may be commercial or produced to military or Federal specifications or description.

Patent defect means any defect which exists at the time of acceptance and is not a latent defect.

Subcontractor (see part 44).

Suspect counterfeit item means an item for which credible evidence (including but not limited to, visual inspection or testing) provides reasonable doubt that the item is authentic.

Testing means that element of inspection that determines the properties or elements, including functional operation of supplies or their components, by the application of established scientific principles and procedures.

46.102 Policy.

Agencies must ensure that-

(a) Contracts include inspection and other quality requirements, including warranty clauses when appropriate, that are determined necessary to protect the Government's interest;

(b) Supplies or services (including commercial services) tendered by contractors meet contract requirements;

(c) Government contract quality assurance is conducted before acceptance (except as otherwise provided in this part), by or under the direction of Government personnel;

(d) No contract precludes the Government from performing inspection; and

(e) Nonconforming supplies or services are rejected, except as otherwise provided in 46.407.

46.103 Contracting office responsibilities.

Contracting offices are responsible for-

(a) Receiving from the activity responsible for technical requirements any specifications for inspection, testing, and other contract quality requirements essential to ensure the integrity of the supplies or services (the activity responsible for technical requirements is responsible for prescribing contract quality requirements, such as inspection and testing requirements or, for service contracts, a quality assurance surveillance plan);

(b) Including in solicitations and contracts the appropriate requirements for the contractor's control of quality for the supplies or services to be acquired;

(c) Issuing any necessary instructions to the cognizant contract administration office and acting on recommendations submitted by that office (see part 42 and 46.104(f));

(d) When contract administration is retained (see part 42), verifying that the contractor fulfills the contract quality requirements; and

(e) Ensuring that nonconformances are identified, and establishing the significance of a nonconformance when considering the acceptability of supplies or services which do not meet contract requirements.

46.104 Contract administration office responsibilities.

When a contract is assigned for administration to the contract administration office cognizant of the contractor's plant, that office, unless specified otherwise, must—

(a) Develop and apply efficient procedures for performing Government contract quality assurance actions under the contract in accordance with the written direction of the contracting office;

(b) Perform all actions necessary to verify whether the supplies or services conform to contract quality requirements;

(c) Maintain, as part of the performance records of the contract, suitable records reflecting-

(1) The nature of Government contract quality assurance actions, including, when appropriate, the number of observations made and the number and type of defects; and

(2) Decisions regarding the acceptability of the products, the processes, and the requirements, as well as action to correct defects.

(d) Implement any specific written instructions from the contracting office;

(e) Report to the contracting office any defects observed in design or technical requirements, including contract quality requirements; and

(f) Recommend any changes necessary to the contract, specifications, instructions, or other requirements that will provide more effective operations or eliminate unnecessary costs (see 46.103(c)).

46.105 [Reserved]

Subpart 46.2 - Contract Quality Requirements

46.201 General.

(a) The contracting officer must include in the solicitation and contract the appropriate quality requirements. The type and extent of contract quality requirements needed depends on the particular acquisition and may range from inspection at time of acceptance to a requirement for the contractor's implementation of a comprehensive program for controlling quality.

(b) As feasible, solicitations and contracts may provide for alternative, but substantially equivalent, inspection methods to obtain wide competition and low cost. The contracting officer may also authorize contractor-recommended alternatives when in the Government's interest and approved by the activity responsible for technical requirements.

(c) Although contracts generally make contractors responsible for performing inspection before tendering supplies to the Government, there are situations in which contracts will provide for specialized inspections to be performed solely by the Government. Among situations of this kind are-

(1) Tests that require use of specialized test equipment or facilities not ordinarily available in suppliers' plants or commercial laboratories (*e.g.,* ballistic testing of ammunition, unusual environmental tests, and simulated service tests); and

(2) Contracts that require Government testing for first article approval (see part 9).

(d) Except as otherwise specified by the contract, required contractor testing may be performed in the contractor's or subcontractor's laboratory or testing facility, or in any other laboratory or testing facility acceptable to the Government.

46.202 Types of contract quality requirements.

Contract quality requirements fall into four general categories, depending on the extent of quality assurance needed by the Government for the acquisition involved.

46.202-1 Contracts for commercial products and commercial services.

When acquiring commercial products (see part 12), the Government must rely on contractors' existing quality assurance systems as a substitute for Government inspection and testing before tender for acceptance unless customary market practices for the commercial product being acquired include in-process inspection. Any in-process inspection by the Government must be conducted in a manner consistent with commercial practice. The Government must rely on the contractor to accomplish all inspection and testing needed to ensure that commercial services acquired conform to contract requirements before they are tendered to the Government.

46.202-2 Government reliance on inspection by contractor.

(a) Except as specified in paragraph (b) of this section, the Government must rely on the contractor to accomplish all inspection and testing needed to ensure that supplies or services acquired at or below the simplified acquisition threshold conform to contract quality requirements before they are tendered to the Government (see 46.301).

(b) The Government must not rely on inspection by the contractor if the contracting officer determines that the Government has a need to test the supplies or services in advance of their tender for acceptance, or to pass judgment upon the adequacy of the contractor's internal work processes. In making the determination, the contracting officer must consider-

(1) The nature of the supplies and services being purchased and their intended use;

(2) The potential losses in the event of defects;

(3) The likelihood of uncontested replacement or correction of defective work; and

(4) The cost of detailed Government inspection.

46.202-3 Standard inspection requirements.

Standard inspection requirements are contained in the clauses prescribed in 46.302 through 46.308, and in the product and service specifications that are included in solicitations and contracts.

46.202-4 Higher-level contract quality requirements.

(a) Agencies must establish procedures for determining when higher-level contract quality requirements are necessary, for determining the risk (both the likelihood and the impact) of nonconformance, and for advising the contracting officer about which higher-level standards should be applied and included in the solicitation and contract. Requiring compliance with higher-level quality standards is necessary in solicitations and contracts for complex or critical items (see 46.203)or when the technical requirements of the contract require-

(1) Control of such things as design, work operations, in-process controls, testing, and inspection; or

(2) Attention to such factors as organization, planning, work instructions, documentation control, and advanced metrology.

(b) Examples of higher-level quality standards include overarching quality management system standards such as ISO 9001, ASQ/ANSI E4, ASME NQA-1, SAE AS9100, SAE AS9003, and ISO/TS 16949, and product or process specific quality standards such as SAE AS5553.

46.203 Criteria for use of contract quality requirements.

The extent of contract quality requirements, including contractor inspection, required under a contract will usually be based upon the classification of the contract item (supply or service) as determined by its technical description, its complexity, and the criticality of its application.

(a) *Technical description.* Contract items may be technically classified as-

(1) Commercial (described in commercial catalogs, drawings, or industrial standards; see part 2); or

(2) Military-Federal (described in Government drawings and specifications).

(b) Complexity. (1) Complex items have quality characteristics, not wholly visible in the end item, for which contractual conformance must be established progressively through precise measurements, tests, and controls applied during purchasing, manufacturing, performance, assembly, and functional operation either as an individual item or in conjunction with other items.

(2) Noncomplex items have quality characteristics for which simple measurement and test of the end item are sufficient to determine conformance to contract requirements.

(c) Criticality. (1) A critical application of an item is one in which the failure of the item could injure personnel or jeopardize a vital agency mission. A critical item may be either peculiar, meaning it has only one application, or common, meaning it has multiple applications.

(2) A noncritical application is any other application. Noncritical items may also be either peculiar or common.

46.204 [Reserved]

Subpart 46.3 - Contract Clauses

46.301 Contractor inspection requirements.

The contracting officer must insert the clause at 52.246-1, Contractor Inspection Requirements, in solicitations and contracts for supplies or services when the contract amount is expected to be at or below the simplified acquisition threshold and (a) inclusion of the clause is necessary to ensure an explicit understanding of the contractor's inspection responsibilities, or (b) inclusion of the clause is required under agency procedures. The clause must not be used if the contracting officer has made the determination specified in 46.202-2(b).

46.302 Fixed-price supply contracts.

The contracting officer must insert the clause at 52.246-2, Inspection of Supplies-Fixed-Price, in solicitations and contracts for supplies, or services that involve the furnishing of supplies, when a fixed-price contract is contemplated and the contract amount is expected to exceed the simplified acquisition threshold. The contracting officer may insert the clause in such solicitations and contracts when the contract amount is expected to be at or below the simplified acquisition threshold and inclusion of the clause is in the Government's interest. If a fixed-price incentive contract is contemplated, the contracting officer must use the clause with its Alternate I. If a fixed-ceiling-price contract with retroactive price redetermination is contemplated, the contracting officer must use the clause with its Alternate II.

46.303 Cost-reimbursement supply contracts.

The contracting officer must insert the clause at 52.246-3, Inspection of Supplies-Cost-Reimbursement, in solicitations and contracts for supplies, or services that involve the furnishing of supplies, when a cost-reimbursement contract is contemplated.

46.304 Fixed-price service contracts.

The contracting officer must insert the clause at 52.246-4, Inspection of Services-Fixed-Price, in solicitations and contracts for services, or supplies that involve the furnishing of services, when a fixed-price contract is contemplated and the contract amount is expected to exceed the simplified acquisition threshold. The contracting officer may insert the clause in such solicitations and contracts when the contract amount is expected to be at or below the simplified acquisition threshold and inclusion is in the Government's interest.

46.305 Cost-reimbursement service contracts.

The contracting officer must insert the clause at 52.246-5, Inspection of Services-Cost Reimbursement, in solicitations and contracts for services, or supplies that involve the furnishing of services, when a cost-reimbursement contract is contemplated.

46.306 Time-and-material and labor-hour contracts.

The contracting officer must insert the clause at 52.246-6, Inspection-Time-and-Material and Labor-Hour, in solicitations and contracts when a time-and-material contract or a labor-hour contract is contemplated. If Government inspection and acceptance are to be performed at the contractor's plant, the contracting officer must use the clause with its Alternate I.

46.307 Fixed-price research and development contracts.

(a) The contracting officer must insert the clause at 52.246-7, Inspection of Research and Development-Fixed-Price, in solicitations and contracts for research and development when-

(1) The primary objective of the contract is the delivery of end items other than designs, drawings, or reports,

(2) A fixed-price contract is contemplated, and

(3) The contract amount is expected to exceed the simplified acquisition threshold; unless use of the clause is impractical and the clause prescribed in 46.309 is considered to be more appropriate.

(b) The contracting officer may insert the clause in such solicitations and contracts when the contract amount is expected to be at or below the simplified acquisition threshold, and its use is in the Government's interest.

46.308 Cost-reimbursement research and development contracts.

The contracting officer must insert the clause at 52.246-8, Inspection of Research and Development-Cost-Reimbursement, in solicitations and contracts for research and development when (a) the primary objective of the contract is the delivery of

end items other than designs, drawings, or reports, and (b) a cost-reimbursement contract is contemplated; unless use of the clause is impractical and the clause prescribed in 46.309 is considered to be more appropriate. If it is contemplated that the contract will be on a no-fee basis, the contracting officer must use the clause with its Alternate I.

46.309 Research and development contracts (short form).

The contracting officer must insert the clause at 52.246-9, Inspection of Research and Development (Short Form), in solicitations and contracts for research and development when the clause prescribed in 46.307 or the clause prescribed in 46.308 is not used.

46.310 [Reserved]

46.311 Higher-level contract quality requirement.

(a) The contracting officer must insert the clause at 52.246-11, Higher-Level Contract Quality Requirement, in solicitations and contracts when the inclusion of a higher-level contract quality requirement is necessary (see 46.202-4).

(b) For each higher-level quality standard, the contracting officer must fill in the title, number, date, and tailoring (if any).

46.312 Construction contracts.

The contracting officer must insert the clause at 52.246-12, Inspection of Construction, in solicitations and contracts for construction when a fixed-price contract is contemplated and the contract amount is expected to exceed the simplified acquisition threshold. The contracting officer may insert the clause in such solicitations and contracts when the contract amount is expected to be at or below the simplified acquisition threshold, and its use is in the Government's interest.

46.313 Contracts for dismantling, demolition, or removal of improvements.

The contracting officer must insert the clause at 52.246-13, Inspection-Dismantling, Demolition, or Removal of Improvements, in solicitations and contracts for dismantling, demolition, or removal of improvements.

46.314 Transportation contracts.

The contracting officer must insert the clause at 52.246-14, Inspection of Transportation, in solicitations and contracts for freight transportation services (including local drayage) by rail, motor (including bus), domestic freight forwarder, and domestic water carriers (including inland, coastwise, and intercoastal). The contracting officer must not use the clause for the acquisition of transportation services by domestic or international air carriers or by international ocean carriers, or to freight services provided under bills of lading or to those negotiated for reduced rates under 49 U.S.C. 10721 or 13712. (See part 47)

46.315 Certificate of conformance.

The contracting officer must insert the clause at 52.246-15, Certificate of Conformance, in solicitations and contracts for supplies or services when the conditions in 46.504 apply.

46.316 Responsibility for supplies.

The contracting officer must insert the clause at 52.246-16, Responsibility for Supplies, in solicitations and contracts for (a) supplies, (b) services involving the furnishing of supplies, or (c) research and development, when a fixed-price contract is contemplated and the contract amount is expected to exceed the simplified acquisition threshold. The contracting officer may insert the clause in such solicitations and contracts when the contract amount is not expected to exceed the simplified acquisition threshold and inclusion of the clause is authorized under agency procedures.

46.317 Reporting nonconforming Items.

(a) Except as provided in paragraph (b) of this section, the contracting officer must insert the clause at 52.246-26, Reporting Nonconforming Items, in solicitations and contracts - as follows:

(1) For an acquisition by an agency, including the Department of Defense, of–

(i) Any items that are subject to higher-level quality standards in accordance with the clause at 52.246-11 Higher-Level Contract Quality Requirement;

(ii) Any items that the contracting officer, in consultation with the requiring activity determines to be critical items for which use of the clause is appropriate;

(2) In addition (as required by paragraph (c)(4) of section 818 of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112-81)), for an acquisition that exceeds the simplified acquisition threshold and is by, or for, the Department of Defense of electronic parts or end items, components, parts, or materials containing electronic parts, whether or not covered in paragraph (a)(1) of this section; or

(3) For the acquisition of services, if the contractor will furnish, as part of the service, any items that meet the criteria specified in paragraphs (a)(1) through (a)(2) of this section.

(b) The contracting officer must not insert the clause at 52.246-26, Reporting Nonconforming Items, in solicitations and contracts when acquiring—

(1) Commercial products and commercial services using part 12 procedures; or

(2) Medical devices that are subject to the Food and Drug Administration reporting requirements at 21 CFR 803.

(c) If required by agency policy, the contracting officer may modify paragraph (b)(4) of the clause at 52.246-26, but only to change the responsibility for the contractor to submit reports to the agency rather than to Government-Industry Data Exchange Program (GIDEP), so that the agency instead of the contractor submits reports to GIDEP within the mandatory 60 days.

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Subpart 46.4 - Government Contract Quality Assurance

46.401 General.

(a) Government contract quality assurance must be performed at such times (including any stage of manufacture or performance of services) and places (including subcontractors' plants) as may be necessary to determine that the supplies or services conform to contract requirements. Quality assurance surveillance plans should be prepared in conjunction with the preparation of the statement of work. The plans should specify-

(1) All work requiring surveillance; and

(2) The method of surveillance.

(b) Each contract must designate the place or places where the Government reserves the right to perform quality assurance.

(c) If the contract provides for performance of Government quality assurance at source, the place or places of performance may not be changed without the authorization of the contracting officer.

(d) If a contract provides for delivery and acceptance at destination and the Government inspects the supplies at a place other than destination, the supplies must not ordinarily be reinspected at destination, but should be examined for quantity, damage in transit, and possible substitution or fraud.

(e) [Reserved]

(f) Government inspection must be documented on an inspection or receiving report form or commercial shipping document/packing list, under agency procedures (see subpart 46.6).

(g) Agencies may prescribe the use of inspection approval or disapproval stamps to identify and control supplies and material that have been inspected for conformance with contract quality requirements.

46.402 Government contract quality assurance at source.

Agencies must perform contract quality assurance, including inspection, at source if—

(a) Performance at any other place would require uneconomical disassembly or destructive testing;

(b) Considerable loss would result from the manufacture and shipment of unacceptable supplies, or from the delay in making necessary corrections;

(c) Special required instruments, gauges, or facilities are available only at source;

(d) Performance at any other place would destroy or require the replacement of costly special packing and packaging;

(e) Government inspection during contract performance is essential; or

(f) It is determined for other reasons to be in the Government's interest.

46.403 Government contract quality assurance at destination.

(a) Government contract quality assurance that can be performed at destination is normally limited to inspection of the supplies or services. Inspection must be performed at destination under the following circumstances—

(1) Supplies are purchased off-the-shelf and require no technical inspection;

(2) Necessary testing equipment is located only at destination;

(3) Perishable subsistence supplies purchased within the United States, except that those supplies destined for overseas shipment will normally be inspected for condition and quantity at points of embarkation;

(4) Brand name products purchased for authorized resale through commissaries or similar facilities (however, supplies destined for direct overseas shipment may be accepted by the contracting officer or an authorized representative on the basis of a tally sheet evidencing receipt of shipment signed by the port transportation officer or other designated official at the transshipment point);

(5) The products being purchased are processed under direct control of the National Institutes of Health or the Food and Drug Administration of the Department of Health and Human Services;

(6) The contract is for services performed at destination; or

(7) It is determined for other reasons to be in the Government's interest.

(b) Overseas inspection of supplies shipped from the United States must not be required except in unusual circumstances, and then only when the contracting officer determines in advance that inspection can be performed or makes necessary arrangements for its performance.

46.404 Government contract quality assurance for acquisitions at or below the simplified acquisition threshold.

(a) In determining the type and extent of Government contract quality assurance to be required for contracts at or below the simplified acquisition threshold, the contracting officer must consider the criticality of application of the supplies or services, the amount of possible losses, and the likelihood of uncontested replacement of defective work (see 46.202-2).

(b) When the conditions in 46.202-2(b) apply, the following policies must govern:

(1) Unless a special situation exists, the Government must inspect contracts at or below the simplified acquisition threshold at destination and only for type and kind; quantity; damage; operability (if readily determinable); and preservation, packaging, packing, and marking, if applicable.

(2) Special situations may require more detailed quality assurance and the use of a standard inspection or higher-level contract quality requirement. These situations include those listed in 46.402 and contracts for items having critical applications.

(3) Detailed Government inspection may be limited to those characteristics that are special or likely to cause harm to personnel or property. When repetitive purchases of the same item are made from the same manufacturer with a history of defect-free work, Government inspection may be reduced to a periodic check of occasional purchases.

46.405 Subcontracts.

(a) Government contract quality assurance on subcontracted supplies or services must be performed only when required in the Government's interest. It does not relieve the prime contractor of any responsibilities under the contract. When appropriate, the prime contractor must be requested to arrange for timely Government access to the subcontractor facility.

(b) The Government must perform quality assurance at the subcontract level when-

(1) The item is to be shipped from the subcontractor's plant to the using activity and inspection at source is required;

(2) The conditions for quality assurance at source are applicable (see 46.402);

(3) The contract specifies that certain quality assurance functions, which can be performed only at the subcontractor's plant, are to be performed by the Government; or

(4) It is otherwise required by the contract or determined to be in the Government's interest.

(c) Supplies or services for which certificates, records, reports, or similar evidence of quality are available at the prime contractor's plant must not be inspected at the subcontractor's plant, except occasionally to verify this evidence or when required under (b) of this section.

(d) All oral and written statements and contract terms and conditions relating to Government quality assurance actions at the subcontract level must be worded so as not to-

(1) Affect the contractual relationship between the prime contractor and the Government, or between the prime contractor and the subcontractor;

(2) Establish a contractual relationship between the Government and the subcontractor; or

(3) Constitute a waiver of the Government's right to accept or reject the supplies or services.

46.406 Foreign governments.

Government contract quality assurance performed for foreign governments or international agencies must be administered according to the foreign policy and security objectives of the United States. Such support must be furnished only when consistent with or required by legislation, executive orders, or agency policies concerning mutual international programs.

46.407 Nonconforming supplies or services.

(a) The contracting officer should reject supplies or services not conforming in all respects to contract requirements (see 46.102). In those instances where deviation from this policy is found to be in the Government's interest, such supplies or services may be accepted only as authorized in this section.

(b) The contracting officer ordinarily must give the contractor an opportunity to correct or replace nonconforming supplies or services when this can be accomplished within the required delivery schedule. Unless the contract specifies otherwise (as may be the case in some cost-reimbursement contracts), correction or replacement must be without additional cost to the Government. Paragraph (e)(2) of the clause at 52.246-2, Inspection of Supplies-Fixed-Price, reserves to the Government the right to charge the contractor the cost of Government reinspection and retests because of prior rejection.

(c) (1) In situations not covered by paragraph (b) of this section, the contracting officer ordinarily must reject supplies or services when the nonconformance is critical or major or the supplies or services are otherwise incomplete. However, there may be circumstances (*e.g.,* reasons of economy or urgency) when the contracting officer determines acceptance or

conditional acceptance of supplies or services is in the best interest of the Government. The contracting officer must make this determination based upon-

(i) Advice of the technical activity that the item is safe to use and will perform its intended purpose;

(ii) Information regarding the nature and extent of the nonconformance or otherwise incomplete supplies or services;

(iii) A request from the contractor for acceptance of the nonconforming or otherwise incomplete supplies or services (if feasible);

(iv) A recommendation for acceptance, conditional acceptance, or rejection, with supporting rationale; and

(v) The contract adjustment considered appropriate, including any adjustment offered by the contractor.

(2) The cognizant contract administration office, or other Government activity directly involved, must furnish this data to the contracting officer in writing, except that in urgent cases it may be furnished orally and later confirmed in writing. Before making a decision to accept, the contracting officer must obtain the concurrence of the activity responsible for the technical requirements of the contract and, where health factors are involved, of the responsible health official of the agency concerned.

(d) If the nonconformance is minor, the cognizant contract administration office may make the determination to accept or reject, except where this authority is withheld by the contracting office of the contracting activity. To assist in making this determination, the contract administration office may establish a joint contractor-contract administrative office review group. Acceptance of supplies and services with critical or major nonconformances is outside the scope of the review group.

(e) The contracting officer must discourage the repeated tender of nonconforming supplies or services, including those with only minor nonconformances, by appropriate action, such as rejection and documenting the contractor's performance record.

(f) When supplies or services are accepted with critical or major nonconformances as authorized in paragraph (c) of this section, the contracting officer must modify the contract to provide for an equitable price reduction or other consideration. In the case of conditional acceptance, amounts withheld from payments generally should be at least sufficient to cover the estimated cost and related profit to correct deficiencies and complete unfinished work. The contracting officer must document in the contract file the basis for the amounts withheld. For services, the contracting officer can consider identifying the value of the individual work requirements or tasks (subdivisions) that may be subject to price or fee reduction. This value may be used to determine an equitable adjustment for nonconforming services. However, when supplies or services involving minor nonconformances are accepted, the contract need not be modified unless it appears that the savings to the contractor in fabricating the nonconforming supplies or performing the nonconforming services will exceed the cost to the Government of processing the modification.

(g) Notices of rejection must include the reasons for rejection and be furnished promptly to the contractor. Promptness in giving this notice is essential because, if timely nature of rejection is not furnished, acceptance may in certain cases be implied as a matter of law. The notice must be in writing if-

(1) The supplies or services have been rejected at a place other than the contractor's plant;

(2) The contractor persists in offering nonconforming supplies or services for acceptance; or

(3) Delivery or performance was late without excusable cause.

(h) The contracting officer must provide disposition instructions for counterfeit or suspect counterfeit items in accordance with agency policy. Agency policy may require the contracting officer to direct the contractor to retain such items for investigative or evidentiary purposes.

46.408 [Reserved]

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Subpart 46.5 - Acceptance

46.501 General.

Acceptance constitutes acknowledgment that the supplies or services conform with applicable contract quality and quantity requirements, except as provided in this subpart and subject to other terms and conditions of the contract. Acceptance may take place before delivery, at the time of delivery, or after delivery, depending on the provisions of the terms and conditions of the contract. Supplies or services must ordinarily not be accepted before completion of Government contract quality assurance actions (however, see 46.504). Acceptance must ordinarily be evidenced by execution of an acceptance certificate on an inspection or receiving report form or commercial shipping document/packing list.

46.502 Responsibility for acceptance.

Acceptance of supplies or services is the responsibility of the contracting officer. When this responsibility is assigned to a cognizant contract administration office or to another agency (see 42.202(g)), acceptance by that office or agency is binding on the Government.

46.503 Place of acceptance.

Each contract must specify the place of acceptance. Contracts that provide for Government contract quality assurance at source must ordinarily provide for acceptance at source. Contracts that provide for Government contract quality assurance at destination must ordinarily provide for acceptance at destination. (For transportation terms, see subpart 47.3.) Supplies accepted at a place other than destination must not be reinspected at destination for acceptance purposes, but should be examined at destination for quantity, damage in transit, and possible substitution or fraud.

46.504 Certificate of conformance.

A certificate of conformance (see 46.315) may be used in certain instances instead of source inspection (whether the contract calls for acceptance at source or destination) at the discretion of the contracting officer if the following conditions apply:

(a) Acceptance on the basis of a contractor's certificate of conformance is in the Government's interest.

(b) (1) Small losses would be incurred in the event of a defect; or

(2) Because of the contractor's reputation or past performance, it is likely that the supplies or services furnished will be acceptable and any defective work would be replaced, corrected, or repaired without contest. In no case will the Government's right to inspect supplies under the inspection provisions of the contract be prejudiced.

46.505 Transfer of title and risk of loss.

(a) Title to supplies must pass to the Government upon formal acceptance, regardless of when or where the Government takes physical possession, unless the contract specifically provides for earlier passage of title.

(b) Unless the contract specifically provides otherwise, risk of loss of or damage to supplies must remain with the contractor until, and must pass to the Government upon-

(1) Delivery of the supplies to a carrier if transportation is f.o.b. origin; or

(2) Acceptance by the Government or delivery of the supplies to the Government at the destination specified in the contract, whichever is later, if transportation is f.o.b. destination.

(c) Paragraph (b) of this section must not apply to supplies that so fail to conform to contract requirements as to give a right of rejection. The risk of loss of or damage to such nonconforming supplies remains with the contractor until cure or acceptance. After cure or acceptance, paragraph (b) of this section must apply.

(d) Under paragraph (b) of this section, the contractor must not be liable for loss of or damage to supplies caused by the negligence of officers, agents, or employees of the Government acting within the scope of their employment.

(e) The policy expressed in paragraphs (a) through (d) of this section is specified in the clause at 52.246-16, Responsibility for Supplies, which is prescribed in 46.316.

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Subpart 46.6 - Material Inspection and Receiving Reports

46.601 General.

Agencies must prescribe procedures and instructions for the use, preparation, and distribution of material inspection and receiving reports and commercial shipping document/packing lists to evidence Government inspection (see 46.401) and acceptance (see 46.501).

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Subpart 46.7 - Warranties

46.701 [Reserved]

46.702 General.

(a) The principal purposes of a warranty in a Government contract are-

(1) To delineate the rights and obligations of the contractor and the Government for defective items and services; and

(2) To foster quality performance.

(b) Generally, a warranty should provide-

(1) A contractual right for the correction of defects notwithstanding any other requirement of the contract pertaining to acceptance of the supplies or services by the Government; and

(2) A stated period of time or use, or the occurrence of a specified event, after acceptance by the Government to assert a contractual right for the correction of defects.

(c) The benefits to be derived from a warranty must be commensurate with the cost of the warranty to the Government.

46.703 Criteria for use of warranties.

The use of warranties is not mandatory. In determining whether a warranty is appropriate for a specific acquisition, the contracting officer must consider the following factors:

(a) *Nature and use of the supplies or services.* This includes such factors as-

(1) Complexity and function;

(2) Degree of development;

(3) State of the art;

(4) End use;

(5) Difficulty in detecting defects before acceptance; and

(6) Potential harm to the Government if the item is defective.

(b) *Cost.* Warranty costs arise from-

(1) The contractor's charge for accepting the deferred liability created by the warranty; and

(2) Government administration and enforcement of the warranty (see paragraph (c) of this section).

(c) *Administration and enforcement.* The Government's ability to enforce the warranty is essential to the effectiveness of any warranty. There must be some assurance that an adequate administrative system for reporting defects exists or can be established. The adequacy of a reporting system may depend upon such factors as the—

(1) Nature and complexity of the item;

(2) Location and proposed use of the item;

(3) Storage time for the item;

(4) Distance of the using activity from the source of the item;

(5) Difficulty in establishing existence of defects; and

(6) Difficulty in tracing responsibility for defects.

(d) *Trade practice.* In many instances an item is customarily warranted in the trade, and, as a result of that practice, the cost of an item to the Government will be the same whether or not a warranty is included. In those instances, it would be in the Government's interest to include such a warranty.

(e) *Reduced requirements.* The contractor's charge for assumption of added liability may be partially or completely offset by reducing the Government's contract quality assurance requirements where the warranty provides adequate assurance of a satisfactory product.

46.704 [Reserved]

46.705 Limitations.

(a) Except for the warranties in the clauses at 52.246-3, Inspection of Supplies-Cost-Reimbursement, and 52.246-8, Inspection of Research and Development-Cost-Reimbursement, the contracting officer must not include warranties in cost-reimbursement contracts, unless authorized in accordance with agency regulations (see 46.708).

(b) Warranty clauses must not limit the Government's rights under an inspection clause (see subpart 46.3) in relation to latent defects, fraud, or gross mistakes that amount to fraud.

(c) Except for warranty clauses in construction contracts, warranty clauses must provide that the warranty applies notwithstanding inspection and acceptance or other clauses or terms of the contract.

46.706 Warranty terms and conditions.

(a) To facilitate the pricing and enforcement of warranties, the contracting officer must ensure that warranties clearly state the-

(1) Exact nature of the item and its components and characteristics that the contractor warrants;

(2) Extent of the contractor's warranty including all of the contractor's obligations to the Government for breach of warranty;

(3) Specific remedies available to the Government; and

(4) Scope and duration of the warranty.

(b) The contracting officer must consider the following guidelines when preparing warranty terms and conditions:

(1) *Extent of contractor obligations*. (i) Generally, the contractor's obligations under warranties extend to all defects discovered during the warranty period, but do not include damage caused by the Government. When a warranty for the entire item is not advisable, a warranty may be required for a particular aspect of the item that may require special protection (*e.g.,* installation, components, accessories, subassemblies, preservation, packaging, and packing, etc.).

(ii) If the Government specifies the design of the end item and its measurements, tolerances, materials, tests, or inspection requirements, the contractor's obligations for correction of defects must usually be limited to defects in material and workmanship or failure to conform to specifications. If the Government does not specify the design, the warranty extends also to the usefulness of the design.

(iii) If express warranties are included in a contract (except contracts for commercial products and commercial services), all implied warranties of merchantability and fitness for a particular purpose must be negated by the use of specific language in the clause (see clauses 52.246-17, Warranty of Supplies of a Noncomplex Nature; 52.246-18, Warranty of Supplies of a Complex Nature; and 52.246-19, Warranty of Systems and Equipment under Performance Specifications or Design Criteria).

(2) *Remedies*. (i) Normally, a warranty must provide as a minimum that the Government may-

(A) Obtain an equitable adjustment of the contract; or

(B) Direct the contractor to repair or replace the defective items at the contractor's expense.

(ii) If it is not practical to direct the contractor to make the repair or replacement, or, because of the nature of the item, the repair or replacement does not afford an appropriate remedy to the Government, the warranty should provide alternate remedies, such as authorizing the Government to-

(A) Retain the defective item and reduce the contract price by an amount equitable under the circumstances; or

(B) Arrange for the repair or replacement of the defective item, by the Government or by another source, at the contractor's expense.

(iii) If it can be foreseen that it will not be practical to return an item to the contractor for repair, to remove it to an alternate source for repair, or to replace the defective item, the warranty should provide that the Government may repair, or require the contractor to repair, the item in place at the contractor's expense. The contract must provide that in the circumstance where the Government is to accomplish the repair, the contractor will furnish at the place of delivery the material or parts, and the installation instructions required to successfully accomplish the repair.

(iv) Unless provided otherwise in the warranty, the contractor's obligation to repair or replace the defective item, or to agree to an equitable adjustment of the contract, must include responsibility for the costs of furnishing all labor and material to-

(A) Reinspect items that the Government reasonably expected to be defective;

(B) Accomplish the required repair or replacement of defective items; and

(C) Test, inspect, package, pack, and mark repaired or replaced items.

(v) If repair or replacement of defective items is required, the contractor will generally be required by the warranty to bear the expense of transportation for returning the defective item from the place of delivery specified in the contract (irrespective of the f.o.b. point or the point of acceptance) to the contractor's plant and subsequent return. When defective items are returned to the contractor from other than the place of delivery specified in the contract, or when the Government exercises alternate remedies, the contractor's liability for transportation charges incurred must not exceed an amount equal to the cost of transportation by the usual commercial method of shipment between the place of delivery specified in the contract and the contractor's plant and subsequent return.

(3) *Duration of the warranty.* The time period or duration of the warranty must be clearly specified and must be established after consideration of such factors as (i) the estimated useful life of the item, (ii) the nature of the item including storage or shelf-life, and (iii) trade practice. The period specified must not extend the contractor's liability for patent defects beyond a reasonable time after acceptance by the Government.

(4) *Notice.* The warranty must specify a reasonable time for furnishing notice to the contractor regarding the discovery of defects. This notice period, which must apply to all defects discovered during the warranty period, must be long enough to assure that the Government has adequate time to give notice to the contractor. The contracting officer must consider the following factors when establishing the notice period:

(i) The time necessary for the Government to discover the defects.

(ii) The time reasonably required for the Government to take necessary administrative steps and make a timely report of discovery of the defects to the contractor.

(iii) The time required to discover and report defective replacements.

(5) *Markings.* (i) The packaging and preservation requirements of the contract must require the contractor to stamp or mark the supplies delivered or otherwise furnish notice with the supplies of the existence of the warranty. The purpose of the markings or notice is to inform Government personnel who store, stock, or use the supplies that the supplies are under warranty. Markings may be brief but should include—

(A) A brief statement that a warranty exists;

(B) The substance of the warranty;

(C) Its duration; and

(D) Who to notify if the supplies are found to be defective.

(ii) For commercial products (see 46.709), the contractor's trade practice in warranty marking is acceptable if sufficient information is presented for supply personnel and users to identify warranted supplies.

(6) *Consistency.* Contracting officers must ensure that the warranty clause and any other warranty conditions in the contract (*e.g.,* in the specifications or an inspection clause) are consistent. To the extent practicable, all of the warranties to be contained in the contract should be expressed in the warranty clause.

46.707 Pricing aspects of fixed-price incentive contract warranties.

If a fixed-price incentive contract contains a warranty, the estimated cost of the warranty to the contractor should be considered in establishing the incentive target price and the ceiling price of the contract. All costs incurred, or estimated to be incurred, by the contractor in complying with the warranty must be considered when establishing the total final price. Contractor compliance with the warranty after the establishment of the total final price must be at no additional cost to the Government.

46.708 Warranties of data.

Warranties of data must be developed and used in accordance with agency regulations.

46.709 Warranties of commercial products and commercial services.

For information on warranties of commercial products and commercial services, see part 12.

46.710 Contract clauses.

The clauses and alternates prescribed in this section may be used in solicitations and contracts in which inclusion of a warranty is appropriate (see 46.709 for warranties for commercial products and commercial services). However, because of the many situations that may influence the warranty terms and conditions appropriate to a particular acquisition, the contracting officer may vary the terms and conditions of the clauses and alternates to the extent necessary. The alternates prescribed in this section address the clauses; however, the conditions pertaining to each alternate must be considered if the terms and conditions are varied to meet a particular need.

(a) (1) The contracting officer may insert a clause substantially the same as the clause at 52.246-17, Warranty of Supplies of a Noncomplex Nature, in solicitations and contracts for noncomplex items when a fixed-price supply contract is contemplated and the use of a warranty clause has been approved under agency procedures. If the contractor's design rather than the Government's design will be used, insert the word "design" before "material" in paragraph (b)(1)(i).

(2) If it is desirable to specify that necessary transportation incident to correction or replacement will be at the Government's expense (as might be the case if, for example, the cost of a warranty would otherwise be prohibitive), the contracting officer may use the clause with its Alternate II.

(3) If the supplies cannot be obtained from another source, the contracting officer may use the clause with its Alternate III.

(4) If a fixed-price incentive contract is contemplated, the contracting officer may use the clause with its Alternate IV.

(5) If it is anticipated that recovery of the warranted item will involve considerable Government expense for disassembly and/or reassembly of larger items, the contracting officer may use the clause with its Alternate V.

(b) (1) The contracting officer may insert a clause substantially the same as the clause at 52.246-18, Warranty of Supplies of a Complex Nature, in solicitations and contracts for deliverable complex items when a fixed-price supply or research and development contract is contemplated and the use of a warranty clause has been approved under agency procedures. If the contractor's design rather than the Government's design will be used, insert the word "design" before "material" in paragraph (b)(1).

(2) If it is desirable to specify that necessary transportation incident to correction or replacement will be at the Government's expense (as might be the case if, for example, the cost of a warranty would otherwise be prohibitive), the contracting officer may use the clause with its Alternate II.

(3) If a fixed-price incentive contract is contemplated, the contracting officer may use the clause with its Alternate III.

(4) If it is anticipated that recovery of the warranted item will involve considerable Government expense for disassembly and/or reassembly of larger items, the contracting officer may use the clause with its Alternate IV.

(c) (1) The contracting officer may insert a clause substantially the same as the clause at 52.246-19, Warranty of Systems and Equipment under Performance Specifications or Design Criteria, in solicitations and contracts when performance specifications or design are of major importance; a fixed-price supply, service, or research and development contract for systems and equipment is contemplated; and the use of a warranty clause has been approved under agency procedures.

(2) If it is desirable to specify that necessary transportation incident to correction or replacement will be at the Government's expense (as might be the case if, for example, the cost of a warranty would otherwise be prohibitive), the contracting officer may use the clause with its Alternate I.

(3) If a fixed-price incentive contract is contemplated, the contracting officer may use the clause with its Alternate II.

(4) If it is anticipated that recovery of the warranted item will involve considerable Government expense for disassembly and/or reassembly of larger items, the contracting officer may use the clause with its Alternate III.

(d) The contracting officer may insert a clause substantially the same as the clause at 52.246-20, Warranty of Services, in solicitations and contracts for services when a fixed-price contract for services is contemplated and the use of a warranty clause has been approved under agency procedures; unless a clause substantially the same as the clause at 52.246-19, Warranty of Systems and Equipment under Performance Specifications or Design Criteria, has been used.

(e) (1) The contracting officer may insert a clause substantially the same as the clause at 52.246-21, Warranty of Construction, in solicitations and contracts when a fixed-price construction contract (see 46.705(c)) is contemplated and the use of a warranty clause has been approved under agency procedures.

(2) If the Government specifies in the contract the use of any equipment by "brand name and model," the contracting officer may use the clause with its Alternate I.

Subpart 46.8 - Contractor Liability for Loss of or Damage to Property of the Government

46.800 Scope of subpart.

This subpart prescribes policies and procedures for limiting contractor liability for loss of or damage to property of the Government that-

(a) Occurs after acceptance; and

(b) Results from defects or deficiencies in the supplies delivered or services performed.

46.801 Applicability.

(a) This subpart does not apply to commercial products and commercial services. This subpart applies to contracts other than those for—

(1) Information technology, including telecommunications;

(2) Construction;

(3) Architect-engineer services; and

(4) Maintenance and rehabilitation of real property.

(b) See subpart 46.7, Warranties, for policies and procedures concerning contractor liability caused by nonconforming technical data.

46.802 Definition.

High-value item, as used in this subpart, means a contract end item that-

(1) Has a high unit cost (normally exceeding $100,000 per unit), such as an aircraft, an aircraft engine, a communication system, a computer system, a missile, or a ship; and

(2) Is designated by the contracting officer as a high-value item.

46.803 Policy.

(a) *General.* The Government will generally act as a self-insurer by relieving contractors, as specified in this subpart, of liability for loss of or damage to property of the Government that (1) occurs after acceptance of supplies delivered or services performed under a contract and (2) results from defects or deficiencies in the supplies or services. However, the Government will not relieve the contractor of liability for loss of or damage to the contract end item itself, except for high-value items.

(b) *High-value items.* In contracts requiring delivery of high-value items, the Government will relieve contractors of contractual liability for loss of or damage to those items. However, this relief must not limit the Government's rights arising under the contract to-

(1) Have any defective item or its components corrected, repaired, or replaced when the defect or deficiency is discovered before the loss of or damage to a high-value item occurs; or

(2) Obtain equitable relief when the defect or deficiency is discovered after such loss or damage occurs.

(c) *Exception.* The Government will not provide contractual relief under paragraphs (a) and (b) of this section when contractor liability can be preserved without increasing the contract price.

(d) *Limitations.* Subject to the specific terms of the limitation of liability clause included in the contract, the relief provided under paragraphs (a) and (b) of this section does not apply-

(1) To the extent that contractor liability is expressly provided under a contract clause authorized by this regulation;

(2) When a defect or deficiency in, or Government's acceptance of, the supplies or services results from willful misconduct or lack of good faith on the part of the contractor's managerial personnel; or

(3) To the extent that any contractor insurance, or self-insurance reserve, covers liability for loss or damage suffered by the Government through purchase or use of the supplies delivered or services performed under the contract.

46.804 [Reserved]

46.805 Contract clauses.

(a) *Contracts that exceed the simplified acquisition threshold.* The contracting officer must insert the appropriate clause or combination of clauses specified in paragraphs (a)(1) through (a)(5) of this section in solicitations and contracts when the contract amount is expected to be in excess of the simplified acquisition threshold and the contract is subject to the requirements of this subpart as indicated in 46.801:

(1) In contracts requiring delivery of end items that are not high-value items, insert the clause at 52.246-23, Limitation of Liability.

(2) In contracts requiring delivery of high-value items, insert the clause at 52.246-24, Limitation of Liability-High Value Items.

(3) In contracts requiring delivery of both high-value items and other end items, insert both clauses prescribed in paragraphs (a)(1) and (a)(2) of this section, Alternate I of the clause at 52.246-24, and identify clearly in the contract schedule the line items designated as high-value items.

(4) In contracts requiring the performance of services, insert the clause at 52.246-25, Limitation of Liability-Services.

(5) In contracts requiring both the performance of services and the delivery of end items, insert the clause prescribed in paragraph (a)(4) of this section and the appropriate clause or clauses prescribed in paragraph (a)(1), (2), or (3) of this section, and identify clearly in the contract schedule any high-value line items.

(b) *Acquisitions at or below the simplified acquisition threshold.* The clauses prescribed by paragraph (a) of this section are not required for contracts at or below the simplified acquisition threshold. However, in response to a contractor's specific request, the contracting officer may insert the clauses prescribed in paragraph (a)(1) or (a)(4) of this section in a contract at or below the simplified acquisition threshold and may obtain any price reduction that is appropriate.

PART 47 - TRANSPORTATION

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47.000 Scope of part.

(a) This part describes policies and procedures for—

(1) Applying transportation and traffic management considerations in the acquisition of supplies; and

(2) Acquiring transportation or transportation-related services by contract methods other than bills of lading, transportation requests, transportation warrants, and similar transportation forms.

(b) Acquire transportation and transportation services either subject to the FAR or using the bill of lading as the contract under 49 U.S.C. 10721 or 49 U.S.C. 13712. The FAR does not regulate acquisition of transportation or transportation-related services when the bill of lading is the contract, but this contract method is common and, therefore, section 47.104 provides guidance on this method.

47.001 Definitions.

As used in this part-

Bill of lading means a transportation document, used as a receipt of goods, as documentary evidence of title, for clearing customs, and generally used as a contract of carriage.

(1) Commercial bill of lading (CBL), unlike the Government bill of lading, is not an accountable transportation document.

(2) Government bill of lading (GBL) is an accountable transportation document, authorized and prepared by a Government official.

Carrier or commercial carrier means a common carrier or a contract carrier.

Common carrier means a person holding itself out to the general public to provide transportation for compensation.

Contract carrier means a person providing transportation for compensation under continuing agreements with one person or a limited number of persons.

Government rate tender under 49 U.S.C. 10721 and 13712 means an offer by a common carrier to the United States at a rate below the regulated rate offered to the general public.

Household goods in accordance with 49 U.S.C. 13102 means personal effects and property used or to be used in a dwelling, when a part of the equipment or supply of such dwelling, and similar property if the transportation of such effects or property is arranged and paid for by—

(1) The householder, except such term does not include property moving from a factory or store, other than property that the householder has purchased with the intent to use in his or her dwelling and is transported at the request of, and the transportation charges are paid to the carrier by, the householder; or

(2) Another party.

Noncontiguous domestic trade means transportation (except with regard to bulk cargo, forest products, recycled metal scrap, waste paper, and paper waste) subject to regulation by the Surface Transportation Board involving traffic originating in or destined to Alaska, Hawaii, or a territory or possession of the United States (see 49 U.S.C. 13102(17) and 13702).

Released or declared value means the assigned value of the cargo for reimbursement purposes, not necessarily the actual value of the cargo. Released value may be more or less than the actual value of the cargo. The released value is the maximum amount that could be recovered by the agency in the event of loss or damage for the shipments of freight and household goods.

47.002 Applicability.

All Government personnel concerned with the following activities must follow this part as applicable:

(a) Acquisition of supplies.

(b) Acquisition of transportation and transportation-related services.

(c) Transportation assistance and traffic management.

(d) Administration of transportation contracts, transportation-related services, and other contracts that involve transportation.

(e) Entering into and administering contracts under which payments are made from Government funds for—

(1) The transportation of supplies;

(2) Transportation-related services; or

(3) Transportation of contractor personnel and their personal belongings.

Subpart 47.1 - General

47.101 Policies.

(a) For domestic shipments, authorize shipments on commercial bills of lading (CBL's). Government bills of lading (GBL's) may be used for international or noncontiguous domestic trade shipments or when otherwise authorized.

(b) The contract administration office (CAO) must ensure that instructions to contractors result in the most efficient and economical use of transportation services and equipment. Transportation personnel will assist and provide transportation management expertise to the CAO. The Federal Management Regulation at 41 CFR parts 102-117 and 102-118 provides specific responsibilities and details on transportation management. (For the Department of Defense (DoD), see DoD 4500.9-R, Defense Transportation Regulation.)

(c) Obtain traffic management advice and assistance when considering transportation factors required for—

(1) Solicitations and awards;

(2) Contract administration, modification, and termination; and

(3) Transportation of property by the Government to and from contractors' plants.

(d) (1) The preferred method of transporting supplies for the Government is by commercial carriers. However, Government-owned, leased, or chartered vehicles, aircraft, and vessels may be used if—

(i) They are available and not fully utilized,

(ii) Their use will result in substantial economies, and

(iii) Their use complies with all applicable statutes, agency policies and regulations.

(2) If the three circumstances listed in paragraph (d)(1) apply, then Government vehicles may be used for purposes such as—

(i) Local transportation of supplies between Government installations;

(ii) Pickup and delivery services that commercial carriers do not perform in connection with line-haul transportation;

(iii) Transporting supplies to meet emergencies; and

(iv) Accomplishing program objectives that cannot be attained by using commercial carriers.

(e) Agencies must not accord preferential treatment to any mode of transportation or to any particular carrier either in awarding or administering contracts for the acquisition of supplies or in awarding contracts for the acquisition of transportation. (See subparts 47.2 and 47.3 for situations in which the contracting officer is permitted to use specific modes of transportation.)

(f) When a contract specifies delivery of supplies f.o.b. origin with transportation costs to be paid by the Government, the contractor must make shipments on bills of lading, or on other shipping documents prescribed by Military Surface Deployment and Distribution Command (SDDC) in the case of seavan containers, either at the direction of or furnished by the CAO or the appropriate agency transportation office.

47.102 [Reserved]

47.103 Transportation payment and audit regulation.

47.103-1 General.

31 U.S.C. 3726 requires all agencies to establish a prepayment audit program. For details on the establishment of a prepayment audit, see 41 CFR part 102-118.

47.103-2 Contract clause.

Complete and insert the clause at 52.247-67, Submission of Transportation Documents for Audit, in solicitations and contracts when a cost-reimbursement contract is contemplated and the contract, or a first-tier cost-reimbursement subcontract under it, will authorize reimbursement of transportation as a direct charge to the contract or subcontract.

47.104 Government rate tenders under sections 10721 and 13712 of the Interstate Commerce Act (49 U.S.C. 10721 and 13712).

(a) This section explains statutory authority for common carriers subject to the jurisdiction of the Surface Transportation Board, i.e., motor carrier, water carrier, freight forwarder, rail carrier, to offer to transport persons or property for the account of the United States without charge or at "a rate reduced from the applicable commercial rate." A carrier offers reduced rates

in a Government rate tender. Additional information for civilian agencies is available in the Federal Management Regulation (41 CFR parts 102-117 and 102-118) and for DoD in the Defense Transportation Regulation (DoD 4500.9-R).

(b) Reduced rates offered in a Government rate tender are authorized for transportation provided by a rail carrier, for the movement of household goods, and for movement by or with a water carrier in noncontiguous domestic trade.

(1) For Government rate tenders submitted by a rail carrier, a rate reduced from the applicable commercial rate is a rate reduced from a rate regulated by the Surface Transportation Board.

(2) For Government rate tenders submitted for the movement of household goods, "a rate reduced from the applicable commercial rate" is a rate reduced from a rate contained in a published tariff subject to regulation by the Surface Transportation Board.

(3) For Government rate tenders submitted for movement by or with a water carrier in noncontiguous domestic trade, "a rate reduced from the applicable commercial rate" is a rate reduced from a rate contained in a published tariff required to be filed with the Surface Transportation Board.

47.104-1 Government rate tender procedures.

(a) 49 U.S.C. 10721 and 13712 rates are published in Government rate tenders and apply to shipments moving for the account of the Government on—

(1) Commercial bills of lading endorsed to show that the Government is assigned, and will reimburse, total transportation charges (see the clause at 52.247-1, Commercial Bill of Lading Notations); and

(2) Government bills of lading.

(b) Agencies may negotiate with carriers for additional or revised 49 U.S.C. 10721 and 13712 rates. Only personnel authorized under agency procedures may negotiate such rates.

47.104-2 Fixed-price contracts.

(a) *F.o.b. destination*. 49 U.S.C. 10721 and 13712 rates do not apply to shipments under fixed-price f.o.b. destination contracts (delivered price).

(b) *F.o.b. origin*. The contracting officer may occasionally require the contractor to prepay the freight charges to a specific destination. In such cases, the contractor must use a commercial bill of lading, and the contractor must invoice the direct and actual transportation cost as a separate item. The clause at 52.247-1, Commercial Bill of Lading Notations, ensures that the Government in this type of arrangement obtains the benefit of 49 U.S.C. 10721 and 13712 rates.

47.104-3 Cost-reimbursement contracts.

(a) 49 U.S.C. 10721 and 13712 rates may apply to shipments other than those made by the Government if the total benefit accrues to the Government, i.e., the Government pays the charges or reimburses the party that initially assumed the freight charges. Therefore, 49 U.S.C. 10721 and 13712 rates may apply to shipments moving on commercial bills of lading in cost reimbursement contracts under which the transportation costs are direct and allowable costs under the cost principles of Part 31.

(b) 49 U.S.C. 10721 and 13712 rates may apply to the movement of household goods and personal effects of contractor employees who are relocated for the convenience and at the direction of the Government and whose total transportation costs are reimbursed by the Government.

(c) The clause at 52.247-1, Commercial Bill of Lading Notations, ensures that the Government receives the benefit of lower 49 U.S.C. 10721 and 13712 rates in cost-reimbursement contracts as described in paragraphs (a) and (b) of this section.

(d) Contracting officers must—

(1) Include in contracts a statement requiring the contractor to use carriers that offer acceptable service at reduced rates if available; and

(2) Ensure that contractors receive the name and location of the transportation officer designated to furnish support and guidance when using Government rate tenders.

47.104-4 Contract clause.

(a) To ensure application of 49 U.S.C. 10721 and 13712 rates, where authorized (see 47.104(b)), insert the clause at 52.247-1, Commercial Bill of Lading Notations, in solicitations and contracts when the contracts will be—

(1) Cost-reimbursement contracts, including those that may involve the movement of household goods (see 47.104-3(b)); or

(2) Fixed-price f.o.b. origin contracts (other than contracts at or below the simplified acquisition threshold) (see 47.104-2(b) and 47.104-3).

(b) The contracting officer may insert the clause at 52.247-1, Commercial Bill of Lading Notations, in solicitations and contracts made at or below the simplified acquisition threshold when the delivery terms will be f.o.b. origin.

47.104-5 Citation of Government rate tenders.

When 49 U.S.C. 10721 and 13712 rates apply, transportation offices or contractors, as appropriate, must identify the applicable Government rate tender by endorsement on bills of lading.

47.105 [Reserved]

Subpart 47.2 - Contracts for Transportation or for Transportation-Related Services

47.200 Scope of subpart.

(a) This subpart describes procedures for the acquisition by sealed bid or negotiated contracts of—

(1)

Freight transportation (including local drayage) from rail, motor (including bus), domestic water (including inland, coastwise, and intercoastal) carriers, and from freight forwarders; and

(2)

Transportation-related services including but not limited to stevedoring, storage, packing, marking, and ocean freight forwarding.

(b)

Except as provided in paragraph (c) below, this subpart does not apply to—

(1)

The acquisition of freight transportation from—

(i)

Domestic or international air carriers (see subpart 47.4); and

(ii)

International ocean carriers (see subpart 47.5);

(2)

Freight transportation acquired by bills of lading;

(3)

Household goods for which rates are negotiated under 49 U.S.C. 10721 and 13712. (These statutes do not apply in intrastate moves); or

(4)

Contracts at or below the simplified acquisition threshold.

(c)

With appropriate modifications, apply the procedures in this subpart as necessary to the acquisition of freight transportation from the carriers listed in paragraph (b)(1) above and passenger transportation from any carrier or mode.

(d)

The procedures in this subpart apply to the transportation of household goods of persons being relocated at Government expense except when acquired—

(1)

Under the commuted rate schedules as required in the Federal Travel Regulation (41 CFR Chapter 302);

(2)

By the Department of Defense under DoD 4500.9-R, Defense Transportation Regulation; or

(3)

Under 49 U.S.C. 10721 and 13712 rates. (These statutes do not apply in intrastate moves.)

47.201 Definitions.

As used in this subpart-

General freight means supplies, goods, and transportable property not encompassed in the definitions of household goods or office furniture.

Office furniture means furniture, equipment, fixtures, records, and other equipment and materials used in Government offices, hospitals, and similar establishments.

47.202 [Reserved]

47.203 [Reserved]

47.204 Single-movement contracts.

Contracting officers may award single-movement contracts for unique transportation services not otherwise available under carrier tariffs or covered by DoD or the General Services Administration contracts, e.g., special requirements at origin and/or destination.

47.205 [Reserved]

47.206 [Reserved]

47.207 Contract clauses, and special requirements.

47.207-1 Qualifications of offerors.

(a) *Operating authorities*. Insert the clause at 52.247-2, Permits, Authorities, or Franchises, when regulated transportation is involved. The clause need not be used when a Federal office move is intrastate and the contracting officer determines that it is in the Government's interest not to apply the requirement for holding or obtaining State authority to operate within the State.

(b) [Reserved]

(c) [Reserved]

(d)

Familiarization with conditions. Insert the clause at 52.247-5, Familiarization with Conditions, to ensure that offerors become familiar with conditions under which and where the services will be performed.

47.207-2 [Reserved]

47.207-3 Description of shipment, origin, and destination.

(a) *Origin of shipments*. Include in solicitations full details regarding the location from which the freight is to be shipped.

(b) *Destination of shipments*. Include full details regarding delivery points.

(c) *Description of the freight*. Include in solicitations—

(1) An inventory if the freight consists of nonbulk items; and

(2) The freight classification description, which the transportation office should provide. If a freight classification description is not available, use a clear nontechnical description. Include additional details necessary to ensure that the prospective offerors have complete information about the freight, e.g., size, weight, hazardous material, whether packed for export, or unusual value.

(d) [Reserved]

(e) *Quantity*.

(1) State the actual weight of the freight or a reasonably accurate estimate.

(2) Insert the clause at 52.247-8, Estimated Weights or Quantities Not Guaranteed, when weights or quantities are estimates.

47.207-4 Determination of weights.

Specify in the contract the method of determining the weights of shipments as appropriate for the kind of freight involved and the type of service required.

(a) *Shipments of freight other than household goods and office furniture*.

(1) [Reserved]

(2) Insert the clause at 52.247-10, Net Weight—General Freight, when the weight of shipments of freight other than household goods or office furniture is not known at the time of shipment and the contractor is responsible for determining the net weight of the shipments.

(b) *Shipments of household goods or office furniture*. Insert the clause at 52.247-11, Net Weight—Household Goods or Office Furniture, when movements of Government employees' household goods or relocations of Government offices are involved.

47.207-5 Contractor responsibilities.

Specify clearly those service requirements that are not normal transportation or transportation-related requirements.

(a) *Type of equipment*. As necessary, specify the type and size of equipment the contractor must furnish. Otherwise, state that the contractor shall furnish clean and sound closed-type equipment of sufficient size to accommodate the shipment.

(b) [Reserved]

(c) *Accessorial services—moving contracts*. Insert a clause substantially the same as the clause at 52.247-13, Accessorial Services—Moving Contracts, in contracts for the transportation of household goods or office furniture.

(d) [Reserved]

(e) *Loading and unloading*. Insert the clause at 52.247-15, Contractor Responsibility for Loading and Unloading, when the contractor is responsible for loading and unloading shipments.

47.207-6 Rates and charges.

(a) (1) Include in the solicitation a statement that the charges in the contract must not exceed the contractor's charges for the same service that is—

(i) Available to the general public; or

(ii) Otherwise tendered to the Government.

(2) Insert the clause at 52.247-17, Charges.

(b) Include in the solicitation a tabulation listing each required service and the basis for the rate (price), e.g., unit of weight or per work-hour, leaving sufficient space for offerors to insert the rates offered for each service.

(c) The following guidelines apply to the composition of a tabulation of transportation or of transportation-related services and their rate (price) bases:

(1) *Combination of pricing bases*. If a contract requires various types of services with different bases for assessing charges, show each service separately and the applicable basis for that service.

(2) *Hourly rate basis*. If charges are based on an hourly rate, state the method for charging for fractions of an hour, e.g., —

(i) A period of 30 minutes or less is charged at one-half the hourly rate; and

(ii) The hourly rate applies to any portion of an hour that exceeds 30 minutes.

(3) *Shipments of varying weights*. If charges are based on weight and shipments will vary in weight, request rates on a graduated weight basis. Include a table of graduated weights for offerors to insert rates.

(4) *Multiple origins and/or destinations*. Specify whether rates are requested for each origin and/or each destination or for specific groups of origins and/or destinations.

(5) *Multiple shipments from one origin*. If multiple shipments will be tendered at one time to the contractor for delivery to two or more consignees at the same destination, request the rate applicable to the aggregate weight. If such shipments are for delivery to various destinations along the route between origin and last destination, request the rate applicable to the aggregate weight and a stopoff charge for each intermediate destination.

(i) Insert the clause at 52.247-18, Multiple Shipments, when multiple shipments are tendered at one time to the contractor for transportation from one origin to two or more consignees at the same destination.

(ii) Insert the clause at 52.247-19, Stopping in Transit for Partial Unloading, when multiple shipments are tendered at one time to the contractor for transportation from one origin to two or more consignees along the route between origin and last destination.

(6) [Reserved]

(7) *Additional services*. State the conditions for payment for any services in addition to those covered in the basic rate, e.g., inside delivery.

47.207-7 Liability and insurance.

(a) Specify in the solicitation and contract—

(1) The contractor's liability for injury to persons or damage to property other than the freight being transported;

(2) The contractor's liability for loss of and/or damage to the freight being transported; and

(3) The amount of insurance the contractor must maintain.

(b) When the contractor's liability for loss of and/or damage to the freight being transported is not specified, the usual measure of liability as prescribed in section 11706 of the Interstate Commerce Act (49 U.S.C. 11706) applies.

(c) Insert the clause at 52.247-21, Contractor Liability for Personal Injury and/or Property Damage.

(d) Insert the clause at 52.247-22, Contractor Liability for Loss of and/or Damage to Freight other than Household Goods, in solicitations and contracts for the transportation of freight other than household goods.

(e) Insert the clause at 52.247-23, Contractor Liability for Loss of and/or Damage to Household Goods, in solicitations and contracts for the transportation of household goods, including the rate per pound appropriate to the situation.

(f) When freight is not shipped under rates subject to released or declared value, see 28.313(a) and the clause at 52.228-9, Cargo Insurance.

(g) When vehicular liability and/or general public liability insurance required by law are not sufficient for a contract, see 28.313(b) and the clause at 52.228-10, Vehicular and General Public Liability Insurance.

47.207-8 Government responsibilities.

State clearly the Government's responsibilities that have a direct bearing on the contractor's performance under the contract, e.g., the Government's responsibility to notify the contractor in advance when hazardous materials are included in a shipment.

47.207-9 Annotation and distribution of shipping and billing documents.

State in detail the responsibilities of the contractor, the contracting agency, and, if appropriate, the consignee for the annotation and distribution of shipping and billing documents. See 41 CFR part 102-118, Transportation Payment and Audit.

47.207-10 [Reserved]

47.207-11 Volume movements within the contiguous United States.

(a) For purposes of contract administration, a volume movement is—

(1) For DoD, the aggregate of freight shipments amounting to or exceeding 25 carloads, 25 truckloads, or 500,000 pounds, to move during the contract period from one origin point for delivery to one destination point or area; and

(2) For civilian agencies, 50 short tons (100,000 pounds) in the aggregate to move during the contract period from one origin point for delivery to one destination point or area.

(b) Transportation personnel assigned to or supporting the CAO, or appropriate agency personnel, must report planned and actual volume movements in accordance with agency regulations. DoD activities report to the Military Surface Deployment and Distribution Command (SDDC) under DoD 4500.9-R, Defense Transportation Regulation.

47.208 Report of shipment (REPSHIP).

47.208-1 Advance notice.

Military and, as required, civilian agency, storage and distribution points, depots, and other receiving activities require advance notice of shipments en route from contractors' plants. Generally, this notification is required only for classified material; sensitive, controlled, and certain other protected material; explosives, and some other hazardous materials; selected shipments requiring movement control; or minimum carload or truckload shipments. It facilitates arrangements for transportation control, labor, space, and use of materials handling equipment at destination. Also, timely receipt of notices by the consignee transportation office precludes the incurring of demurrage and vehicle detention charges.

47.208-2 Contract clause.

Insert the clause at 52.247-68, Report of Shipment (REPSHIP), in solicitations and contracts requiring advance notice of shipment for safety or security reasons, or where the contract requires carload or truckload shipments to DoD installations or to civilian agency facilities.

Subpart 47.3 - Transportation in Supply Contracts

47.300 Scope of subpart.

(a) This subpart describes policies and procedures for the application of transportation and traffic management considerations in the acquisition of supplies. The terms and conditions in this subpart apply to fixed-price contracts.

(b) If a special requirement exists for application of any of these terms and conditions to other types of contracts, e.g., cost-reimbursement contracts, for which transportation arrangements are normally the responsibility of the contractor and transportation costs are allowable, then use the terms and conditions in this subpart as a guide for—

(1) Contract coverage of transportation; and

(2) Instructions to the contractor to minimize the ultimate transportation costs to the Government.

47.301 General.

47.301-1 Responsibilities of contracting officers.

(a) Obtain from traffic management offices transportation factors required for—

(1) Solicitations and awards; and

(2) Contract administration, modification, and termination, including the movement of property by the Government to and from contractors' plants.

(b) Request transportation office participation especially before making an initial acquisition of supplies that are unusually large, heavy, high, wide, or long; have sensitive or dangerous characteristics; or lend themselves to containerized movements from the source. In determining total transportation charges, also consider additional costs arising from factors such as the use of special equipment, excess blocking and bracing material, or circuitous routing.

47.301-2 [Reserved]

47.301-3 Using the Defense Transportation System (DTS).

(a) All military and civilian agencies shipping, or arranging for the acquisition and shipment by Government contractors, using military-controlled transport or through military transshipment facilities must follow Department of Defense (DoD) Regulation DoD 4500.9-R, Defense Transportation Regulation, Part II. This regulation establishes uniform procedures and documents for the generation, documentation, communication, and use of transportation information, thus providing the capability for control of shipments moving in the DTS. DoD 4500.9-R Part II has been implemented on a world-wide basis.

(b) Contracting activities are responsible for—

(1) Ensuring that the requirements of DoD 4500.9-R Part II regulation are included in appropriate contracts for all applicable shipments; and

(2) Enforcing these requirements regarding shipments under their control. This includes requirements relating to documentation, marking, advance notification of shipment dates, and terminal clearances.

(c) Designate in contractual documents a contract administration office (see 42.202(a)) as the point of contact to whom the contractor will provide information necessary to—

(1) Effect DoD 4500.9-R Part II documentation and movement control, including air or water terminal shipment clearances; and

(2) Obtain data necessary for shipment marking and freight routing. Contractual documents must specify that the contractor shall not ship directly to a military air or water port terminal without authorization from the designated contract administration office (see 47.305-6(f)).

47.302 Place of delivery-f.o.b. point.

(a) The policies and procedures in 47.304-1 and -3 govern the transportation of supplies from sources in the Contiguous United States (CONUS), except when identifiable costs, nature of the supplies (security, safety, or value), delivery requirements (premium modes of transport, escorts, transit arrangements, and tentative conditions), or other advantages, limitations, or requirements dictate otherwise. The policies and procedures in 47.304-4 govern the transportation of supplies from sources outside CONUS.

(b) Generally, solicit offers, and award contracts, with delivery terms on the basis prescribed in 47.304.

(c) (1) The delivery term must not dictate the place of performance of Government acquisition quality assurance actions or the place of acceptance, except that if acceptance is at destination, use f.o.b. destination (see 47.304-1(f)).

(2) The fact that transportation is f.o.b. destination does not alone necessitate changing the place of acceptance from origin to destination. Further, the fact that acceptance is at origin does not necessitate an f.o.b. origin delivery term. Providing for inspection and acceptance at origin (if appropriate under 46.402), in conjunction with an f.o.b. destination term, might benefit both the Government and the contractor. Government acceptance of title at origin permits payment to the contractor, provided the invoice is supported either—

(i) By a copy of the signed commercial bill of lading (indicating the carrier's receipt of the supplies covered by the invoice for transportation to the destination specified in the contract); or

(ii) By other appropriate evidence of shipment to the destination for the contractor's account.

47.303 Standard delivery terms and contract clauses.

This section lists standard delivery terms. See 47.300(b) regarding applicability to cost reimbursement contracts.

47.303-1 F.o.b. origin.

(a) *Explanation of delivery term*. *F.o.b. origin* means free of expense to the Government delivered—

(1) On board the indicated type of conveyance of the carrier (or of the Government, if specified) at a designated point in the city, county, and State from which the shipment will be made and from which line-haul transportation service (as distinguished from switching, local drayage, or other terminal service) will begin;

(2) To, and placed on, the carrier's wharf (at shipside, within reach of the ship's loading tackle, when the shipping point is within a port area having water transportation service) or the carrier's freight station;

(3) To a U.S. Postal Service facility; or

(4) If stated in the solicitation, to any Government-designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract (the Federal Motor Carrier Safety Administration prescribes commercial zones at Subpart B of 49 CFR part 372).

(b) [Reserved]

(c) *Contract clause*. Insert in solicitations and contracts the clause at 52.247-29, F.o.b. Origin, when the delivery term is f.o.b. origin.

47.303-2 F.o.b. origin, contractor's facility.

(a) *Explanation of delivery term*. *F.o.b. origin, contractor's facility* means free of expense to the Government delivered on board the indicated type of conveyance of the carrier (or of the Government if specified) at the designated facility, on the named street or highway, in the city, county, and State from which the shipment will be made.

(b) [Reserved]

(c) *Contract clause*. Insert in solicitations and contracts the clause at 52.247-30, F.o.b. Origin, Contractor's Facility, when the delivery term is f.o.b. origin, contractor's facility.

47.303-3 F.o.b. origin, freight allowed.

(a) *Explanation of delivery term*. *F.o.b. origin, freight allowed* means—

(1) Free of expense to the Government delivered—

(i) On board the indicated type or conveyance of the carrier (or of the Government, if specified) at a designated point in the city, county, and State from which the shipments will be made and from which line-haul transportation service (as distinguished from switching, local drayage, or other terminal service) will begin;

(ii) To, and placed on, the carrier's wharf (at shipside, within reach of the ship's loading tackle, when the shipping point is within a port area having water transportation service) or the carrier's freight station;

(iii) To a U.S. Postal Service facility; or

(iv) If stated in the solicitation, to any Government-designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract (the Federal Motor Carrier Safety Administration prescribes commercial zones at Subpart B of 49 CFR part 372); and

(2) An allowance for freight, based on applicable published tariff rates (or Government rate tenders) between the points specified in the contract, is deducted from the contract price.

(b) [Reserved]

(c) *Contract clause*. Insert in solicitations and contracts the clause at 52.247-31, F.o.b. Origin, Freight Allowed, when the delivery term is f.o.b. origin, freight allowed.

47.303-4 F.o.b. origin, freight prepaid.

(a) *Explanation of delivery term*. *F.o.b. origin, freight prepaid* means—

(1) Free of expense to the Government delivered—

(i) On board the indicated type of conveyance of the carrier (or of the Government, if specified) at a designated point in the city, county, and State from which the shipments will be made and from which line-haul transportation service (as distinguished from switching, local drayage, or other terminal service) will begin;

(ii) To, and placed on, the carrier's wharf (at shipside, within reach of the ship's loading tackle, when the shipping point is within a port area having water transportation service) or the carrier's freight station;

(iii) To a U.S. Postal Service facility; or

(iv) If stated in the solicitation, to any Government-designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract (the Federal Motor Carrier Safety Administration prescribes commercial zones at Subpart B of 49 CFR part 372); and

(2) The cost of transportation, ultimately the Government's obligation, is prepaid by the contractor to the point specified in the contract.

(b) [Reserved]

(c) *Contract clause*. Insert in solicitations and contracts the clause at 52.247-32, F.o.b. Origin, Freight Prepaid, when the delivery term is f.o.b. origin, freight prepaid.

47.303-5 F.o.b. origin, with differentials.

(a) *Explanation of delivery term*. *F.o.b. origin, with differentials* means—

(1) Free of expense to the Government delivered—

(i) On board the indicated type of conveyance of the carrier (or of the Government, if specified) at a designated point in the city, county, and State from which the shipments will be made and from which line-haul transportation service (as distinguished from switching, local drayage, or other terminal service) will begin;

(ii) To, and placed on, the carrier's wharf (at shipside, within reach of the ship's loading tackle, when the shipping point is within a port area having water transportation service) or the carrier's freight station;

(iii) To a U.S. Postal Service facility; or

(iv) If stated in the solicitation, to any Government-designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract (the Federal Motor Carrier Safety Administration prescribes commercial zones at Subpart B of 49 CFR part 372); and

(2) Differentials for mode of transportation, type of vehicle, or place of delivery as indicated in contractor's offer may be added to the contract price.

(b) [Reserved]

(c) *Contract clause*. Insert in solicitations and contracts the clause at 52.247-33, F.o.b. Origin, with Differentials, when offerors are likely to include in f.o.b. origin offers a contingency to compensate for a possibly unfavorable routing condition by the Government at the time of shipment.

47.303-6 F.o.b. destination.

(a) *Explanation of delivery term*. *F.o.b. destination* means—

(1) Free of expense to the Government delivered, on board the carrier's conveyance, at a specified delivery point where the consignee's facility (plant, warehouse, store, lot, or other location to which shipment can be made) is located; and

(2) Supplies shall be delivered to the destination consignee's wharf (if destination is a port city and supplies are for export), warehouse unloading platform, or receiving dock, at the expense of the contractor. The Government shall not be liable for any delivery, storage, demurrage, accessorial, or other charges involved before the actual delivery (or constructive placement as defined in carrier tariffs) of the supplies to the destination, unless such charges are caused by an act or order of the Government acting in its contractual capacity. If rail carrier is used, supplies shall be delivered to the specified unloading platform of the consignee. If motor carrier (including "piggyback") is used, supplies shall be delivered to truck tailgate at the unloading platform of the consignee, except when the supplies delivered meet the requirements of Item 568 of the National Motor Freight Classification for "heavy or bulky freight." When supplies meeting the requirements of the referenced Item 568 are delivered, unloading (including movement to the tailgate) shall be performed by the consignee, with assistance from the truck driver, if requested. If the contractor uses rail carrier or freight forwarder for less than carload shipments, the contractor shall ensure that the carrier will furnish tailgate delivery when required, if transfer to truck is required to complete delivery to consignee.

(b) [Reserved]

(c) *Contract clause*. Insert in solicitations and contracts the clause at 52.247-34, F.o.b. Destination, when the delivery term is f.o.b. destination.

47.303-7 F.o.b. destination, within consignee's premises.

(a) *Explanation of delivery term*. *F.o.b. destination, within consignee's premises* means free of expense to the Government delivered and laid down within the doors of the consignee's premises, including delivery to specific rooms within a building if so specified.

(b) [Reserved]

(c) *Contract clause*. Insert in solicitations and contracts the clause at 52.247-35, F.o.b. Destination, within Consignee's Premises, when the delivery term is f.o.b. destination, within consignee's premises.

47.303-8 F.a.s. vessel, port of shipment.

(a) *Explanation of delivery term*. *F.a.s. vessel, port of shipment* means free of expense to the Government delivered alongside the ocean vessel and within reach of its loading tackle at the specified port of shipment.

(b) [Reserved]

(c) *Contract clause*. Insert in solicitations and contracts the clause at 52.247-36, F.a.s. Vessel, Port of Shipment, when the delivery term is f.a.s. vessel, port of shipment.

47.303-9 F.o.b. vessel, port of shipment.

(a) *Explanation of delivery term*. F.o.b. vessel, port shipment means free of expense to the Government loaded, stowed, and trimmed on board the ocean vessel at the specified port of shipment.

(b) [Reserved]

(c) *Contract clause*. Insert in solicitations and contracts the clause at 52.247-37, F.o.b. Vessel, Port of Shipment, when the delivery term is f.o.b. vessel, port of shipment.

47.303-10 F.o.b. inland carrier, point of exportation.

(a) *Explanation of delivery term*. F.o.b. inland carrier, point of exportation means free of expense to the Government, on board the conveyance of the inland carrier, delivered to the specified point of exportation.

(b) [Reserved]

(c) *Contract clause*. Insert in solicitations and contracts the clause at 52.247-38, F.o.b. Inland Carrier, Point of Exportation, when the delivery term is f.o.b. inland carrier, point of exportation.

47.303-11 F.o.b. inland point, country of importation.

(a) *Explanation of delivery term*. F.o.b. inland point, country of importation means free of expense to the Government, on board the indicated type of conveyance of the carrier, delivered to the specified inland point where the consignee's facility is located.

(b) [Reserved]

(c) *Contract clause*. Insert in solicitations and contracts the clause at 52.247-39, F.o.b. Inland Point, Country of Importation, when the delivery term is f.o.b. inland point, country of importation.

47.303-12 [Reserved]

47.303-13 [Reserved]

47.303-14 [Reserved]

47.303-15 [Reserved]

47.303-16 [Reserved]

47.303-17 [Reserved]

47.304 Determination of delivery terms.

47.304-1 General.

(a) In general, determine f.o.b. terms based on overall costs, considering the criteria in this section.

(b) Specify in solicitations whether offerors must submit offers f.o.b. origin, f.o.b. destination, or both, or whether offerors may choose the basis on which they make an offer. Consider the most advantageous delivery point, such as—

(1) F.o.b. origin, carrier's equipment, wharf, or specified freight station near contractor's plant; or

(2) F.o.b. destination.

(c) In determining whether f.o.b. origin or f.o.b. destination is more advantageous to the Government, consider the availability of lower freight rates, i.e., Government rate tenders, to the Government for f.o.b. origin acquisitions. F.o.b. origin contracts also present other desirable traffic management features, in that they—

(1) Permit use of transit privileges (see 47.305-13);

(2) Permit diversions to new destinations without price adjustment for transportation (see 47.305-11);

(3) Facilitate use of special routings or types of equipment (e.g., circuitous routing or oversize shipments) (see 47.305-14);

(4) Facilitate, if necessary, use of premium cost transportation and permit Government-controlled transportation;

(5) Permit negotiations for reduced freight rates (see 47.104-1(b)); and

(6) Permit use of small shipment consolidation stations.

(d) When destinations are tentative or unknown, specify in the solicitation f.o.b. origin only.

(e) When the size or quantity of supplies with confidential or higher security classification requires commercial transportation services, generally specify f.o.b. origin acquisitions.

(f) When acceptance must be at destination, specify in the solicitation f.o.b. destination only.

(g) Here follow examples of situations in which solicitations will normally be on an f.o.b. destination only basis as advantageous to the Government (see 47.305-4):

(1) Bulk supplies, such as coal, that require other than Government-owned or operated handling, storage, and loading facilities, are destined for shipment outside CONUS.

(2) Steel or other bulk construction products are destined for shipment outside CONUS.

(3) Supplies consist of forest products such as lumber.

(4) Perishable or medical supplies are subject to in-transit deterioration.

(5) Evaluation of f.o.b. origin offers will likely result in increased administrative lead time or administrative cost that would outweigh the potential advantages of an f.o.b. origin determination.

47.304-2 [Reserved]

47.304-3 Shipments from CONUS for overseas delivery.

(a) When Government acquisitions involve shipments from CONUS to overseas destinations, delivery f.o.b. origin may afford not only the economies of lower freight rates available to the Government within CONUS, but also flexibility for selection of—

(1) The port of export; and

(2) The ocean transportation providing the lowest overall cost to the Government.

(b) (1) Unless valid reasons exist to the contrary (see 47.304-5), make acquisition of supplies originating within CONUS for ultimate delivery to destinations outside CONUS on an f.o.b. origin basis. This policy applies to supplies and equipment shipped either directly to a port area for export or to a storage or holding area for subsequent forwarding to a port area for export.

(2) Solicitation of offers on other than an f.o.b. origin basis requires written justification.

(c) Export cargo involves considerations of operational and cost factors from the point of origin within CONUS to the overseas port destination. Determine the lowest cost of shipping only upon considering and comparing the various prospective landed costs, including inland, terminal, and ocean costs. Also, agencies may have export licensing privileges for shipments to foreign destinations. Obtain advice from the transportation officer to ensure full use of these privileges.

47.304-4 Shipments originating outside CONUS.

(a) Unless valid reasons exist to the contrary (see 47.304-5), make acquisition of supplies originating outside CONUS for ultimate delivery to destinations within CONUS or elsewhere, regardless of the quantity of the shipments, on either an f.o.b. origin or an f.o.b. destination basis, whichever is more advantageous to the Government.

(b) When developing acquisition documents, request the advice of the transportation officer to determine the best place of delivery, considering the possible use of Government transportation facilities, reduced rates available, special licensing or custom requirements, and availability of U.S.-flag shipping services between the points involved (see subpart 47.5).

47.304-5 Exceptions.

(a) Unusual conditions or circumstances might dictate the use of terms other than f.o.b. origin or f.o.b. destination. Such conditions or circumstances include, but are not limited to—

(1) Transportation disabilities at origin or destination;

(2) Mode of transportation required;

(3) Availability of Government or commercial loading, unloading, or transshipment facilities;

(4) Characteristics of the supplies;

(5) Trade customs related to certain supplies;

(6) Origins or destinations in Alaska and Hawaii; and

(7) Program requirements.

(b) Obtain assistance from transportation officers before issuing solicitations when unusual conditions or circumstances exist that relate to f.o.b. terms.

47.305 Solicitation provisions, contract clauses, and transportation factors.

47.305-1 Solicitation requirements.

When the acquisition of supplies is on f.o.b. origin or f.o.b. destination delivery terms, include in solicitations a requirement that the offeror furnish the Government as much of the following data as is applicable to the particular acquisition:

(a) Modes of transportation and, if rail transportation is used, names of rail carriers serving the offeror's facility.

(b) The number of railroad cars, motor trucks, or other conveyances that can be loaded per day.

(c) Type of packaging**,** e.g., box, carton, crate, drum, bundle, skids, and when applicable, package number from the governing freight classification.

(d) Number of units packed in one container.

(e) Guaranteed maximum shipping weight; cubic measurement; and length, width, and height of each container.

(f) Minimum size of each shipment.

(g) Number of containers or units that can be loaded in a car, truck, or other conveyance of the size normally used (specify type and size) for the commodity.

(h) Description of material in terms of the governing freight classification or tariff (or Government rate tender) under which lowest freight rates apply.

(i) Benefits available to the Government under transit arrangements.

(j) Other requirements as stated under specific section headings.

47.305-2 [Reserved]

47.305-3 F.o.b. origin solicitations.

When preparing f.o.b. origin solicitations, see 47.303 for clause prescriptions. Include in supply solicitations that will or may result in f.o.b. origin contracts any requirements, information, provisions, and clauses concerning the following items:

(a) Delivery in carload or truckload lots f.o.b. carrier's equipment, wharf, or freight station.

(b) The requirement that the offeror furnish the following information with the offer:

(1) Location of the offeror's actual shipping point(s) (street address, city, State, and ZIP code) from which supplies will be delivered to the Government.

(2) Whether the offeror's shipping point has a private railroad siding, and the name of the rail carrier serving it.

(3) When the offeror's shipping point does not have a private siding, the names and addresses of the nearest public rail siding and of the carrier serving it. This will enable transportation officers, when issuing routing instructions, to select the mode of transportation providing the required service at the lowest overall cost.

(4) The quantity of supplies to be shipped from each shipping point.

(c) When delivery is f.o.b. origin, contractor's facility, and the designated facility is not covered by the line-haul transportation rate, the charges required to deliver the shipment to the point where the line-haul rate is applicable.

(d) When delivery is f.o.b. origin, freight allowed, the basis on which transportation charges will be allowed, including the origin and destination locations.

(e) When the Government will accept only f.o.b. origin offers, a statement that the Government will reject as nonresponsive offers submitted on any other basis.

(f) The methods of transportation used in evaluating offers, as applicable,to establish the cost of transportation between offeror's shipping point and the destination within the contiguous United States. Add this transportation cost to the offer price to determine the Government's overall cost. The Government normally uses land transportation by regulated common carriers between points in the 48 contiguous United States and the District of Columbia.

(g) (g) (1) When offerors are likely to include in f.o.b. origin offers a contingency to compensate for a possibly unfavorable routing condition by the Government at the time of shipment, the contracting officer may permit offerors to state in offers a reimbursable differential that represents the cost of bringing the supplies to any f.o.b. origin place of delivery the Government specifies at the time of shipment. See the clause at 52.247-33, F.o.b. Origin, with Differentials.

(2) Here follow situations that might impose on the contractor a substantial cost above at plant or commercial shipping point prices because of Government-required routings:

(i) The loading nature of the supplies, e.g., wheeled vehicles.

(ii) Government-specified methods of shipment, e.g., towaway, driveaway, tri-level vehicle, or rail car, that might increase the contractor's cost for bringing the supplies to, or loading and bracing the supplies at, the specified place of delivery.

(iii) The contractor's f.o.b. origin shipping point is a port city served by United States inland, coastwise, or intercoastal water transportation, and the contractor would incur additional costs to make delivery f.o.b. a wharf in that city to accommodate Government-specified water routing.

(iv) The contractor's plant lacks a private rail siding, and shipping by a Government-specified rail routing would require the contractor to deliver the supplies to a public siding or freight terminal and to load, brace, and install dunnage in rail cars.

47.305-4 F.o.b. destination solicitations.

(a) When preparing f.o.b. destination solicitations, see 47.303 for clause prescriptions.

(b) When the Government will accept only f.o.b. destination offers, state in the solicitation that the Government will reject as nonresponsive offers submitted on a basis other than f.o.b. destination.

(c) When the solicitation or contract for supplies specifies f.o.b. destination, but inspection and acceptance will be at origin, insert in solicitations and contracts the clause at 52.247-48, F.o.b. Destination—Evidence of Shipment.

47.305-5 [Reserved]

47.305-6 Shipments to ports and air terminals.

(a) When acquiring supplies based on the delivery terms in 47.303-8 through 47.303-11, include in the solicitation a requirement that the offeror furnish the Government the following information:

(1) When the delivery term is f.a.s. vessel, port of shipment; f.o.b. vessel, port of shipment; or f.o.b. inland carrier, point of exportation, the offeror must furnish—

(i) A delivery schedule in number of units and/or long or short tons;

(ii) Maximum quantities available per shipment;

(iii) The quantity that can be made available for loading to vessel per running day of 24 hours (if acquisition involves a commodity to be shipped in bulk);

(iv) The minimum lead time required to make supplies available for loading to vessel; and

(v) The port and pier or other designation and, when applicable, the maximum draft of vessel (in feet) that can be accommodated.

(2) When the delivery term is f.o.b. inland point, country of importation, the offeror must furnish—

(i) A delivery schedule in number of units and/or long or short tons;

(ii) Maximum quantities available per shipment; and

(iii) Other data appropriate to shipment by air carrier.

(b) When acquiring supplies that originate within CONUS for known destinations outside CONUS, for transportation evaluation purposes, note in the solicitation the CONUS port of loading or point of exit (aerial or water) and the water port of debarkation that serves the overseas destination.

(c) The contracting officer may also, for evaluation purposes, list in the solicitation other CONUS ports compatible with the nature and quantity of the supplies, their destination, type of carrier required, and specified overseas delivery dates. This allows offerors that are geographically remote from the port that normally serves the overseas destination to offer competitive transportation costs.

(d) Unless logistics requirements limit the ports of loading to the ports listed in the solicitation, state in the solicitation that —

(1) Offerors may nominate additional ports (including ports in Alaska and Hawaii) more favorably located to their shipping points; and

(2) When evaluating offers, the Government will consider such additional ports that possess the capabilities of the listed ports, considering the type of supplies.

(e) [Reserved]

(f) (1) When the supplies will move in the DTS (see 47.301-3), specify in the contract that—

(i) A Transportation Control Movement Document (TCMD) must be sent to the appropriate DoD air or water clearance authority in accordance with DoD 4500.9-R, Defense Transportation Regulation, Part II, procedures for all shipments consigned to DoD air or water terminal transshipment points; and

(ii) An Export Release must be obtained for supplies to be transshipped via a water port of loading to overseas destinations, except for shipments for which an Export Release is not required, generally shipments of less than 10,000 pounds, (see DoD 4500.9-R Part II).

(2) When shipments will be consigned to DoD air or water terminal transshipment points, insert in solicitations and contracts the clause at 52.247-52, Clearance and Documentation Requirements—Shipments to DoD Air or Water Terminal Transshipment Points.

(g) When a contract will not generate any shipments that require an Export Release, list in the solicitation only the DoD CONUS ports that serve the overseas destination, except that the contracting officer may limit the water ports listed when necessary to meet delivery or other requirements.

(h) Specify in the award the United States ports of loading that afford the lowest overall cost to the overseas destination.

(i) When supplies will originate outside CONUS to destinations either within or outside CONUS, use the appropriate f.o.b. term and include evaluation-of-offers information.

(j) In furtherance of the Cargo Preference Act of 1954 (46 U.S.C. 55305), to encourage and foster the American Merchant Marine, the port of delivery of supplies originating outside the United States and shipped by ocean vessel must derive from availability of United States-flag vessels between the ports involved, unless the acquiring activity has given other specific instructions. See subpart 47.5.

47.305-7 Quantity analysis, direct delivery, and reduction of crosshauling and backhauling.

(a) *Quantity analysis*.

(1) The requiring activity must consider the acquisition of carload or truckload quantities.

(2) When transporting additional quantities of the supplies will result in lower unit transportation costs (or a de minimus increase in total transportation costs), without impairing the program schedule, determine from the requiring activity

whether a known requirement exists for additional quantities. This situation might arise, for example, when the activity could store the additional quantity for future use, or when multiple activities on the same transportation route or in the same geographical area could use or store the additional quantity.

(b) *Direct delivery*. When a requiring activity normally acquires supplies in large quantities for shipment to a central point and for subsequent distribution, to reduce the cost of transportation and handling, consider—

(1) Whether the quantities involved warrant scheduling direct delivery; and

(2) The feasibility of providing for direct delivery from the contractor to the using activity.

(c) *Crosshauling and backhauling*. Select distribution and transshipment facilities intermediate to origins and ultimate destinations to minimize crosshauling and backhauling, i.e., the transportation of personal property of the same kind in opposite directions or the return of the property to or through areas previously traversed in shipment.

47.305-8 Consolidation of small shipments and the use of stopoff privileges.

(a) *Consolidation of small shipments*. Consolidation of small shipments into larger lots frequently results in lower transportation costs. Therefore, the contracting officer, after consultation with the transportation office and the requiring activity, may revise the delivery schedules to provide for deliveries in larger quantities.

(b) *Stopping for partial unloading*. When feasible, consolidate schedules for delivery of supplies to multiple destinations. Direct the use of stopoff privileges permitted under carrier tariffs for partial unloading at one or more points directly en route between the point of origin and the last destination.

47.305-9 Commodity description and freight classification.

(a) Generally, the freight rate for supplies is based on the rating applicable to the freight classification description published in the National Motor Freight Classification (NMFC) (for carriers) and the Uniform Freight Classification (UFC) (for rail) filed with Federal and State regulatory bodies. Therefore, state in the solicitation a complete description of the commodity and the packing requirements to determine proper transportation charges for the evaluation of offers. If proper classification of supplies using freight classification tariffs is impracticable, or if doubt exists, then obtain the applicable freight classification from the transportation office. Additionally, offerors may provide an official freight classification description.

(b) (1) When the supplies are new to the supply system, nonstandard, or modifications of previously shipped items, and different freight classifications might apply, insert in solicitations the provision at 52.247-53, Freight Classification Description.

(2) Alert the transportation officer to the possibility of negotiations for appropriate freight classification ratings and reasonable transportation rates.

(c) Include in the solicitation adequate descriptions of explosives and other dangerous supplies according to—

(1) The regular freight classification; and

(2) The hazardous material description and hazard class as shown in 49 CFR 172.101.

(d) Furnish the freight classification information developed in 47.305-9(a), (b), and (c) above to the contract administration office.

47.305-10 Packing, marking, and consignment instructions.

(a) Include in acquisition documents packing and marking requirements necessary to prevent deterioration of supplies and damages due to the hazards of shipping, handling, and storage, and, when appropriate, marking in accordance with the requirements of 49 CFR 172.300.

(b) Include in contracts complete consignment and marking instructions at the time the contract is awarded to ensure that supplies are delivered to proper destinations without delay. If complete consignment information is initially unknown, then issue amended delivery instructions under the Changes clause of the contract (see part 43) as soon as the information becomes known.

(c) As necessary to meet required delivery schedules, issue instructions by telephone or electronic means. Confirm telephonic instructions in writing, and confirm electronic instructions in the absence of confirmation of receipt.

(d) Marking and consignment instructions for military shipments must conform to the current issue of MIL-STD-129 (Military Standard Marking for Shipment and Storage) and other applicable DoD regulations. Mark shipments for civilian agencies as specified in Federal Standard 123, Marking for Domestic Shipment (Civil Agencies).

47.305-11 Options in shipment and delivery.

Although the clauses prescribed in subpart 43.2 allow certain changes regarding shipment and delivery, generally provide specifically for certain options in the solicitation. The Government may reserve the right to—

(a) Direct deliveries of all or part of the contract quantity to destinations or to consignees other than those specified in the solicitation and in the contract;

(b) Direct shipments in quantities requiring transportation rates different from those on which the contract price is based; and

(c) Direct shipments by a mode of transportation other than that stipulated in the solicitation and in the contract.

47.305-12 Delivery of Government-furnished property.

(a) When a solicitation contemplates Government-furnished property, and transportation costs to the Government factor in the evaluation of offers, include in the solicitation a clear description of the property, its location, and other information necessary for preparation of cost estimates.

(b) Describe any explosive and dangerous material according to—

(1) The regular freight classification; and

(2) The hazardous material description and hazard class as shown in 49 CFR 172.101.

47.305-13 Transit arrangements.

(a) (1) Transit arrangements permit the stopping of a carload or truckload shipment at a specific intermediate point en route to the final destination for storage, processing, or other purposes, as specified in carrier tariffs or rate tenders. A single through rate is charged from origin to final destination plus a transit or other related charge, rather than a more expensive combination of rates to and from the transit point.

(2) Consider possible benefits available to the Government using existing transit arrangements or through efforts to obtain additional transit privileges from the carriers. Restrict solicitations incorporating transit arrangements to f.o.b. origin offers, because f.o.b. destination offers can only include fixed overall delivered prices at first destination.

(3) (i) Traffic management personnel must furnish information and analyses of situations in which transit arrangements might benefit the Government. The quantity awarded must entail sufficient tonnage to ensure the contractor can make carload/truckload shipments, and reasonable certainty should exist that carload/truckload quantities will ship upon request from the transit point.

(ii) Insert in solicitations the provision at 52.247-56, Transit Arrangements, when benefits might accrue to the Government because transit arrangements might apply.

(b) [Reserved]

47.305-14 Mode of transportation.

Generally, do not specify in solicitations a particular mode of transportation or a particular carrier. If, however, a program requires particular types of carriers, then state in the solicitation that the Government will consider only offers involving the specified types of carriers. Obtain all specifications for mode, route, delivery, etc., from the transportation office.

47.305-15 Loading responsibilities of contractors.

(a) (1) Contractors are responsible for loading, blocking, and bracing carload shipments as specified in standards published by the Association of American Railroads.

(2) Insert in solicitations and contracts the clause at 52.247-58, Loading, Blocking, and Bracing of Freight Car Shipments, when supplies may be shipped in carload lots by rail.

(b) If the nature of the supplies**,** or safety, environmental, or transportability factors**,** require special methods for securing the supplies on the carrier's equipment, or if only a special mode of transportation or vehicle is appropriate, then include in solicitations detailed specifications coordinated with the transportation office.

47.305-16 [Reserved]

47.305-17 [Reserved]

47.306 [Reserved]

Subpart 47.4 - Air Transportation by U.S.-Flag Carriers

47.400 Scope of subpart.

This subpart describes policies and procedures for implementing 49 U.S.C. 40118, Government-financed air transportation, commonly known as the Fly America Act.

47.401 Definitions.

As used in this subpart-

Air freight forwarder means an indirect air carrier that is responsible for the transportation of property from the point of receipt to the point of destination, and utilizes for the whole or any part of such transportation the services of a direct air carrier or its agent, or of another air freight forwarder.

Gateway airport abroad means the airport from which the traveler last embarks en route to the United States or at which the traveler first debarks incident to travel from the United States.

Gateway airport in the United States means the last U.S. airport from which the traveler's flight departs or the first U.S. airport at which the traveler's flight arrives.

International air transportation means transportation by air between a place in the United States and a place outside the United States or between two places both of which are outside the United States.

United States means the 50 States, the District of Columbia, and outlying areas of the United States.

U.S.-flag air carrier means an entity granted authority to provide air transportation in the form of a certificate of public convenience and necessity under 49 U.S.C. 41102.

47.402 Policy.

Under the Fly America Act, Federal employees and their dependents, consultants, contractors, grantees, and others must use, if available, U.S.-flag air carriers for U.S. Government-financed international air travel and transportation of their personal effects or property.

47.403 Guidelines for implementation of the Fly America Act.

This section 47.403 reflects the Guidelines for Implementation of the Fly America Act (case number B-138942), issued by the Comptroller General of the United States on March 31, 1981.

47.403-1 Availability and unavailability of U.S.-flag air carrier service.

(a) If a U.S.-flag air carrier cannot provide the international air transportation needed or if use of U.S.-flag air carrier service would not accomplish an agency's mission, the agency may use a foreign-flag air carrier service as necessary.

(b) Consider a U.S.-flag air carrier service as available even though—

(1) A foreign-flag air carrier can provide comparable or a different kind of service at less cost;

(2) The agency or traveler prefers, or finds convenient, foreign-flag air carrier service; or

(3) Excess foreign currency is available to pay for foreign-flag air carrier service (unless U.S.-flag air carriers decline to accept excess or near excess foreign currencies for transportation payable only out of such monies).

(c) Except as provided in paragraph (a), use U.S.-flag air carrier service for U.S. Government-financed commercial foreign air travel if U.S.-flag air carrier service is available. In determining availability of a U.S.-flag air carrier, apply the following scheduling principles unless their application would result in the last or first leg of travel to or from the United States being performed by a foreign-flag air carrier:

(1) Use U.S.-flag air carrier service available at point of origin to destination or, in the absence of direct or through service, to the farthest interchange point on a usually traveled route.

(2) When a U.S.-flag air carrier does not serve an origin or interchange point, use foreign-flag air carrier service only to the nearest interchange point on a usually traveled route to connect with U.S.-flag air carrier service.

(3) When a U.S.-flag air carrier involuntarily reroutes the traveler via a foreign-flag air carrier, the traveler may use the foreign-flag air carrier notwithstanding the availability of alternative U.S.-flag air carrier service.

(d) For travel between a gateway airport in the United States and a gateway airport abroad, consider passenger service by U.S.-flag air carrier unavailable if—

(1) The gateway airport abroad is the traveler's origin or destination airport, and use of U.S.-flag air carrier service would extend the time in a travel status, including delay at origin and accelerated arrival at destination, by at least 24 hours more than travel by a foreign-flag air carrier; or

(2) (i) The gateway airport abroad is an interchange point and use of U.S.-flag air carrier service would require the traveler to wait 6 hours or more to make connections at that point; or

(ii) Delayed departure from, or accelerated arrival at, the gateway airport in the United States would extend time in a travel status by at least 6 hours more than travel by a foreign-flag air carrier.

(e) The rules in paragraphs (a), (b), and (c) apply to travel between two points outside the United States, but do not consider passenger service by a U.S.-flag air carrier reasonably available if—

(1) Travel by a foreign-flag air carrier would eliminate two or more aircraft changes en route;

(2) One of the two points abroad is the gateway airport en route to or from the United States and the use of a U.S.-flag air carrier would extend the time in a travel status by at least 6 hours more than travel by a foreign-flag air carrier, including accelerated arrival at the overseas destination or delayed departure from the overseas origin, as well as delay at the gateway airport or other interchange point abroad; or

(3) The travel is not part of the trip to or from the United States and the use of a U.S.-flag air carrier would extend the time in a travel status by at least 6 hours more than travel by a foreign-flag air carrier including delay at origin, delay en route, and accelerated arrival at destination.

(f) For all short-distance travel under either paragraph (d) or paragraph (e), do not consider U.S. air carrier service available when the elapsed travel time on a scheduled flight from origin to destination airport by foreign-flag air carrier is 3 hours or less and service by a U.S.-flag air carrier would involve at least 6 hours of travel time.

47.403-2 Air transport agreements between the United States and foreign governments.

Nothing in the guidelines of the Comptroller General (see 47.403) precludes, and no penalty results from, use of a foreign-flag air carrier that provides transportation under an air transport agreement between the United States and a foreign government, the terms of which are consistent with the international aviation policy goals at 49 U.S.C. 40101 and provide reciprocal rights and benefits.

47.403-3 Disallowance of expenditures.

(a) (1) Agencies must disallow expenditures for U.S. Government-financed commercial international air transportation on foreign-flag air carriers unless the contractor attaches to the voucher a memorandum adequately explaining why—

(i) Service by U.S.-flag air carriers was not available; or

(ii) Use of foreign-flag air carriers was necessary.

(2) The contractor's use of a statement of unavailability similar to the one contained in the clause at 52.247-63, Preference for U.S.-Flag Air Carriers, satisfies this memorandum requirement.

(b) When the travel is by indirect route, or the traveler otherwise fails to use available U.S.-flag air carrier service, the amount disallowed against the traveler is based on the loss of revenues suffered by U.S.-flag air carriers. Use the following formula, which is prescribed and more fully explained in 56 Comp. Gen. 209 (1977), to calculate the amount disallowed:

$$\frac{\text{Sum of U.S.-flag carrier segment mileage, authorized}}{\text{Sum of all segment mileage, authorized}} \times \text{Fare payable by Government}$$

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$$\frac{\text{Sum of U.S.-flag carrier segment mileage, traveled}}{\text{Sum of all segment mileage, traveled}} \times \text{Through fare payed}$$

47.404 Air freight forwarders.

(a) Agencies may use air freight forwarders that are engaged in international air transportation (49 U.S.C. 40102(a)(23)) for U.S. Government-financed movements of property. The rule on disallowance of expenditures in 47.403-3(a) applies also to the air carriers used by these international air freight forwarders.

(b) Agency personnel must inform international air freight forwarders that to facilitate prompt payments of their bills, the forwarder must submit with their bills—

(1) A copy of the airway bill or manifest showing the air carriers used; and

(2) Justification for the use of foreign-flag air carriers similar to the one shown in the clause at 52.247-63, Preference for U.S.-Flag Air Carriers.

47.405 Contract clauses.

(a) Insert the clause at 52.247-63, Preference for U.S.-Flag Air Carriers, in solicitations and contracts when the possibility exists that performance of the contract will entail U.S. Government-financed international air transportation of personnel (and their personal effects) or property. This clause does not apply to contracts awarded using the simplified acquisition procedures in part 13 or contracts for commercial products (see part 12).

(b) Insert the clause at 52.247-69, Reporting Requirement for U.S.-Flag Air Carriers Regarding Training to Prevent Human Trafficking, in solicitations and contracts with a U.S.-flag air carrier for the transportation by air of passengers. This clause does not apply to solicitations issued or contracts awarded—

(1) By the Department of Defense; or

(2) For commercial products.

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Subpart 47.5 - Ocean Transportation by U.S.-Flag Vessels

47.500 Scope of subpart.

(a) This subpart describes policy and procedures for giving preference to U.S.-flag vessels when transportation of supplies by ocean vessel is required.

(b) This subpart does not apply to the Department of Defense (DoD). Policy and procedures applicable to DoD appear in DFARS subpart 247.5.

47.501 Definitions.

As used in this subpart—

Dry bulk carrier means a vessel used primarily for the carriage of shipload lots of homogeneous unmarked nonliquid cargoes such as grain, coal, cement, and lumber.

Dry cargo liner means a vessel used for the carriage of heterogeneous marked cargoes in parcel lots. However, any cargo may be carried in these vessels, including part cargoes of dry bulk items or, when carried in deep tanks, bulk liquids such as petroleum and vegetable oils.

Foreign-flag vessel means any vessel of foreign registry including vessels owned by U.S. citizens but registered in a nation other than the United States.

Government vessel means a vessel owned by the U.S. Government and operated directly by the Government or for the Government by an agent or contractor, including a privately owned U.S.-flag vessel under bareboat charter to the Government.

Privately owned U.S.-flag commercial vessel means a vessel (1) registered and operated under the laws of the United States, (2) used in commercial trade of the United States, (3) owned and operated by U.S. citizens, including a vessel under voyage or time charter to the Government, and (4) a Government-owned vessel under bareboat charter to, and operated by, U.S. citizens.

Tanker means a vessel used primarily for the carriage of bulk liquid cargoes such as liquid petroleum products, vegetable oils, and molasses.

U.S.-flag vessel when used independently means either a Government vessel or a privately owned U.S.-flag commercial vessel.

47.502 Policy.

(a) The Cargo Preference Act of 1954 (46 U.S.C. 55305) requires Government agencies acquiring, either within or outside the United States, supplies that might require ocean transportation to ensure that contractors transport at least 50 percent of the gross tonnage of these supplies (computed separately for dry bulk carriers, dry cargo liners, and tankers) on privately owned U.S.-flag commercial vessels. This requirement applies—

(1) To the extent that such vessels are available at rates that are fair and reasonable for U.S.-flag commercial vessels; and

(2) When the supplies are—

(i) Acquired for the account of the United States;

(ii) Furnished to, or for the account of, a foreign nation without provision for reimbursement;

(iii) Furnished for the account of a foreign nation in connection with which the United States advances funds or credits, or guarantees the convertibility of foreign currencies; or

(iv) Acquired with advance of funds, loans, or guaranties made by or on behalf of the United States.

(b) The Cargo Preference Act of 1904 (10 U.S.C. 2631) requires agencies buying supplies for the Department of Defense to use only U.S.-flag vessels for ocean transportation, unless those vessels are not available at fair and reasonable rates.

47.503 Applicability.

(a) Except as stated in paragraph (b) below and in 47.504, the Cargo Preference Acts of 1904 and 1954, described in 47.502, apply to the following cargoes:

(1) Supplies owned by the Government and in the possession of—

(i) The Government;

(ii) A contractor; or

(iii) A subcontractor at any tier.

(2) Supplies not owned by the Government at the time of shipment that the Government acquires for its own use and for which it requires subsequent delivery to a Government activity.

(3) Supplies not owned by the Government at the time of shipment that are to be transported for distribution to foreign assistance programs, but only if these supplies are not acquired or contracted for with local currency funds (see 47.504(b)).

(b) Government-owned supplies to be shipped commercially that are—

(1) In the possession of a department, a contractor, or a subcontractor at any tier; and

(2) For use of military departments must be transported exclusively in privately owned U.S.-flag commercial vessels if such vessels are available at rates that are fair and reasonable for U.S.-flag commercial vessels.

(c) The 50-percent requirement does not preclude use of privately owned U.S.-flag commercial vessels for transportation of up to 100 percent of the cargo subject to the Cargo Preference Act of 1954.

47.504 Exceptions.

The policy and procedures in this subpart do not apply to the following:

(a) Shipments aboard vessels as required or authorized by law or treaty.

(b) Ocean transportation between foreign countries of supplies purchased with foreign currencies made available, or derived from funds that are made available, under the Foreign Assistance Act of 1961 (22 U.S.C. 2353).

(c) Shipments of classified supplies when the classification prohibits the use of non-Government vessels.

(d) Subcontracts for the acquisition of commercial products, including commercial components, or commercial services (see part 12). This exception does not apply to—

(1) Grants-in-aid shipments, such as agricultural and food-aid shipments;

(2) Shipments covered under 46 U.S.C. 55305, such as those generated by Export-Import Bank loans or guarantees;

(3) Subcontracts under—

(i) Government contracts or agreements for ocean transportation services; or

(ii) Construction contracts; or

(4) Shipments of commercial products that are—

(i) Items the contractor is reselling or distributing to the Government without adding value (see part 12). Generally, the contractor does not add value to the items when it subcontracts items for f.o.b. destination shipment; or

(ii) Shipped in direct support of U.S. military—

(A) Contingency operations;

(B) Exercises; or

(C) Forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations.

47.505 [Reserved]

47.506 Procedure.

If the contractor notifies the contracting officer that a privately owned U.S.-flag commercial vessel is not available, then seek assistance from the transportation activity.

47.507 Contract clauses.

(a) (1) Insert the clause at 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels, in solicitations and contracts that may involve ocean transportation of supplies subject to the Cargo Preference Act of 1954. (For application of the Cargo Preference Act of 1954, see 47.502(a), 47.503(a), and 47.504.)

(2) If a statute or agency procedures require transportation of the supplies furnished under the contracts exclusively in privately owned U.S.-flag commercial vessels (see 47.502(b) and 47.503(b)), use the clause with its Alternate I.

(3) Except for contracts or agreements for ocean transportation services or construction contracts, use the clause with its Alternate II if any of the supplies to be transported are commercial products that are shipped in direct support of U.S. military —

(i) Contingency operations;

(ii) Exercises; or

(iii) Forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations.

(b) The contracting officer may, under agency procedures, insert in solicitations and contracts additional clauses concerning the vessels used.

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PART 48 - VALUE ENGINEERING

Sec.

48.001 Definitions.

Subpart 48.1 - Policies and Procedures

48.101 General.
48.102 Policies.

Subpart 48.2 - Contract Clauses

48.201 Clauses for supply or service contracts.
48.202 Clause for construction contracts.

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48.001 Definitions.

As used in this part—

Acquisition savings means savings resulting from the application of a value engineering change proposal (VECP) to contracts awarded by the same contracting office of its successor for essentially the same unit. Acquisition savings include—

(1) Instant contract savings, that are the net cost reductions on the contract under which the VECP is submitted and accepted, and that are equal to the instant unit cost reduction multiplied by the number of instant contract units affected by the VECP, less the contractor's allowable development and implementation costs;

(2) Concurrent contract savings, that are net reductions in the prices of other contracts that are definitized and ongoing at the time the VECP is accepted; and

(3) Future contract savings, that are the product of the future unit cost reduction multiplied by the number of future contract units in the sharing base. On an instant contract, future contract savings include savings on increases in quantities after VECP acceptance that are due to contract modifications, exercise of options, additional orders, and funding of subsequent year requirements on a multiyear contract.

Collateral costs means agency costs of operation, maintenance, logistic support, or Government-furnished property.

Collateral savings means those measurable net reductions resulting from a VECP in the agency's overall projected collateral costs, exclusive of acquisition savings, whether or not the acquisition cost changes.

Contracting office includes any contracting office that the acquisition is transferred to, such as another branch of the agency or another agency's office that is performing a joint acquisition action.

Contractor's development and implementation costs means those costs the contractor incurs on a VECP specifically in developing, testing, preparing, and submitting the VECP, as well as those costs the contractor incurs to make the contractual changes required by Government acceptance of a VECP.

Future unit cost reduction means the instant unit cost reduction adjusted as the contracting officer considers necessary for projected learning or changes in quantity during the sharing period. It is calculated at the time the VECP is accepted and applies either—

(1) Throughout the sharing period, unless the contracting officer decides that recalculation is necessary because conditions are significantly different from those previously anticipated; or

(2) To the calculation of a lump-sum payment, that cannot later be revised.

Instant contract means the contract under which the VECP is submitted. It does not include increases in quantities after acceptance of the VECP that are due to contract modifications, exercise of options, or additional orders. If the contract is a multiyear contract, the term does not include quantities funded after VECP acceptance. In a fixed-price contract with prospective price redetermination, the term refers to the period for which firm prices have been established.

Instant unit cost reduction means the amount of the decrease in unit cost of performance (without deducting any contractor's development or implementation costs) resulting from using the VECP on the instant contract. In service contracts, the instant unit cost reduction is normally equal to the number of hours per line-item task saved by using the VECP on the instant contract, multiplied by the appropriate contract labor rate.

Sharing base means the number of affected end items on contracts of the contracting office accepting the VECP.

Sharing period means the period beginning with acceptance of the first unit incorporating the VECP and ending at a calendar date or event determined by the contracting officer for each VECP.

Unit means the item or task to which the contracting officer and the contractor agree the VECP applies.

Value engineering proposal means, in connection with an A-E contract, a change proposal developed by employees of the Federal Government or contractor value engineering personnel under contract to an agency to provide value engineering services for the contract or program.

Subpart 48.1 - Policies and Procedures

48.101 General.

Value engineering is a formal technique where contractors may (1) voluntarily suggest more economical methods and share resulting savings or (2) be required to create programs to identify and submit more economical methods to the Government.

48.102 Policies.

(a) As 41 U.S.C. 1711 requires, agencies must create and maintain cost-effective value engineering procedures. Agencies must offer contractors substantial financial incentives to develop and submit VECPs. Contracting offices must include value

engineering provisions in appropriate supply, service, architect-engineer and construction contracts as sections 48.201 and 48.202 direct, except when the agency head grants exemptions for specific cases or contract classes.

(b) Non-Department of Defense agencies must use the value engineering program requirement clause (52.248-1, Alternates I or II) in initial production contracts for major systems and for major systems research and development contracts. Exceptions apply when the contracting officer determines and documents that such use is inappropriate.

(c) Department of Defense contracts must include the VE program requirement clause (52.248-1, Alternates I or II) in initial production solicitations and contracts (first and second buys) for major system acquisitions under DoD Directive 5000.1. Exceptions include:

(1) Cases where the prime contractor has proven effective VE work in earlier phases or similar production contracts.

(2) Contracts awarded through competition.

Subpart 48.2 - Contract Clauses

48.201 Clauses for supply or service contracts.

(a) *General.* The contracting officer must add a value engineering clause to solicitations and contracts exceeding the simplified acquisition threshold, except as noted in paragraphs (a)(1) through (5) and paragraph (f). Without approval from the chief of the contracting office, a value engineering clause must not be included in solicitations and contracts for:

(1) Research and development except full-scale development;

(2) Engineering services from nonprofit organizations;

(3) Personal services (see part 37);

(4) Product or component improvement, unless the value engineering incentive applies only to areas not covered by improvement provisions;

(5) Commercial products without special packaging or other requirements; or

(6) Contracts exempted by the agency head from part 48 requirements.

(b) *Value engineering incentive.* To create a value engineering incentive, the contracting officer must add clause 52.248-1, Value Engineering, to solicitations and contracts with exceptions noted in paragraph (a) and considerations in paragraph (e)(1) of this section.

(c) *Value engineering program requirement*. (1) For mandatory value engineering efforts (when substantial government savings may result from sustained, specified effort levels), the contracting officer must use the clause with Alternate I, noting considerations in paragraph (e)(2) of this section.

(2) The government may specify the value engineering program requirement in the solicitation. In negotiated contracts, contractors may propose it in their offers as a negotiation topic. The program requirement must appear as a separate line item in the contract Schedule.

(d) *Value engineering incentive and program requirement*. (1) When both a value engineering incentive and program requirement are appropriate, the contracting officer must use the clause with Alternate II, noting considerations in paragraph (e)(3) of this section.

(2) The contract must limit the value engineering program to clearly defined performance areas listed by line item. Alternate II applies a value engineering program to those specified areas and a value engineering incentive to all other contract areas.

(e) When calculating collateral savings costs more than the benefits, the head of the contracting activity may determine the contracting officer must use the clause with:

(1) Alternate III for value engineering incentives;

(2) Alternate III and Alternate I for value engineering program requirements; or

(3) Alternate III and Alternate II for combined incentives and program requirements.

(f) *Architect-engineer contracts.* For contracts requiring specific value engineering effort in architect-engineer work, the contracting officer must add clause 52.248-2, Value Engineering Architect-Engineer. Clause 52.248-1, Value Engineering, must not appear in architect-engineer solicitations and contracts.

(g) For engineering-development contracts and those with early production units, the contracting officer must modify clause 52.248-1 by:

(1) Replacing the text in paragraph (i)(3)(i) of the clause with language about quantities delivered over 36-60 months during peak production; and

(2) Revising the first sentence in paragraph (3) of the definition of "acquisition savings" with similar language about quantities over 36-60 months during peak production.

(h) For extended production periods (like ship construction or major systems), when agency procedures require sharing future contract savings on all units delivered under contracts awarded during the sharing period, the contracting officer must modify clause 52.248-1 by revising its paragraph (i)(3)(i) and the first sentence under paragraph (3) of the definition of "acquisition savings" with language about contracts awarded during the sharing period.

48.202 Clause for construction contracts.

Insert the clause 52.248-3, Value Engineering-Construction, in construction solicitations and contracts exceeding the simplified acquisition threshold, unless creating an incentive contract. This clause must not appear in incentive-type construction contracts. When computing and tracking collateral savings costs more than the benefits, as determined by the head of the contracting activity, the contracting officer must use the clause with its Alternate I.

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PART 49 - TERMINATION OF CONTRACTS

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49.000 Scope of part.

(a) This part covers the policy and procedures for terminating contracts early. The Government can terminate contracts for two main reasons:

(1) For its own convenience.

(2) Because the contractor failed to perform (called "default").

(b) This part prescribes—

(1) The contract clauses relating to termination and excusable delay; and

(2) Instructions for using termination and settlement forms.

49.001 Definitions.

As used in this part—

Other work means Government and commercial work the contractor is doing now or plans to do later, which does not include work on the contract that was terminated.

Plant clearance period means a set time period that starts when the contract is completed or terminated and ends 90 days after the contracting officer receives acceptable inventory schedules for each property classification. The parties can agree to make this period longer if needed. The final phase starts after the contracting officer receives acceptable inventory schedules.

Settlement agreement means a written agreement in the form of a contract modification that settles all or part of a settlement proposal

Settlement proposal means a contractor's or subcontractor's proposal for ending a contract terminated in whole or in part. The proposal must use the required forms and include supporting data from this part. Settlement proposals count as "claims" under false claims laws (see 18 U.S.C. 287 and 31 U.S.C. 3729).

Unsettled contract change means a contract change or contract term for which a formal modification is required but has not been executed.

49.002 Applicability.

(a) (1) This part applies to contracts that allow termination for Government convenience or contractor default. See part 13 for information on simplified acquisition contracts.

(2) This part does not apply to contracts for commercial products and commercial services awarded under part 12 procedures. For those contracts, use part 12 for termination policies. This part can be used as guidance for those contracts, but only if it does not conflict with part 12 or the applicable clause.

(b) Contractors must use this part to settle subcontracts terminated after a cost-reimbursement prime contract is modified, unless the contracting officer deems such a use inappropriate. The contracting officer must use this part as a guide when reviewing subcontract settlements. This applies when the contractor uses the subcontract settlement as basis for reimbursement under a cost-reimbursement contract.

(c) The contracting officer may use this part to determine equitable adjustments resulting from a modification under Changes clauses. This does not apply to cost-reimbursement contracts.

(d) When this part refers to the "amount" of a settlement proposal, calculate as follows:

(1) Start with the total settlement amount requested.

(2) Then subtract—

(i) Amounts due for completed work at the contract price; and

(ii) Amounts for settling subcontractor proposals.

(3) Do not subtract—

(i) Credits from keeping or selling termination inventory; and

(ii) Advance or partial payments already made.

Subpart 49.1 - General Principles

49.100 Scope of subpart.

(a) This subpart covers-

(1) The authority and duties of contracting officers to terminate contracts completely or partially for Government convenience or contractor default;

(2) What contractors and contracting officers must do after a termination notice;

(3) Basic procedures for settling terminated contracts; and

(4) Settlement agreements.

(b) More detailed rules are in other subparts. Subparts 49.2 and 49.3 cover convenience terminations and settlements for fixed-price and cost-reimbursement contracts. Subpart 49.4 covers default terminations.

49.101 Authorities and responsibilities.

(a) Contract termination clauses give contracting officers the authority to—

(1) Terminate contracts for convenience or default; and

(2) Enter into settlement agreements under this regulation.

(b) The contracting officer must terminate contracts, whether for default or convenience, only when it is in the Government's interest. Use a no-cost settlement instead of a termination notice when—

(1) It is known that the contractor will accept it;

(2) Government property was not furnished; and

(3) There are no outstanding payments, debts due the Government, or other contractor obligations.

(c) Contracting officers should not terminate a contract for convenience when the remaining work is worth less than $5,000.

(d) After the contracting officer or termination contracting officer (TCO) issues a termination notice, the TCO handles the settlement negotiations, including no-cost settlements if appropriate. The TCO is responsible for working out payment details with the contractor. Auditors and TCOs must work quickly on reviews, negotiations, and give special attention to small business settlements.

(e) When the same item is under contract with both large and small businesses, and the contracting officer needs to terminate some of the undelivered items for convenience, the contracting officer must give preference to continuing small business contracts unless it can be clearly shown that the small business will be unable to provide the item in a timely fashion.

(f) The contracting officer handles releasing extra funds from terminations. This responsibility can be given to the TCO if specified in writing.

49.102 Notice of termination.

(a) *General.* Contracting officers must terminate contracts only with a written notice to the contractor. See 49.601 for the notice format. The notice of termination may be expedited by means of electronic communication capable of providing confirmation of receipt by the contractor. When mailing the notice, use certified mail and request return receipt. If hand-delivering the notice, get written acknowledgment from the contractor. The notice must include the following:

(1) Why the contract is terminated (convenience or default) and the related contract clause.

(2) When the termination takes effect.

(3) How much of the contract is terminated (partial or complete). If partial, which parts are terminated.

(4) Any special instructions.

(5) Steps the contractor should take to help employees if the termination, together with all other outstanding terminations, will cause significant job losses. See 49.601-2, paragraph (g).

(b) *Distribution of copies.* The contracting officer must simultaneously send the termination notice to the contractor; the contract administration office; and any known assignee, guarantor, or surety.

(c) *Amendment of termination notice.* The contracting officer may amend a termination notice to-

(1) Fix minor mistakes;

(2) Add more information or instructions; or

(3) Rescind the notice if it is discovered that the terminated items were completed or shipped before the contractor received the notice.

(d) *Reinstatement of terminated contracts.* Upon written consent of the contractor, the contracting office may reinstate a terminated portion of a contract in whole or in part by amending the notice of termination if it has been determined in writing that-

(1) Circumstances clearly indicate that the Government still needs the terminated items; and

(2) Reinstatement benefits the Government.

49.103 Methods of settlement.

(a) Settlement of terminated cost-reimbursement contracts and fixed-price contracts terminated for convenience may be effected by-

(1) Negotiated agreement;

(2) Determination by the TCO;

(3) Costing-out under vouchers using SF 1034, Public Voucher for Purchases and Services Other Than Personal, for cost-reimbursement contracts (as prescribed in subpart 49.3); or

(4) A combination of these methods.

(b) When possible, the TCO should negotiate a fair and prompt settlement with the contractor. The TCO must settle a settlement proposal by determination only when it cannot be settled by agreement.

49.104 Duties of prime contractor after receipt of notice of termination.

After receiving a termination notice, the contractor is required to follow the notice and the termination clause of the contract, except as otherwise directed by the TCO. The notice and clause for convenience terminations generally require the contractor to—

(a) Stop work immediately on the terminated portion of the contract and stop placing subcontracts for that work;

(b) Terminate all subcontracts related to the terminated portion of the prime contract;

(c) Immediately tell the TCO about any special circumstances that prevent stopping work;

(d) Perform the continued portion of the contract and submit promptly any request for an equitable adjustment of price for the continued portion, if the termination is partial. Support this request with evidence of any cost increases;

(e) Take necessary or directed action to protect and preserve property in the contractor's possession in which the Government has or may acquire an interest. When directed by the TCO, deliver this property to the Government;

(f) Promptly notify the TCO in writing of any legal proceedings arising from any subcontract or other commitment related to the terminated portion of the contract;

(g) Settle outstanding liabilities and proposals arising from termination of subcontracts. Get any approvals or ratifications the TCO requires;

(h) Promptly submit the contractor's own settlement proposal, supported by appropriate schedules; and

(i) Dispose of termination inventory as directed or authorized by the TCO.

49.105 Duties of termination contracting officer after issuance of notice of termination.

(a) Following the termination clause and termination notice, the TCO must-

(1) Tell the prime contractor what actions to take;

(2) Review the prime contractor's settlement proposal and, when appropriate, subcontractor settlement proposals;

(3) Quickly negotiate settlement with the contractor and make a settlement agreement; and

(4) Quickly settle the contractor's settlement proposal by determination for portions on which agreement cannot be reached, if a complete settlement cannot be negotiated.

(b) To speed up settlement, the TCO may ask for specially trained people to-

(1) Assist in dealings with the contractor;

(2) Advise on legal and contract matters;

(3) Conduct accounting reviews and assist with accounting matters; and

(4) Handle the following termination inventory tasks (see subpart 45.6):

(i) Verify the inventory exists;

(ii) Decide what can be allocated and in what amounts;

(iii) Recommend whether items can be used or are serviceable;

(iv) Do necessary screening and redistribution; and

(v) Help the contractor get rid of remaining items.

(c) The TCO should quickly hold a meeting with the contractor to make a clear plan for completing the settlement. When appropriate, after talking with the contractor, major subcontractors should be asked to attend. Topics to be discussed and documented include the following:

(1) Basic rules for settling any settlement proposal, including what the contractor must do under the termination clause.

(2) How much of the contract is terminated, when work stops, and status of plans, drawings, and information that would have been delivered if the contract had been completed.

(3) Status of any continuing work;

(4) The contractor's duty to terminate subcontracts and basic rules for settling subcontractor settlement proposals.

(5) Names of subcontractors involved and dates the termination notices were issued to them.

(6) Contractor staff handling review and settlement of subcontractor settlement proposals and methods being used.

(7) Plans for transferring title and for delivering to the Government any materials the Government needs.

(8) Basic rules and procedures for protecting, preserving, and getting rid of contractor and subcontractor termination inventories, including preparing termination inventory schedules.

(9) Contractor accounting practices and preparation of SF 1439 (Schedule of Accounting Information (49.602-3)).

(10) What form to use when submitting settlement proposals.

(11) Accounting review of settlement proposals.

(12) Any need for interim financing through partial payments.;

(13) Rough timeline for negotiating the settlement, including when the contractor and subcontractors must submit settlement proposals, termination inventory schedules, and accounting information schedules (see 49.206-3 and 49.303-2).

(14) Actions taken by the contractor to reduce harm to employees hurt by the termination (see paragraph (g) of the letter notice in 49.601-2).

(15) Contractor's duty to provide accurate, complete, and current cost or pricing data, and to certify this data (see part 15 requirements for certified cost or pricing data) when the termination settlement amount, or partial termination settlement amount plus the estimated cost to complete the continued work, exceeds the cost or pricing data threshold in part 15.

49.105-1 Release of excess funds.

(a) The TCO must estimate funds needed for settlement, and within 30 days of receiving the termination notice, recommend that the contracting officer release excess funds. The contracting officer or TCO (if given the responsibility) should quickly release the initial excess funds. The TCO must not recommend releasing amounts under $1,000 unless requested by the contracting officer.

(b) The TCO must continuously monitor funding requirements in order to release additional excess funds promptly. See 49.604 for a recommended format. If previous funding releases create a shortage for settlement, the TCO must tell the contracting officer immediately. The contracting officer must restore the funds within 30 days.

49.105-2 Cleanup of construction site.

For terminated construction contracts, the contracting officer must direct cleanup actions to ensure: site cleanup, protection of usable materials, removal of hazards, and any other actions needed for a safe and healthy site.

49.106 Fraud or other criminal conduct.

If the TCO suspects fraud or other criminal conduct related to the settlement of a terminated contract, the TCO shall discontinue negotiations and report the facts under agency procedures.

49.107 Audit of prime contract settlement proposals and subcontract settlements.

(a) *Prime contractor audits*. The TCO must send settlement proposals to the audit agency for review when the value meets or exceeds the certified cost or pricing data threshold in part 15. The TCO may send proposals valued below the threshold for certified cost and pricing data for audit review.

(1) When referring proposals, include-

(i) Specific information the TCO considers relevant; and

(ii) Facts and circumstances to help the audit agency.

(2) The audit agency must-

(i) Develop requested information;

(ii) Make additional accounting reviews as appropriate; and

(iii) Submit written comments and recommendations to the TCO.

(3) For proposals under the threshold that do not need formal examination, the TCO will do a desk review and include a written summary in the termination case file.

(b) *Subcontract settlement audits*. The TCO must refer subcontract settlements to the audit agency when—

(1) The amount exceeds the certified cost or pricing data threshold; or

(2) The TCO decides a complete or partial accounting review is advisable. The audit agency must submit written comments and recommendations to the TCO. This review does not remove the prime contractor's or higher-tier subcontractor's responsibility to do their own accounting review.

(c) *Contractor responsibilities*.

(1) Prime contractors and subcontractors must perform accounting reviews and necessary field audits. However, the TCO should request a Government audit of a subcontractor’s settlement proposal when—

(i) A subcontractor objects, for competitive reasons, to an upper-tier contractor reviewing its records;

(ii) The Government audit agency is already working at the subcontractor's location, or can do the audit more economically;

(iii) Government audit is needed for consistent treatment and orderly administration; or

(iv) The contractor has substantial or controlling financial interest in the subcontractor.

(2) The audit agency should avoid duplicating reviews done by upper-tier contractors. However, this does not prevent additional Government reviews when appropriate.

(3) When contractors perform accounting reviews, the TCO should ask the audit agency to periodically examine the contractor's procedures and performance, and provide comments and recommendations to the TCO.

(d) *Using audit reports*. Audit reports are advisory only. The TCO uses them for negotiating settlements or making unilateral determinations. Government personnel handling audit reports must be careful not to reveal privileged information that could hurt the negotiation position of the Government, prime contractor, or higher-tier subcontractor. When appropriate and in the Government's best interest, the TCO may give audit reports to prime contractors and higher-tier subcontractors for settling subcontract proposals.

49.108 Settlement of subcontract settlement proposals.

49.108-1 Subcontractor's rights.

Subcontractors have no direct contract rights against the Government when a prime contract is terminated. Subcontractors may have rights against the prime contractor or intermediate subcontractor with whom it has contracted. When a prime contract is terminated, the prime contractor and each subcontractor are responsible for promptly settling the settlement proposals of their immediate subcontractors.

49.108-2 Prime contractor's rights and obligations.

(a) Termination for convenience clauses require prime contractors to terminate subcontracts related to terminated prime work unless the TCO directs otherwise. Prime contractors should include termination clauses in their subcontracts for their protection. See subpart 49.5 for suggestions on subcontract termination clauses.

(b) If a prime contractor fails to include proper termination clauses in subcontracts or fails to exercise clause rights, this does not—

(1) Affect the Government's right to require subcontract termination; or

(2) Increase Government obligations beyond what they would have been with proper clauses.

(c) Normally, the TCO should measure the reasonableness of prime contractor settlements with subcontractors by the total amount due under paragraph (f) of the subcontract termination clause suggested in 49.502(e). The TCO must allow reimbursement above that amount only in unusual cases and only when the subcontract terms did not unreasonably increase the subcontractor's rights.

49.108-3 Settlement procedure.

(a) Contractors must settle with subcontractors following the same policies and principles used for prime contract settlements in this subpart and subparts 49.2 or 49.3. However, the prime contractor or next higher tier subcontractor must accept the basis and form of the subcontractor's settlement proposal. Each settlement must have enough accounting data and other information for the Government to adequately review it. The Government will never pay the prime contractor any amount for lost anticipated profits or consequential damages from terminating any subcontract (but see 49.108-5).

(b) Except as provided in 49.108-4, the TCO must require that-

(1) All subcontractor termination inventory be disposed of and accounted for following the procedures in paragraph (j) of clause 52.245-1, Government Property; and

(2) The prime contractor submit all termination settlements with subcontractors for approval or ratification.

(c) The TCO must quickly examine each subcontract settlement received to determine whether-

(1) The subcontract termination was necessary because of the prime contract termination (or because of a change order —see 49.002(c));

(2) The settlement was made in good faith;

(3) The settlement amount is reasonable; and

(4) The settlement is allocable to the terminated portion of the contract (or if only partially allocable, that the proposed allocation is reasonable).

(d) When considering if any subcontract settlement is reasonable, the TCO must generally follow the provisions in this part for settling prime contracts. The TCO must also comply with any applicable requirements in 49.106 and 49.111 for accounting and other reviews. After the examination, the TCO must notify the contractor in writing of—

(1) Approval or ratification; and

(2) The reasons for disapproval.

49.108-4 Authorization for subcontract settlements without approval or ratification.

(a) (1) The TCO may give written authorization to the prime contractor to complete settlements of subcontracts terminated in whole or in part without approval or ratification when the settlement amount (see 49.002(d)) is $100,000 or less. This requires a written request from the contractor. The TCO may grant this authorization if—

(i) The TCO is satisfied with the adequacy of the procedures used by the contractor in settling settlement proposals, including proposals for keeping, selling, or otherwise disposing of termination inventory of the immediate and lower tier subcontractors. The TCO must obtain advice and recommendations from—

(A) The appropriate audit agency about the adequacy of the contractor's audit administration, including personnel; and

(B) The cognizant plant clearance officer about the adequacy of the contractor's procedures and personnel for handling property disposal matters;

(ii) Any termination inventory included in determining the settlement amount will be disposed of as directed by the prime contractor, except that disposing of the inventory will not be subject to-

(A) Review by the TCO under 49.108-3(c); or

(B) The screening requirements in 45.602-3; and

(iii) A certificate similar to the certificate in the settlement proposal form in 49.602-1(a) will accompany the settlement.

(2) Except as stated in paragraph (a)(4) of this section, authority granted to a prime contractor under paragraph (a)(1) of this section by any TCO must apply to all Executive agencies' prime contracts that are terminated or modified by change orders.

(3) Except as stated in paragraph (a)(4) of this section, the TCO must accept settlements of terminated lower tier subcontracts as part of the prime contractor's settlement proposal. This applies when the settlements are completed by any of the prime contractor's immediate or lower-tier subcontractors who have been granted authority as prime contractors to settle subcontracts, provided that the settlement is within the limit of the authority. Authorization to settle proposals of lower-tier subcontractors must not be granted directly to subcontractors. However, a prime contractor authorized to approve subcontractor settlements may also exercise this authority when acting as a subcontractor for its terminated subcontracts and orders. When exercising this authority as a subcontractor, the contractor must notify the purchaser.

(4) The provisions of paragraphs (a)(1), (2), and (3) of this section do not apply to contracts under the administration of any contracting officer if the contracting officer notifies the prime contractor concerned. This notice must—

(i) Be in writing; and

(ii) If paragraph (a)(3) of this section is involved, specify any subcontractor affected.

(b) Section 45.602 must apply to disposal of completed end items allocable to the terminated subcontract. However, these items may be disposed of without review by the TCO under 49.108-3 and without screening under 45.602-3, if the items do not require demilitarization and the total amount (at the subcontract price) when added to the settlement amount does not exceed the amount authorized under this section.

(c) A TCO granting the authorization in paragraph (a)(1) of this section must periodically (at least annually) make a selective review of settlements and settlement procedures. This review determines if the contractor is making adequate reviews and fair settlements, and whether the authorization should remain in effect. The TCO must obtain advice and recommendations from the appropriate audit agency and the cognizant plant clearance officer. The TCO must revoke the authorization by written notice to the contractor, effective on the date of receipt, when—

(1) The contractor's procedures are not adequate;

(2) Improper settlements are being made; or

(3) The authority has not been used in the preceding 2 years.

(d) The contractor may make any number of separate settlements with a single subcontractor but must not divide settlement proposals solely to bring them under an authorization limit. Separate settlement proposals that would normally be included in a single proposal, such as those based on a series of separate orders for the same item under one contract, must be consolidated whenever possible.

(e) Upon written request of the contractor, the TCO may increase an authorization granted under paragraph (a)(1) of this section to authorize the contractor to conclude settlements under a particular prime contract. The TCO may limit the increased authorization to specific subcontracts or classes of subcontracts.

(f) Authorizations granted under 49.108-4 do not authorize the settlement of requisitions or orders placed with any unit within the contractor's corporate entity.

49.108-5 Recognition of judgments and arbitration awards.

(a) When a subcontractor obtains a final judgment against a prime contractor, the TCO must treat the judgment amount as a cost of settling with the contractor. This applies to the extent the judgment is properly allocable to the terminated portion of the prime contract, if these conditions are met:

(1) The prime contractor made reasonable efforts to include in the subcontract a termination clause described in 49.502(e), 49.503(c), or a similar clause that excludes payment of anticipatory profits or consequential damages.

(2) The subcontract provisions about termination rights of both parties are fair and reasonable and do not unreasonably increase the subcontractor's common law rights.

(3) The contractor made reasonable efforts to settle the subcontractor's settlement proposal.

(4) The contractor promptly notified the contracting officer when the proceedings that led to the judgment began and did not refuse to give the Government control of the defense.

(5) The contractor defended the suit diligently or, if the Government took control of the defense, provided reasonable assistance when requested.

(b) If not all conditions in paragraphs (a)(1) through (5) of this section are met, the TCO may allow the contractor the part of the judgment considered fair for settling the subcontract proposal. The TCO must consider the policies in this part for settlement proposals.

(c) When a contractor and subcontractor submit the subcontractor's settlement proposal to arbitration under any applicable law or contract provision, the TCO must recognize the arbitration award as the cost of settling the contractor's proposal. This applies to the same extent and under the same conditions as in paragraphs (a) and (b) of this section.

49.108-6 Delay in settling subcontractor settlement proposals.

When a prime contractor's inability to settle with a subcontractor delays prime contract settlement, the TCO may settle with the prime contractor. The TCO must exclude the subcontractor settlement proposal from the settlement completely or partially and reserve the rights of the Government and prime contractor regarding the subcontractor proposal.

49.108-7 Assignment of rights under subcontracts.

(a) Termination for convenience clauses in 52.249 (except short-form clauses) require prime contractors to assign to the Government all rights, titles, and interests under any subcontract terminated because of prime contract termination. The TCO directs this assignment. The TCO must not require assignment unless it benefits the Government.

(b) Termination for convenience clauses (except short-form clauses) also give the Government the right to settle and pay any settlement proposal from a subcontract termination at its discretion. This right does not obligate the Government to settle and pay subcontractor settlement proposals. Generally, the prime contractor must settle and pay these proposals. However, when the TCO determines it benefits the Government, the TCO must settle the subcontractor's proposal using prime contract settlement procedures after notifying the contractor (*e.g.*, when a subcontractor is the only source and a delay by the prime contractor in settlement or payment would hurt the subcontractor's financial position). Direct settlements with subcontractors are not encouraged.

49.109 Settlement agreements.

49.109-1 General.

When a termination settlement has been negotiated and all required reviews have been obtained, the contractor and the TCO must execute a settlement agreement. Use Standard Form 30 (Amendment of Solicitation/Modification of Contract) (see 49.603). The settlement must cover—

(a) Any offsets that the Government has against the contractor that may be applied against the terminated contract; and

(b) All subcontractor settlement proposals, except proposals that are specifically excluded from the agreement and reserved for separate settlement.

49.109-2 Reservations.

(a) The TCO must–

(1) Reserve in the settlement agreement any rights or demands of the parties that are excluded from the settlement;

(2) Ensure reservation wording does not create rights for the parties beyond those existing before executing the settlement agreement;

(3) Mark each applicable settlement agreement with "This settlement agreement contains a reservation" and keep in the contract file until the reservation is removed;

(4) Ensure sufficient funds are kept to cover complete settlement of reserved items; and

(5) At the appropriate time, prepare a separate settlement of reserved items and include it in a separate settlement agreement.

(b) A recommended format for settlement of reservations appears in 49.603-9.

49.109-3 Government property.

Before executing a settlement agreement, the TCO must determine the accuracy of the Government property account for the terminated contract. If an audit reveals property the contractor cannot account for, the TCO must either—

(a) Reserve the Government's rights regarding that property in the settlement agreement; or

(b) Make an appropriate deduction from the amount otherwise due the contractor.

49.109-4 No-cost settlement.

The TCO must execute a no-cost settlement agreement (see 49.603-6 or 49.603-7, as applicable) if—

(a) The contractor has not incurred costs for the terminated contract portion; or

(b) The contractor is willing to waive the costs incurred; and

(c) No amounts are due the Government under the contract.

49.109-5 Partial settlements.

The TCO should try to settle all rights and liabilities of the parties in one agreement except those from any continuing contract portion. Generally, the TCO must not make partial settlements covering particular items of the prime contractor's settlement proposal. However, the TCO may make a partial settlement when complete settlement cannot be finished promptly if—

(a) Agreed upon issues are clearly severable from other issues; and

(b) The partial settlement will not hurt the Government's or contractor's interests in disposing of the unsettled part.

49.109-6 Joint settlement of two or more settlement proposals.

(a) With contractor consent, the TCO or TCOs concerned may jointly negotiate two or more termination settlement proposals with the same contractor under different contracts, even if the contracts are with different contracting offices or agencies. Consolidate accounting work as much as practical. The resulting settlement may be shown by—

(1) One settlement agreement covering all contracts involved; or

(2) A separate agreement for each contract involved.

(b) When the settlement agreement covers more than one contract, it must—

(1) Clearly identify the contracts involved;

(2) Assign an amendment modification number to each contract;

(3) Divide the total settlement amount among the contracts on some reasonable basis;

(4) Have attached or incorporated a schedule showing the division; and

(5) Be distributed and attached to each contract involved the same way as other contract modifications.

49.109-7 Settlement by determination.

(a) *General.* If the contractor and TCO cannot agree on a termination settlement, or if a settlement proposal is not submitted within the period required by the termination clause, the TCO must issue a determination of the amount due. This determination must be consistent with the termination clause, including any cost principles incorporated by reference. The TCO must comply with 49.109-1 through 49.109-6 in making a settlement by determination and with 49.203 in making an adjustment for loss, if any.

(b) *Notice to contractor.* Before issuing a determination of the amount due the contractor, the TCO must give the contractor at least 15 days' notice by certified mail (return receipt requested) to submit written evidence. The evidence must reach the TCO on or before a stated date and must support the amount previously proposed.

(c) *Justification of settlement proposal*. (1) The contractor has the burden of establishing the proposed amount by proof satisfactory to the TCO.

(2) The contractor may submit vouchers, verified transcripts of books of account, affidavits, audit reports, and other documents as desired. The TCO may request the contractor to submit additional documents and data, and may request appropriate accountings, investigations, and audits.

(3) The TCO may accept copies of documents and records without requiring original documents unless there is a question of authenticity.

(4) The TCO may hold any conferences considered appropriate—

(i) To confer with the contractor;

(ii) To obtain additional information from Government personnel or from independent experts; or

(iii) To consult persons who have submitted affidavits or reports.

(d) *Determinations.* After reviewing the information available, the TCO must determine the amount due and must transmit a copy of the determination to the contractor by certified mail (return receipt requested), or by any other method that provides evidence of receipt. The transmittal letter must advise the contractor that the determination is a final decision from which the contractor may appeal under the Disputes clause, except as shown in paragraph (f) of this section. The determination must specify the amount due the contractor and will be supported by detailed schedules conforming generally to the forms for settlement proposals prescribed in 49.602-1 and by additional information, schedules, and analyses as appropriate. The TCO must explain each major item of disallowance. The TCO need not reconsider any other action relating to the terminated portion of the contract that was ratified or approved by the TCO or another contracting officer.

(e) *Preservation of evidence.* The TCO must retain all written evidence and other data relied upon in making a determination, except that copies of original books of account need not be made. The TCO must return books of account, together with other original papers and documents, to the contractor within a reasonable time.

(f) *Appeals.* The contractor may appeal, under the Disputes clause, any settlement by determination, except when the contractor has failed to submit the settlement proposal within the time provided in the contract and failed to request an extension of time. The pendency of an appeal will not affect the authority of the TCO to settle the settlement proposal or any part by negotiation with the contractor at any time before the appeal is decided.

(g) *Decision on the contractor's appeal.* The TCO must give effect to a decision of the Claims Court or a board of contract appeals, when necessary, by an appropriate modification to the contract. When appropriate, the TCO should obtain a release from the contractor. TCOs are authorized to modify the formats of settlement agreements in 49.603 to agree with this provision.

49.110 Settlement negotiation memorandum.

(a) The TCO must, at the conclusion of negotiations, prepare a settlement negotiation memorandum describing the principal elements of the settlement for inclusion in the termination case file and for use by reviewing authorities. Pricing aspects of the settlement must be documented, and memorandum distributed, both in accordance with part 15.

(b) If the settlement was negotiated on the basis of individual items, the TCO must specify the factors considered for each item. If the settlement was negotiated on an overall lump-sum basis, the TCO need not evaluate each item or group of items individually but must support the total amount of the recommended settlement in reasonable detail. The memorandum must include explanations of matters involving differences and doubtful questions settled by agreement, and the factors considered. The TCO should include any other matters that will assist reviewing authorities in understanding the basis for the settlement.

49.111 Review of proposed settlements.

Each agency must establish procedures for administrative review of proposed termination settlements when necessary. When one agency provides termination settlement services for another agency, the agency providing the services must also perform the settlement review function.

49.112 Payment.

49.112-1 Partial payments.

(a) *General.* If the contract authorizes partial payments on settlement proposals before settlement, a prime contractor may request them on the form prescribed in 49.602-4 at any time after submission of interim or final settlement proposals. The Government will process applications for partial payments promptly. A subcontractor must submit its application through the prime contractor. The prime contractor must attach its own invoice and recommendations to the subcontractor's application. Partial payments to a subcontractor must be made only through the prime contractor and only after the prime contractor has submitted its interim or final settlement proposal. Except for undelivered acceptable finished products, partial payments must not be made for profit or fee claimed under the terminated portion of the contract. In exercising discretion on the extent of partial payments to be made, the TCO must consider the diligence of the contractor in settling with subcontractors and in preparing its own settlement proposal.

(b) *Amount of partial payment.* Before approving any partial payment, the TCO must obtain any desired accounting, engineering, or other specialized reviews of the data submitted in support of the contractor's settlement proposal. If the reviews and the TCO's examination of the data indicate that the requested partial payment is proper, the TCO may authorize reasonable payments up to—

(1) 100 percent of the contract price, adjusted for undelivered acceptable items completed before the termination date, or later completed with the approval of the TCO (see 49.205);

(2) 100 percent of the amount of any subcontract settlement paid by the prime contractor if the settlement was approved or ratified by the TCO under 49.108-3(c) or was authorized under 49.108-4;

(3) 90 percent of the direct cost of termination inventory, including costs of raw materials, purchased parts, supplies, and direct labor;

(4) 90 percent of other allowable costs (including settlement expense and manufacturing and administrative indirect costs) allocable to the terminated portion of the contract and not included in paragraphs (b)(1), (2), or (3) of this section; or

(5) 100 percent of partial payments made to subcontractors under this section.

(c) *Recognition of assignments.* When an assignment of claims has been made under the contract, the Government must not make partial payments to other than the assignee unless the parties to the assignment consent in writing (see part 32).

(d) *Security for partial payments.* If any partial payment is made for completed end items or for costs of termination inventory, the TCO must protect the Government's interest. This must be done by obtaining title to the completed end items or termination inventory, or by the creation of a lien in favor of the Government, paramount to all other liens, on the completed end items or termination inventory, or by other appropriate means.

(e) *Deductions in computing amount of partial payments*. The TCO must deduct from the gross amount of any partial payment otherwise payable under 49.112-1(b)—

(1) All unliquidated balances of progress and advance payments (including interest) made to the contractor, which are allocable to the terminated portion of the contract; and

(2) The amounts of all credits arising from the purchase, retention, or sale of property, the costs of which are included in the application for payment.

(f) *Limitation on total amount.* The total amount of all partial payments must not exceed the amount that will, in the opinion of the TCO, become due to the contractor because of the termination.

(g) *Effect of overpayment.* If the total of partial payments exceeds the amount finally determined due on the settlement proposal, the contractor must repay the excess to the Government on demand, together with interest. However, interest will not be charged for any—

(1) Excess payment attributable to a reduction in the settlement proposal because of retention or other disposition of termination inventory, until 10 days after the date of the retention or disposition, or a later date determined by the TCO; or

(2) Overpayment under cost-reimbursement research and development contracts without profit or fee if the overpayments are repaid to the Government within 30 days after demand.

(h) *Certification and approval of partial payments*. (1) The contractor must place the following certification on vouchers or invoices for partial payments:

"The payment covered by this voucher is a partial payment on the Contractor's settlement proposal under contract No. _____ under part 49 of the Federal Acquisition Regulation."

(2) The TCO must approve the invoice or voucher by noting on it the following:

"Payment of $ _____ is approved."

49.112-2 Final payment.

(a) *Negotiated settlement.* After execution of a settlement agreement, the contractor must submit a voucher or invoice showing the amount agreed upon, less any portion previously paid. The TCO must attach a copy of the settlement agreement to the voucher or invoice and forward the documents to the disbursing officer for payment.

(b) *Settlement by determination.* If the settlement is by determination and-

(1) There is no appeal within the allowed time, the contractor must submit a voucher or invoice showing the amount determined due, less any portion previously paid; or

(2) There is an appeal, the contractor must submit a voucher or invoice showing the amount finally determined due on the appeal, less any portion previously paid. Pending determination of any appeal, the contractor may submit vouchers or invoices for charges that are not directly involved with the portion being appealed, without prejudice to the rights of either party on the appeal.

(c) *Construction contracts.* In the case of construction contracts, before forwarding the final payment voucher, the contracting officer must ascertain whether there are any outstanding labor violations. If so, the contracting officer must determine the amount to be withheld from the final payment (see part 22).

(d) *Interest.* The Government must not pay interest on the amount due under a settlement agreement or a settlement by determination. The Government may, however, pay interest on a successful contractor appeal from a contracting officer's determination under the Disputes clause at 52.233-1.

49.113 Unsettled contract changes.

(a) Before settling a completely terminated contract, the TCO must get a list from the contracting office of all related contract changes that have not been settled. The TCO must settle all unsettled contract changes as part of the final settlement. Get recommendations from the contracting office about the changes before settling them.

(b) When only part of a contract has been terminated, the contracting officer will usually handle any outstanding unsettled contract changes. However, the contracting officer may delegate this job to the TCO.

49.114 Settlement of terminated incentive contracts.

(a) *Fixed-price incentive contracts*. The TCO must settle terminated fixed-price incentive contracts using the rules in paragraph (j) of clause 52.216-16, Incentive Price Revision-Firm Target, and clause 52.249-2, Termination for Convenience of the Government (Fixed-Price).

(1) *Partial termination.* When only part of a contract is terminated, the TCO must negotiate a settlement using the termination clause and the incentive price revision clause. The contracting officer must apply the incentive price rules to completed items the Government accepted, including any items the contractor may ask for payment in the settlement proposal. The TCO must pay the contractor the target price for completed items included in the settlement proposal that do not have a final price yet. The TCO must include in the settlement agreement an appropriate reservation about final pricing for these completed items.

(2) *Complete termination.* If any items were delivered and accepted by the Government, the contracting officer must set prices using the contract's incentive provisions. For the terminated portion of the contract, the termination clause rules apply and the incentive clause rules do not apply. The TCO handling the termination settlement will make sure no costs from the incentive negotiations are included in the termination settlement. The TCO must coordinate with the contracting officer and use proper evidence to ensure this.

(b) *Cost-plus-incentive-fee contracts.* The TCO must settle terminated cost-plus-incentive-fee contracts using clause 52.249-6, Termination (Cost-Reimbursement).

(1) *Partial termination.* When only part of a contract is terminated, the TCO must limit the settlement to adjusting the target fee as provided in paragraph (e) of clause 52.216-10, Incentive Fee. The settlement agreement must include a note about any target cost adjustment from the partial termination. The contracting officer must adjust the target cost if needed.

(2) *Complete termination.* The parties must negotiate the settlement using the rules in subpart 49.3 and clause 52.249-6, Termination (Cost Reimbursement). The fee must be adjusted based on the target fee. Incentive provisions must not be applied or considered.

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Subpart 49.2 - Additional Principles for Fixed-Price Contracts Terminated for Convenience

49.201 General.

(a) Fair compensation involves judgment and has no exact measurement. Different methods can determine fair compensation. Business judgment, not strict accounting rules, is most important when making settlements. Settlements should pay contractors fairly for—

(1) Work they have completed;

(2) Preparations they made for terminated portions of the contract; and

(3) A reasonable profit amount.

(b) The main goal is to reach an agreed settlement. Parties can agree on a total payment amount without breaking down specific costs or profit components.

(c) Cost and accounting information helps guide—but does not strictly control—fair compensation decisions. When appropriate—

(1) Costs can be estimated;

(2) Differences can be compromised; and

(3) Uncertain matters can be resolved through agreement.

(d) Other data types or standards might provide equally reliable guidance. Keep recordkeeping, reporting, and accounting for terminated contracts to a minimum while protecting public interest.

49.202 Profit.

(a) The TCO can use any reasonable method to determine a fair profit.

(1) The TCO must pay profit to the contractor for-

(i) Work they did on the terminated part; and

(ii) Preparations made for the terminated portion of work.

(2) Do not pay profit for-

(i) Settlement costs (the costs of working out the final payment);

(ii) To cover the profit amount the contractor expected to make on work they never did; or

(iii) Consequential damages.

(3) When the contractor helps settle subcontractor proposals, do not base their profit on the amount of those settlements. The effort involved in reaching settlement may be considered.

(4) Do not pay profit for materials or services that subcontractors had not delivered by the termination date, regardless of the percentage of completion.

(b) When deciding on profit, think about these things:

(1) How much and how hard was the work compared to all the work the contract required. Engineering estimates are not required, but should be considered if they are available.

(2) Engineering work, planning schedules, technical studies, supervision, and other needed services.

(3) How well the contractor did, especially—

(i) Making quality products on time;

(ii) Keeping costs down;

(iii) Using materials, buildings, and workers economically; or

(iv) Disposition of termination inventory.

(4) How much money the contractor put in and how much risk they took.

(5) New ideas and technical help the contractor gave to the Government and other contractors.

(6) The type of business, including where materials come from and how complicated the manufacturing is.

(7) How much profit the contractor would have made if they had finished the whole contract.

(8) How much profit both sides expected when they made the contract.

(9) How hard it was to manage subcontractors, including picking them, placing contracts with them, managing them, and working out settlements when their contracts were terminated.

(c) For construction contracts, the contracting officer must-

(1) Follow paragraphs (a) and (b) of this section;

(2) Allow profit on settlements with construction subcontractors for actual work done at the job site; and

(3) Exclude profit on settlements with construction subcontractors for materials they had on hand or preparations made to complete the work.

49.203 Adjustment for loss.

(a) When settling a terminated contract, the TCO must not allow profit if the contractor would have lost money completing the full contract. The TCO must—

(1) Figure out how much the contractor would have lost;

(2) Adjust the settlement payment accordingly using the methods in paragraph (b) or (c) of this section; and

(3) Consider factors like production efficiency when estimating completion costs.

(b) For inventory-based settlements payment is limited to the sum of items in paragraphs (b)(1), (2), and (3) of this section, minus all disposal credits and minus all unliquidated previous advance and progress payments previously made—

(1) The settlement expenses.

(2) The contract price for acceptable completed items.

(3) The remainder of the settlement amount otherwise agreed upon or determined (including the allocable portion of initial costs (see part 31), reduced by multiplying the remainder by the ratio of (i) the total contract price to (ii) the total cost incurred before termination plus the estimated cost to complete the entire contract.

(c) If the settlement is on a total cost basis (see 49.206-2(b)), the contractor must not be paid more than the total of the amounts in paragraphs (c)(1) and (2) of this section, minus all disposal and other credits, all advanced and progress payments, and all other amounts previously paid under the contract—

(1) The amount negotiated or determined for settlement expenses.

(2) The remainder of the total settlement amount otherwise agreed upon or determined (lines 7 and 14 of SF 1436, Settlement Proposal (Total Cost Basis)) reduced by multiplying the remainder by the ratio of (i) the total contract price to (ii) the remainder plus the estimated cost to complete the entire contract.

49.204 Deductions.

From the settlement payment, the TCO must subtract—

(a) The price of any inventory kept or purchased by the contractor, plus proceeds from materials sold but not yet paid or credited to the Government;

(b) The fair value, as determined by the TCO, of any inventory that was lost, damaged beyond usability, or not delivered to the Government (normal spoilage is expected, as is inventory for which the Government has expressly assumed the risk of loss);

(c) Any other appropriate amounts for that specific case.

49.205 Completed end items.

(a) Right after the termination date, the TCO must-

(1) Have all undelivered finished products inspected and accepted if they meet contract requirements; and

(2) Decide which accepted products should be delivered under the contract.

(b) The contractor must bill for accepted and delivered products at the contract price in the normal way. Do not include these in the settlement proposal.

(c) When finished products are accepted but will not be delivered under the contract, the TCO should include them in the settlement proposal at the contract price. The TCO should adjust for any savings in shipping or other costs, and include any credits for buying, keeping, or selling them.

(d) Work in place accepted by the Government under a construction contract is not considered a completed item, even if the Government paid for it at unit prices specified in the contract.

49.206 Settlement proposals.

49.206-1 Submission of settlement proposals.

(a) Subject to the termination clause, the contractor should quickly submit a settlement proposal to the TCO for the amount claimed because of the termination. The final settlement proposal must be submitted within one year from the termination date, unless the TCO allows more time. If a single contract involves two or more divisions of the contractor, they can combine their termination costs in a single settlement proposal.

(b) The settlement proposal must cover all cost elements including settlements with subcontractors and any proposed profit. With the TCO's agreement, proposals may be filed in steps covering separate parts of costs. These step-by-step proposals must include all costs of a particular type, unless the TCO says otherwise.

(c) Settlement proposals must be on the forms prescribed in 49.602 unless those forms do not work for a particular contract. Settlement proposals must have reasonable detail supported by adequate accounting data. Actual costs, standard costs (properly adjusted), or average costs may be used if the contractor determines them based on generally accepted accounting principles consistently followed by the contractor. When actual, standard, or average costs are not reasonably available, estimated costs may be used if the TCO approves the estimation method. Contractors do not have to maintain overly complicated cost accounting systems just because their contracts might be terminated.

(d) The contractor should use Settlement Proposal (Short Form), SF 1438, when the total proposal is less than $10,000, unless the TCO authorizes otherwise. Combine settlement proposals that would normally go together whenever possible, such as those based on a series of separate orders for the same item under one contract. Do not split them up just to bring them below $10,000.

(e) Submit Schedule of Accounting Information, SF 1439, for each termination requiring a settlement proposal, except when using Standard Form 1438. Even if several step-by-step proposals are submitted, only one SF 1439 should be submitted unless major changes happen in the information after the original form is filed.

49.206-2 Bases for settlement proposals.

(a) *Inventory basis*.

(1) The inventory basis is the preferred method for settlement proposals. With this approach, the contractor may propose only costs allocable to the terminated portion of the contract. The settlement proposal must separately list—

(i) Metals, raw materials, purchased parts, work in process, finished parts, components, dies, jigs, fixtures, and tooling, at purchase or manufacturing cost;

(ii) Charges such as engineering costs, initial costs, and general administrative costs;

(iii) Costs of settlements with subcontractors;

(iv) Settlement expenses; and

(v) Other proper charges.

(2) An allowance for profit (49.202) or adjustment for loss (49.203(b)) must be added to complete the gross settlement proposal. All unliquidated advance and progress payments and all disposal and other known credits must then be subtracted.

(3) The inventory basis is also appropriate for—

(i) The partial termination of a construction or related professional services contract.

(ii) The partial or complete termination of supply orders under any terminated construction contract.

(iii) Complete termination of a unit-price professional services contract (not lump-sum contracts).

(b) *Total cost basis*.

(1) When the inventory basis is not practical or would cause delays, the total-cost basis (SF 1436) may be used if the TCO approves it in advance. Examples include the following:

(i) When production has not started and costs represent planning, preproduction, or "get ready" expenses.

(ii) When the contractor's accounting system cannot easily establish unit costs for work in process and finished products.

(iii) When the contract does not specify unit prices.

(iv) When the termination is complete and involves a letter contract.

(2) For a complete termination using the total-cost basis, the contractor must itemize costs incurred under the contract up to the effective date of termination. The costs of settlements with subcontractors and applicable settlement expenses must also be added. An allowance for profit or adjustment for loss must be made. The contract price for all end items delivered or to be delivered and accepted must be deducted. All unliquidated advance and progress payments and known disposal and other credits must also be deducted.

(3) For a partial termination using the total-cost basis, the contractor must wait until completing the continued portion of the contract before submitting the proposal. The proposal must follow paragraph (b)(2) instructions, except it must include all costs incurred up to the completion of the continued portion.

(4) For a completely terminated construction contract or lump-sum professional services contract, the contractor must —

(i) Use the total cost basis of settlement;

(ii) Omit Line 10 "Deduct-Finished Product Invoiced or to be Invoiced" from Section II of SF 1436 Settlement Proposal (Total Cost Basis); and

(iii) Reduce the gross settlement amount by the total of all progress and other payments.

(c) *Other basis.* Settlement proposals cannot be submitted on any basis other than paragraph (a) or (b) of this section without prior approval from the chief of the contracting or contract administration office.

49.206-3 Submission of inventory disposal schedules.

Subject to the termination clause terms, the contractor should prepare inventory schedules on Standard Form 1428, Inventory Disposal Schedule, listing inventory which is allocable to the terminated portion of the contract. The schedules must be submitted within 120 days of the effective date of termination unless extended by the TCO.

49.207 Limitation on settlements.

The total amount payable to the contractor for a settlement, before subtracting disposal or other credits and not counting settlement costs, must not be more than the contract price minus payments already made or to be made under the contract.

49.208 Equitable adjustment after partial termination.

Under the termination clause, after partial termination, a contractor can request an equitable adjustment in the price of the continued part of a fixed-price contract. The TCO must forward the proposal to the contracting officer except when the TCO has authority to negotiate. The contractor must submit the proposal using the format in the Uniform Contract Format shown in part 15.

(a) When the contracting officer keeps responsibility for negotiating the equitable adjustment and making a supplemental agreement, the contracting officer must make sure no part of a price increase is included in a termination settlement made or in process.

(b) The TCO must also make sure no part of the costs included in the equitable adjustment are included in the termination settlement.

Subpart 49.3 - Additional Principles for Cost-Reimbursement Contracts Terminated for Convenience

49.301 General.

Cost-reimbursement contract termination clauses cover both cost and fee settlements. The contract explains which costs are allowed.

49.302 Discontinuance of vouchers.

(a) After complete contract termination, the contractor shall stop using Standard Form 1034 (Public Voucher) after the last day of the sixth month following the month of the termination. The contractor may elect to stop using any time during the 6-month period. When the contractor has vouchered out all costs within the 6-month period, a proposal for fee, if any, may be submitted on SF 1437 or by certified letter. The contractor must submit fee proposals to the Termination Contracting Officer (TCO) within 1 year of termination, unless the deadline is extended by the TCO. When use of vouchers is discontinued, the contractor must submit all unvouchered costs and the proposed fee, if any, as specified in 49.303.

(b) For partial terminations, see section 49.304.

49.303 Procedure after discontinuing vouchers.

49.303-1 Submission of settlement proposal.

Unless extended by the TCO, within 1 year of termination the contractor must submit a final proposal for unvouchered costs and any fee, using the form in 49.602-1 unless the TCO approves another format. The proposal must not include—

(a) Any costs already disallowed by the Government; or

(b) Previously questioned costs still under review.

49.303-2 Submission of inventory disposal schedules.

For termination inventory, contractors must submit complete inventory disposal schedules to the TCO, only reflecting items allocable to the terminated portion. These schedules must be submitted within 120 days of termination and be prepared on Standard Form 1428. TCO approval in writing is required for any time extensions.

49.303-3 Audit of settlement proposal.

The TCO must submit the settlement proposal for audit review unless it only adjusts the fee.

49.303-4 Adjustment of indirect costs.

(a) To avoid delays when the contract has the 52.216-7 clause (Allowable Cost and Payment), the TCO may—

(1) Negotiate indirect costs when final rates have not been negotiated;

(2) Use reasonable billing rates as final rates; or

(3) Save the indirect cost adjustment for the final settlement agreement when rates are established.

(b) When negotiating indirect costs the contractor must remove these costs and related direct costs from calculations for other contracts during the same accounting period.

49.303-5 Final settlement.

(a) The TCO finalizes the settlement after receiving the audit report (if needed), and the contract audit closing statement for costs vouchered.

(b) Fee adjustments follow 49.305.

(c) The final agreement may resolve all issues between both parties. However—

(1) Costs disallowed by the Government are not allowable; and

(2) Costs of the same nature as those disallowed are not allowable.

(d) Parties can agree on total costs without agreeing on each individual item. Differences can be compromised, and uncertain issues can be resolved by agreement. However, an overall settlement must not include costs that are unallowable under the terms of the contract.

49.304 Procedure for partial termination.

49.304-1 General.

(a) For partial terminations, the TCO must limit settlement to fee adjustment and reduced estimated cost. The TCO must adjust fee as provided in 49.304-2 and 49.305, unless—

(1) The terminated portion is clearly severable from the balance of the contract; and

(2) Performance of the contract is virtually complete, or when the remaining work involves only minor items, spare parts, or is not substantial.

(b) For these exceptions, follow 49.302 and 49.303.

49.304-2 Submission of settlement proposal (fee only).

For fee-only proposals the contractor must limit the settlement proposal to a proposed reduction in fee. The final settlement proposal must be submitted to the TCO within one year of termination, using the form prescribed in 49.602-1 or a certified letter. It must include proof supporting the fee amount.

49.304-3 Submission of vouchers.

When only adjusting the fee in partial terminations the contractor must continue to submit the SF 1034, Public Voucher for Purchases and Services Other than Personal, for reimbursable costs. The Government must not reimburse the contractor for costs of settlements with subcontractors without required approvals or ratifications.

49.305 Adjustment of fee.

49.305-1 General.

(a) (1) The TCO must determine the final fee based on contract terms, typically using percentage of completion.

(2) Important factors include-

(i) The extent and difficulty of the work performed by the contractor; and

(ii) Work performed in—

(A) Stopping performance;

(B) Settling terminated subcontracts; and

(C) Disposing of inventory.

(3) These costs must be compared with the total work required by the contract or the terminated portion.

(4) The contractor's adjusted fee must not include an allowance for fee in subcontractor effort included in subcontractor settlement proposals.

(b) Completion percentage is not only based on costs incurred ratio. The percentage might be higher or lower than the ratio of costs incurred, depending on the TCO's evaluation of other important factors.

49.305-2 Construction contracts.

(a) The percentage of completion basis includes all contractor effort, not just the actual construction work. It includes such factors as—

(1) Mobilization including organization;

(2) Use of finances;

(3) Ordering and receiving materials;

(4) Placing subcontracts;

(5) Creating shop drawings;

(6) Performing work in place by own personnel;

(7) Supervising subcontractors;

(8) Managing the job; and

(9) Closing down the project;

(b) Calculate the fee adjustment as follows:

(1) Assign a weighted value to each factor based on importance and difficulty.

(2) The total weighted value should be easily divisible (e.g., by 100) to determine percentages.

(3) Determine the percentage complete of each factor based on specific facts of each contract.

(4) Multiply the completion percentage by the importance value for each factor.

(5) Add these values for overall completion percentage.

(6) Apply this percentage to the total fee applicable to the terminated portion of the contract to calculate the equitable adjustment.

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Subpart 49.4 - Termination for Default

49.401 General.

(a) In a termination for default, the Government exercises its right to terminate a contract because the contractor failed or is expected to fail to perform its contractual obligations.

(b) If the contractor establishes, or it is otherwise determined that, the contractor was not in default, or the failure to perform was excusable (i.e., beyond the contractor's control and without fault or negligence), then the default clauses prescribed at 49.503 provide that the termination will be treated as a termination for convenience. The parties' rights and obligations will be governed accordingly.

(c) The Government may exercise termination or cancellation rights beyond those in the contract clauses (for example, paragraph (h) of the Default clause at 52.249-8).

(d) For default terminations of Federal Supply Schedule orders, see GSA procedures for those contracts.

(e) Despite the provisions of this section, the contracting officer may reinstate a terminated contract by amending the termination notice if-

(1) The contractor provides written consent;

(2) The contracting officer makes a written determination that the supplies or services are still needed; and

(3) Reinstatement benefits the Government.

49.402 Termination of fixed-price contracts for default.

49.402-1 The Government’s right.

Under contracts with the Default clause at 52.249-8, the Government has the right, subject to the notice requirements of the clause, to terminate the contract completely or partially for default if the contractor fails to-

(a) Deliver supplies or perform services within the time specified in the contract;

(b) Perform any other provision of the contract; or

(c) Make progress, and that failure puts contract performance at risk.

49.402-2 Effect of termination for default.

(a) Under a default termination, the Government-

(1) Is not responsible for the contractor's costs on undelivered work;

(2) Is entitled to repayment of advance and progress payments for that work; and

(3) May require the contractor to transfer title and deliver completed supplies and manufacturing materials.

(b) The contracting officer must not use the Default clause to acquire completed supplies or manufacturing materials unless the Government does not already have title under other contract provisions. The contracting officer should only acquire manufacturing materials for another contractor after considering any difficulties the other contractor might have using them.

(c) Subject to paragraph (d), the Government must pay the contractor the contract price for any completed supplies and the agreed amount for manufacturing materials acquired by the Government under the Default clause.

(d) To protect against overpayment when laborers and material suppliers might have liens against the completed supplies or materials, the contracting officer must take one or more of these measures before payment:

(1) Verify that payment bonds from the contractor adequately cover all claims or obtain similar bonds to cover outstanding liens.

(2) Require the contractor to provide statements from laborers and material suppliers giving up any lien rights they may have.

(3) Create an agreement among all parties that releases the Government from potential liability.

(4) Withhold appropriate amounts from payments when the above measures are inadequate.

(5) Take other suitable actions based on the situation and the contractor's financial condition.

(e) The contractor is responsible for any excess costs the Government incurs buying similar supplies and services, and for any other damages, whether or not the Government buys replacement items.

49.402-3 Procedure for default.

(a) Before deciding on default termination, the Government must review the situation (i.e., default, convenience, or no-cost cancellation) with contracting and technical personnel, as well as legal counsel, to ensure the action is appropriate.

(b) The administrative contracting officer must get prior approval from the contracting office before issuing a show cause notice or cure notice. This approval should be obtained quickly.

(c) When the contractor fails to deliver supplies or perform services within the specified time (Default clause paragraph (a)(1)), no advance notice of termination is required. However, if the Government has taken actions that might suggest it waived the contract deadlines, the contracting officer must send a notice setting a new deadline. This notice must state that the Government reserves its rights under the Default clause.

(d) For failures covered under Default clause paragraph (a)(1) - such as not providing a required performance bond or endangering contract performance - the contracting officer must-

(1) Give the contractor written notice specifying the failure;

(2) Allow 10 days (or longer if necessary) to cure the failure;

(3) When appropriate, include this notice in the show cause notice; and

(4) After the time period expires, decide whether to terminate the contract or accept the resolution.

(e) A sample cure notice format appears in 49.607.

(f) Show cause notice procedures are as follows:

(1) If default termination seems appropriate, the contracting officer should, when practical, notify the contractor in writing about-

(i) The possible termination;

(ii) The contractual liabilities involved;

(iii) Why the contract might be terminated;

(iv) The opportunity to explain why termination should not occur;

(v) That a lack of response may be taken as an admission by the contractor that no valid explanation exists; and

(vi) When appropriate, a suggested discussion.

(2) A sample show cause notice appears in 49.607.

(g) (1) When default termination is likely, the contracting officer must notify the surety in writing. If the contractor is later terminated for default, the contracting officer must send the surety a copy of the default notice.

(2) If the surety requests it and the contractor and any assignees agree, arrangements can be made to send checks to the contractor through the surety. The contractor must submit a written request to the disbursing officer specifically directing this change in payment address.

(h) For small business contractors-

(1) The contracting officer must immediately send copies of any cure notice or show cause notice to the contracting office's small business specialist and Small Business Administration Area Office nearest the contractor;

(2) When possible, the contracting officer should consult with the small business specialist before proceeding with default termination.

(i) The contracting officer must consider these factors when deciding whether to terminate a contract for default:

(1) The contract terms and relevant laws and regulations.

(2) The specific failure and any explanations provided.

(3) Whether the supplies or services can be obtained from other sources.

(4) How urgently the items are needed and how long it would take to get them from other sources compared to the original contractor.

(5) How essential the contractor is to Government acquisition programs and how termination might affect their ability to supply other contracts.

(6) How termination might affect the contractor's ability to repay guaranteed loans, progress payments, or advance payments.

(7) Any other relevant facts and circumstances.

(j) After following procedures in paragraphs (a) through (i), if the contracting officer decides termination is proper, the contracting officer must issue a notice of termination stating-

(1) The contract number and date;

(2) What specific actions or failures constitute the default;

(3) That the contractor's right to proceed with the contract (or a specified portion) is terminated;

(4) That the Government may purchase similar supplies or services and charge any excess costs to the contractor;

(5) If the failure is determined not excusable, that the notice serves as this decision, and the contractor may appeal under the Disputes clause;

(6) That the Government reserves all other legal rights and remedies; and

(7) That this notice is a decision that the contractor is in default and has the right to appeal under the Disputes clause.

(k) The contracting officer must-

(1) Distribute the termination notice to all parties who received the original contract;

(2) Send a copy to the contractor's surety and ask if they want to arrange for completion of the work; and

(3) Tell the disbursing officer to stop payments under the terminated contract until further notice.

(l) For construction contracts, promptly after issuing the termination notice, the contracting officer must determine-

(1) How the work will be completed; and

(2) Whether materials, equipment, and plant that are on the site will be needed.

(m) If the contracting officer determines before issuing the termination notice that the failure was excusable, they must not terminate for default. If termination is still in the Government's interest, they may terminate for convenience.

(n) If the contracting officer cannot determine before issuing the notice whether the failure was excusable, they must-

(1) Make a written decision on this issue as soon as possible after issuing the notice;

(2) Deliver the decision promptly to the contractor; and

(3) Notify the contractor of their right to appeal under the Disputes clause.

49.402-4 Procedure in lieu of termination for default.

Instead of terminating for default, the contracting officer may take these alternative actions when they serve the Government's interests:

(a) Allow the contractor, surety, or guarantor to continue performance under a revised delivery schedule.

(b) Permit the contractor to continue performance through a subcontract or other business arrangement with an acceptable third party, as long as the Government's rights are adequately protected.

(c) Execute a no-cost termination settlement agreement using the formats in 49.603-6 and 49.603-7 when-

(1) The supplies or services are no longer needed; and

(2) The contractor is not liable for damages under 49.402-7.

49.402-5 Memorandum by the contracting officer.

When a contract is terminated for default or when an alternative procedure from 49.402-4 is used, the contracting officer must prepare a memorandum for the contract file explaining the reasons for the action.

49.402-6 Repurchase against contractor’s account.

(a) Generally, the contracting officer decides whether to repurchase before issuing the termination notice when supplies or services are still needed after termination. Guidelines for repurchasing are as follows:

(1) The contracting officer must repurchase similar items against the contractor's account as soon as practical.

(2) The price must be reasonable considering quality and delivery requirements.

(3) The contracting officer may buy more than the undelivered quantity if needed.

(4) Extra cost can only be charged to the contractor for the undelivered quantity (including permitted variations).

(b) For repurchases limited to the undelivered quantity-

(1) The Default clause allows the contracting officer to use any terms and acquisition method;

(2) The contracting officer must maximize competition;

(3) The Default clause serves as the authority; and

(4) For quantities exceeding the undelivered amount, treat the entire purchase as a new acquisition.

(c) If the repurchase costs more than the terminated supplies or services, after completing the repurchase contract, the contracting officer must demand payment from the contractor for the excess amount. This calculation should account for changes in transportation costs, discounts, etc. If the contractor does not pay, follow the procedures in part 32 for collecting contract debts.

49.402-7 Other damages.

(a) If the contract is terminated for default or an alternative action is taken (see 49.402-4), the contracting officer must assess and demand any liquidated damages the Government is entitled to under the contract. Under the clause at 52.211-11, these damages are in addition to any excess repurchase costs.

(b) If the Government has suffered other measurable damages, including administrative costs, the contracting officer must, based on legal advice, take appropriate action as outlined in part 32 to assert the Government's demand for these damages.

49.402-8 Reporting information.

The contracting officer must follow agency procedures to report information about the termination for default notice, any withdrawal of the termination, and any conversion to a termination for convenience. This report must comply with requirements in 42.1503(h).

49.403 Termination of cost-reimbursement contracts for default.

(a) The right to terminate a cost-reimbursement contract for default comes from the Termination for Default or for Convenience of the Government clause at 52.249-6. The clause requires giving the contractor 10 days' notice before termination.

(b) Settling a cost-reimbursement contract terminated for default follows the same principles as termination for convenience (subparts 49.1 and 49.3), except-

(1) The costs of preparing the contractor's settlement proposal are not allowable (see paragraph (h)(3) of the clause); and

(2) The contractor receives reimbursement for allowable costs, with an appropriate reduction in the total fee (see paragraph (h)(4) of the clause).

(c) The contracting officer must use the procedures in 49.402 when appropriate for cost-reimbursement contracts. However, these contracts do not include provisions for recovering excess repurchase costs after termination (but see paragraph (g) of clause 52.246-3 regarding the contractor's failure to replace or correct defective supplies).

49.404 Surety-takeover agreements.

(a) These procedures apply mainly, but not exclusively, to fixed-price construction contracts terminated for default.

(b) Since the surety must pay for damages resulting from the contractor's default, the surety has certain rights in completing the contract and using undisbursed funds. The contracting officer must carefully consider the surety's proposals, evaluating how they might affect the Government's rights against the surety.

(c) The contracting officer should allow sureties to complete the contract unless-

(1) The people or companies proposed by the surety are not qualified or competent; or

(2) The proposal does not serve the Government's best interests.

(d) Multiple parties may claim the defaulting contractor's assets, including unpaid earnings. The surety may include a "takeover" agreement in its proposal to establish its rights to payment. The contracting officer may enter into a written agreement with the surety (but not before the termination date). Consider using a three-way agreement among the Government, surety, and defaulting contractor to resolve remaining rights, including claims to unpaid earnings.

(e) Any takeover agreement must require the surety to complete the contract and the Government to pay the surety's costs up to the unpaid contract price, subject to these conditions:

(1) Any unpaid earnings of the defaulting contractor may be used to pay Government claims against the contractor, except when those earnings are needed to pay the surety's actual completion costs and expenses (not including bond payments).

(2) The surety must meet contract requirements for liquidated damages for delays unless the delays qualify as excusable under the contract.

(3) If contract proceeds were assigned to a financing institution, the surety cannot receive payment from unpaid earnings without the assignee's written permission.

(4) The Government must not pay the surety more than it spent completing the work and meeting its payment bond obligations. Payments to the surety for its payment bond obligations require—

(i) Agreement among the Government, defaulting contractor, and surety;

(ii) A determination by the Comptroller General about who gets paid and how much; or

(iii) A court order from a court of competent jurisdiction.

49.405 Liquidation of liability.

The contract makes the contractor and surety liable for resulting damages. The contracting officer must use all retained percentages of progress payments and any progress payments due for completed work to offset the contractor's and surety's liability. If these amounts are not enough, the contracting officer must take steps to recover the additional amount from the contractor and surety.

Subpart 49.5 - Contract Termination Clauses

49.501 General.

This subpart describes which contract termination clauses to use. This subpart does not apply to contracts that use the clause at 52.213-4, Terms and Conditions-Simplified Acquisitions (Other Than Commercial Products and Commercial Services). In appropriate cases, agencies may authorize the use of special purpose clauses, if consistent with this chapter.

49.502 Termination for convenience of the Government.

(a) *Fixed-price contracts that do not exceed the simplified acquisition threshold (short form)*-

(1) *General use*. Insert the clause at 52.249-1, Termination for Convenience of the Government (Fixed-Price) (Short Form), in solicitations and contracts when using a fixed-price contract and the contract amount is not expected to exceed the simplified acquisition threshold, except if-

(i) The clause at 52.249-4, Termination for Convenience of the Government (Services) (Short Form) is more appropriate;

(ii) The contract is for research and development work with an educational or nonprofit institution on a no-profit basis;

(iii) The contract is for architect-engineer services; or

(iv) One of the clauses prescribed or cited at 49.505(a) or (c) is more appropriate.

(2) *Dismantling and demolition.* If the contract is for dismantling, demolition, or removal of improvements, use the clause with its Alternate I.

(b) *Fixed-price contracts that exceed the simplified acquisition threshold*-

(1) (i) *General use.* Insert the clause at 52.249-2, Termination for Convenience of the Government (Fixed-Price), when a fixed-price contract is contemplated and the contract amount is expected to exceed the simplified acquisition threshold.

(ii) *Exceptions*. Do not use this clause for contracts for the following:

(A) Dismantling and demolition.

(B) Research and development work with an educational or nonprofit institution on a no-profit basis.

(C) Architect-engineer services.

(D) If the clause at 52.249-4, Termination for Convenience of the Government (Services) (Short Form), is more appropriate (see 49.502(c)), or if one of the clauses prescribed or cited at 49.505(a) or (c) is appropriate.

(2) *Construction.* If the contract is for construction, use the clause with its Alternate I.

(i) *Partial payments.* If the contract is with an agency of the Government or with State, local or foreign governments or their agencies, and the contracting officer determines that requiring interest payments on excess partial payments is inappropriate, use the clause with its Alternate II. For construction contracts with these same organizations, use the clause with its Alternate III.

(ii) *Dismantling and demolition.* Insert the clause at 52.249-3, Termination for Convenience of the Government (Dismantling, Demolition, or Removal of Improvements) in solicitations and contracts for dismantling, demolition, or removal of improvements, when a fixed-price contract is contemplated and the contract amount is expected to exceed the simplified acquisition threshold. If the contract is with an agency of the Government or with State, local, or foreign governments or their agencies, and if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate, use the clause with its Alternate I.

(c) *Service contracts (short form).*

(1) Insert the clause at 52.249-4, Termination for Convenience of the Government (Services) (Short Form), in solicitations and contracts for services when all of these conditions are met:

(i) A fixed-price contract is contemplated (regardless of dollar value).

(ii) The contracting officer determines that because of the kind of services required, the successful offeror will not incur substantial charges in preparation for and in carrying out the contract.

(iii) If terminated for the Government's convenience, the contractor would limit termination settlement charges to services rendered before the termination date.

(2) This clause may be appropriate in contracts for services such as rental of unreserved parking space, or laundry and dry cleaning.

(d) *Research and development contracts.* Insert the clause at 52.249-5, Termination for the Convenience of the Government (Educational and Other Nonprofit Institutions), in solicitations and contracts when either a fixed-price or cost-

reimbursement contract is contemplated, and the contract is for research and development work with an educational or nonprofit institution on a nonprofit or no-fee basis.

(e) Subcontracts- (1) *General use.* The prime contractor may find these clauses suitable for use in fixed-price subcontracts (except as noted in paragraph (e)(2) below): 52.249-1, Termination for Convenience of the Government (Fixed-Price) (Short Form), or 52.249-2, Termination for Convenience of the Government (Fixed-Price), as appropriate, provided the relationship between the contractor and subcontractor is clearly indicated. Delete conditions that do not apply (for example, paragraph (d) in 52.249-2.) Reduce the time periods for submitting the subcontractor's termination settlement proposal (for example, to 6 months) and the time for requesting an equitable price adjustment (for example, to 45 days.)

(2) *Research and development.* The prime contractor may find the clause at 52.249-5, Termination for the Convenience of the Government (Educational and Other Nonprofit Institutions), suitable for use in subcontracts placed with educational or nonprofit institutions on a no-profit or no-fee basis; provided, that the relationship between the contractor and subcontractor is clearly indicated. Conditions that do not apply (e.g., paragraph (h)) should be deleted, the period for submitting the subcontractor's termination settlement proposal should be reduced (e.g.,6 months), the subcontract should be placed on a no-profit or no-fee basis, and the subcontract should incorporate or be negotiated on the basis of the cost principles in part 31.

49.503 Termination for convenience of the Government and default.

(a) *Cost-reimbursement contracts*- (1) *General use.* Insert the clause at 52.249-6, Termination (Cost-Reimbursement), in solicitations and contracts when a cost-reimbursement contract is contemplated, except in research and development contracts with educational or nonprofit institutions that have no fee.

(2) *Construction.* If the contract is for construction, insert the clause with its Alternate I.

(3) *Partial payments.* If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate, insert the clause with its Alternate II. In such contracts for construction, insert the clause with its Alternate III.

(4) *Time-and-material and labor-hour contracts.* If the contract is a time-and-material or labor-hour contract, insert the clause with its Alternate IV. If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate, insert the clause with its Alternate V.

(b) Insert the clause at 52.249-7, Termination (Fixed-Price Architect-Engineer), in solicitations and contracts for architect-engineer services when a fixed-price contract is contemplated.

(c) *Subcontracts.* The prime contractor may use and customize the clause at 52.249-6, Termination (Cost-Reimbursement), suitable for use in cost-reimbursement subcontracts, as long as the relationship between the contractor and subcontractor is clearly indicated. The contractor should delete conditions that do not apply (for example, paragraphs (e), (j), and (n)). Reduce the time period for the subcontractor to submit their termination settlement proposal (for example, to 6 months).

49.504 Termination of fixed-price contracts for default.

(a) (1) *Supplies and services.* Insert the clause at 52.249-8, Default (Fixed-Price Supply and Service), in solicitations and contracts when a fixed-price contract is contemplated, and the contract amount is expected to exceed the simplified acquisition threshold. The contracting officer may use the clause when the contract amount is at or below the simplified acquisition threshold, if appropriate (e.g., if the acquisition involves items with a history of unsatisfactory quality).

(2) *Transportation.* If the contract is for transportation or transportation-related services, insert the clause with its Alternate I.

(b) *Research and development.* Insert the clause at 52.249-9, Default (Fixed-Price Research and Development), in solicitations and contracts for research and development when a fixed-price contract is contemplated, and the contract amount is expected to exceed the simplified acquisition threshold, except for contracts with educational or nonprofit institutions on a no-profit basis. The contracting officer may use the clause when the contract amount is at or below the simplified acquisition threshold, if appropriate.

(c) (1) *Construction.* Insert the clause at 52.249-10, Default (Fixed-Price Construction), in solicitations and contracts for construction when a fixed price contract is contemplated, and the amount is expected to exceed the simplified acquisition threshold. The contracting officer may use the clause when the contract amount is at or below the simplified acquisition threshold, if appropriate (e.g., if completion dates are essential.)

(2) *Dismantling and demolition.* If the contract is for dismantling, demolition, or removal of improvements, insert the clause with its Alternate I.

(3) *National emergencies.* If the contract is to be awarded during a period of national emergency, the contracting officer may use the clause-

(i) With its Alternate II when a fixed-price contract for construction is contemplated; or

(ii) With its Alternate III when a contract for dismantling, demolition, or removal of improvements is contemplated.

49.505 Other termination clauses.

(a) *Personal service contracts.* Insert clause 52.249-12, Termination (Personal Services), in solicitations and contracts for personal services (see part 37).

(b) *Excusable delays.* Insert clause 52.249-14, Excusable Delays, in—

(1) Solicitations and contracts for supplies, services, construction, and research and development on a fee basis when a cost-reimbursement contract is contemplated; and

(2) Time-and-material and labor-hour contracts.

(c) *Communication service contracts.* Agencies must prescribe and insert agency-specific clauses for canceling or terminating orders under communication service contracts with common carriers.

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Subpart 49.6 - Contract Termination Forms and Formats

49.601 Notice of termination for convenience.

(See 49.402-3(g) for notice of termination for default.)

49.601-1 Electronic notice.

The contracting officer may provide expedited notice of termination by electronic means that includes a requirement for the contractor to confirm receipt. If the contractor does not confirm receipt promptly, the contracting officer must resend the notice electronically and expedite the letter notice described in 49.601-2. If the contractor confirms receipt of the electronic notice, and the notice contains all information required in 49.601-2, the contracting officer does not need to send the letter notice.

(a) *Complete termination:* Use the following electronic notice when completely terminating a supply contract for convenience. This notice may be modified for other than supply contracts.

Date _____

XYZ Corporation New York, NY 12345

Contract No. _____ is completely terminated under clause _____, effective _____ [*insert* "immediately, (*today's date*)" or "on _____, 20_____," or "as soon as you have delivered, including prior deliveries, the following items:" *(list)*]. Immediately stop all work, terminate subcontracts, and place no further orders except to the extent [*insert if applicable* "necessary to complete items not terminated or"] that you or a subcontractor wish to retain and continue for your own account any work-in-process or other materials. Provide by electronic means similar instructions to all subcontractors and suppliers. Detailed instructions follow.

_____

(Contracting Officer)

(b) *Partial termination:*The following electronic notice is suggested for use if a supply contract is being partially terminated for convenience. If appropriately modified, the notice may be used for other than supply contracts.

Date _____

XYZ Corporation New York, NY 12345

Contract No._____ is partially terminated under clause _____, effective _____ [*insert* "immediately, (*today's date*)" or "on _____, 20____"]. Reduce items to be delivered as follows: [*insert instructions*]. Immediately stop all work, terminate subcontracts, and place no further orders except as necessary to perform the portion not terminated or that you or a subcontractor wish to retain and continue for your account any work-in-process or other materials. Provide by electronic means similar instructions to all subcontractors and suppliers. Detailed instructions follow.

_____

(Contracting Officer)

49.601-2 Letter notice.

The following letter notice of termination is suggested for use if a contract for supplies is being terminated for convenience. With appropriate modifications, it may be used in terminating contracts for other than supplies and in terminating subcontracts. This notice shall be sent by certified mail, return receipt requested, or electronically, provided evidence of receipt is received by the contracting officer. If no prior electronic notice was issued, or if no confirmation of an electronic notice was received, use the alternate notice that follows this notice.

NOTICE OF TERMINATION TO PRIME CONTRACTORS

[*At the top of the notice, set out all special details relating to the particular termination; e.g.,name and address of company, contract number of terminated contract, line items, etc.]*

(a) *Effective date of termination.* This confirms the Government's electronic notice to you dated _____, 20_____, terminating _____ [*insert* "completely" *or* "in part"] Contract No._____ (referred to as "the

contract") for the Government's convenience under the clause entitled _____ [*insert title of appropriate termination clause*]. The termination is effective on the date and in the manner stated in the electronic notice.

(b) *Cessation of work and notification to immediate subcontractors.* You shall take the following steps:

(1) Stop all work, make no further shipments, and place no further orders relating to the contract, except for-

(i) The continued portion of the contract, if any;

(ii) Work-in-process or other materials that you may wish to retain for your own account; or

(iii) Work-in-process that the Contracting Officer authorizes you to continue (A) for safety precautions, (B) to clear or avoid damage to equipment, (C) to avoid immediate complete spoilage of work-in-process having a definite commercial value, or (D) to prevent any other undue loss to the Government. (If you believe this authorization is necessary or advisable, immediately notify the Contracting Officer by telephone or personal conference and obtain instructions.)

(2) Keep adequate records of your compliance with paragraph (b)(1) of this notice showing the-

(i) Date you received the Notice of Termination;

(ii) Effective date of the termination; and

(iii) Extent of completion of performance on the effective date.

(3) Furnish notice of termination to each immediate subcontractor and supplier that will be affected by this termination. In the notice-

(i) Specify your Government contract number;

(ii) State whether the contract has been terminated completely or partially;

(iii) Provide instructions to stop all work, make no further shipments, place no further orders, and terminate all subcontracts under the contract, subject to the exceptions in paragraph (b)(1) of this notice;

(iv) Provide instructions to submit any settlement proposal promptly; and

(v) Request that similar notices and instructions be given to its immediate subcontractors.

(4) Notify the Contracting Officer of all pending legal proceedings that are based on subcontracts or purchase orders under the contract, or in which a lien has been or may be placed against termination inventory to be reported to the Government. Also, promptly notify the Contracting Officer of any such proceedings that are filed after receipt of this Notice.

(5) Take any other action required by the Contracting Officer or under the Termination clause in the contract.

(c) *Termination inventory.*(1)As instructed by the Contracting Officer, transfer title and deliver to the Government all termination inventory of the following types or classes, including subcontractor termination inventory that you have the right to take: [*Contracting Officer insert proper identification or* "None"].

(2) To settle your proposal, it will be necessary to establish that all prime and subcontractor termination inventory has been properly accounted for. For detailed information, see part 45.

(d) *Settlements with subcontractors.* You remain liable to your subcontractors and suppliers for proposals arising because of the termination of their subcontracts or orders. You are requested to settle these settlement proposals as promptly as possible. For purposes of reimbursement by the Government, settlements will be governed by the provisions of part 49.

(e) *Completed end items.*(1) Notify the Contracting Officer of the number of items completed under the contract and still on hand and arrange for their delivery or other disposal (see 49.205).

(2) Invoice acceptable completed end items under the contract in the usual way and do not include them in the settlement proposal.

(f) *Patents.* If required by the contract, promptly forward the following to the Contracting Officer:

(1) Disclosure of all inventions, discoveries, and patent applications made in the performance of the contract.

(2) Instruments of license or assignment on all inventions, discoveries, and patent applications made in the performance of the contract.

(g) *Employees affected.*(1)If this termination, together with other outstanding terminations, will necessitate a significant reduction in your work force, you are urged to-

(i) Promptly inform the local State Employment Service of your reduction-in-force schedule in numbers and occupations, so that the Service can take timely action in assisting displaced workers;

(ii) Give affected employees maximum practical advance notice of the employment reduction and inform them of the facilities and services available to them through the local State Employment Service offices;

(iii) Advise affected employees to file applications with the State Employment Service to qualify for unemployment insurance, if necessary;

(iv) Inform officials of local unions having agreements with you of the impending reduction-in-force; and

(v) Inform the local Chamber of Commerce and other appropriate organizations which are prepared to offer practical assistance in finding employment for displaced workers of the impending reduction-in-force.

(2) If practicable, urge subcontractors to take similar actions to those described in paragraph (g)(1) of this notice.

(h) *Administrative.* The contract administration office named in the contract will identify the Contracting Officer who will be in charge of the settlement of this termination and who will, upon request, provide the necessary settlement forms. Matters not covered by this notice should be brought to the attention of the undersigned.

(i) Please acknowledge receipt of this notice as provided below.

_____ (Contracting Officer)
_____ (Name of Office)
_____ (Address)

ACKNOWLEDGMENT OF NOTICE

The undersigned acknowledges receipt of a signed copy of this notice on _____, 20____. Two signed copies of this notice are returned.

_____ (Name of Contractor)
By _____ (Name)
_____ (Title)

(End of notice)

Alternate notice. Substitute the following paragraph (a) for paragraph (a) of 49.601-2, Notice of Termination to Prime Contractors, if no prior electronic notice was issued, or if no confirmation of an electronic notice was received:

(a) *Effective date of termination*. You are notified that Contract No. _____ (referred to as "the contract") is terminated _____ [*insert* "completely" *or* "in part"] for the Government's convenience under the clause entitled _____[*insert title of appropriate termination clause*]. The termination is effective _____ [*insert either* "immediately upon receipt of this Notice" *or* "on _____, 20____," *or* "as soon as you have delivered, including prior deliveries, the following items:" (*list*)]. Reduce items to be delivered as follows: [*insert instructions*].

49.602 Forms for settlement of terminated contracts.

The standard forms listed below shall be used for settling terminated prime contracts. The forms at 49.602-1 and 49.602-2 may also be used for settling terminated subcontracts. A listing of the Standard forms is located in subpart 53.3.

49.602-1 Termination settlement proposal forms.

(a) Standard Form 1435, Settlement Proposal (Inventory Basis), shall be used to submit settlement proposals resulting from the termination of fixed-price contracts if the proposals are computed on an inventory basis (see 49.206-2(a)).

(b) Standard Form 1436, Settlement Proposal (Total Cost Basis), shall be used to submit settlement proposals resulting from the termination of fixed-price contracts if the proposals are computed on a total cost basis (see 49.206-2(b)).

(c) Standard Form 1437, Settlement Proposal for Cost- Reimbursement Type Contracts, shall be used to submit settlement proposals resulting from the termination of cost-reimbursement contracts (see 49.302).

(d) Standard Form 1438, Settlement Proposal (Short Form), shall be used to submit settlement proposals resulting from the termination of fixed-price contracts if the total proposal is less than $10,000 (see 49.206-1(d)).

49.602-2 Inventory forms.

Standard Form (SF) 1428, Inventory Disposal Schedule, and SF 1429, Inventory Disposal Schedule-Continuation Sheet, shall be used to support settlement proposals submitted on the forms specified in 49.602-1(b) and (d).

49.602-3 Schedule of accounting information.

Standard Form 1439, Schedule of Accounting Information, shall be filed in support of a settlement proposal unless the proposal is filed on Standard Form 1438, Settlement Proposal (Short Form) (see 49.206-1(e)).

49.602-4 Partial payments.

Standard Form 1440, Application for Partial Payment, shall be used to apply for partial payments (see 49.112).

49.602-5 Settlement agreement.

Standard Form30 (SF 30), Amendment of Solicitation/Modification of Contract, shall be used to execute a settlement agreement (see 49.109).

49.603 Formats for termination for convenience settlement agreements.

The formats to be used for termination for convenience settlement agreements should be substantially as shown in this section (see 49.109). Termination contracting officers (TCO's) may, however, modify the contents of these agreements to conform with special termination clauses prescribed or authorized by their agencies (e.g., see 49.501 and 49.505(c)).

49.603-1 Fixed price contracts-complete termination.

[*Insert the following in Block 14 of SF 30 for settlements of fixed-price contracts completely terminated.*]

(a) This supplemental agreement settles the settlement proposal resulting from the Notice of Termination dated _____.

(b) The parties agree to the following:

(1) The Contractor certifies that all contract termination inventory (including scrap) has been retained or acquired by the contractor, sold to third parties, returned to suppliers, delivered to or stored for the Government, or otherwise properly accounted for, and that all proceeds and retention credits have been used in arriving at this agreement.

(2) The Contractor certifies that each immediate subcontractor, whose settlement proposal is included in the proposal settled by this agreement, has furnished the contractor a certificate stating-

(i) That all subcontract termination inventory (including scrap) has been retained or acquired by the subcontractor, sold to third parties, returned to suppliers, delivered to or stored for the Government, or otherwise properly accounted for, and that all proceeds and retention credits were used in arriving at the settlement of the subcontract, and

(ii) That the subcontractor has received a similar certificate from each immediate subcontractor whose proposal was included in its proposal.

(3) The Contractor certifies that all items of termination inventory, the costs of which were used in arriving at the amount of this settlement or the settlement of any subcontract settlement proposal included in this settlement, (i) are properly allocable to the terminated portion of the contract, (ii) do not exceed the reasonable quantitative requirements of the terminated portion of the contract, and (iii) do not include any items reasonably usable without loss to the Contractor on its other work. The Contractor further certifies that the Contracting Officer has been informed of any substantial change in the status of the items between the dates of the termination inventory schedules and the date of this agreement.

(4) The Contractor transfers, conveys, and assigns to the Government all the right, title, and interest, if any, that the Contractor has received, or is entitled to receive, in and to subcontract termination inventory not otherwise properly accounted for.

(5) The Contractor shall, within 10 days after receipt of the payment specified in this agreement, pay to each of its immediate subcontractors (or their respective assignees) the amounts to which they are entitled, after deducting any prior payments and, if the Contractor so elects, any amounts due and payable to the Contractor by those subcontractors.

(6)(i) The Contractor has received $_____ for work and services performed, or items delivered, under the completed portion of the contract. The Government confirms the right of the Contractor, subject to paragraph (7) of this agreement, to retain this sum and agrees that it constitutes a portion of the total amount to which the Contractor is entitled in complete and final settlement of the contract.

(ii) Further, the Government agrees to pay to the Contractor or its assignee, upon presentation of a proper invoice or voucher, the sum of $_____ [*insert net amount of settlement*], arrived at by deducting from the sum of $_____ [*for proposals on an inventory basis insert gross amount of settlement; for proposals on a total cost basis, insert gross amount of settlement less amount shown in paragraph (b)(6)(i) of this agreement*]-

(A) The amount of $_____ for all unliquidated partial or progress payments previously made to the Contractor or its assignee and all unliquidated advance payments (with any interest),

(B) The amount of $_____ for all applicable property disposal credits [*insert if appropriate,* "and (C) the amount of $____ for all other amounts due the Government under this contract, except as provided in paragraph (7) of this agreement."]

(iii) The net settlement of $____ in paragraph (b)(6)(ii) of this agreement, together with sums previously paid, constitutes payment in full and complete settlement of the amount due the Contractor for the complete termination of the contract and all other demands and liabilities of the Contractor and the Government under the contract, except as provided in paragraph (b)(7) of this section.

(7) Regardless of any other provision of this agreement, the following rights and liabilities of the parties under the contract are reserved: [*The following list of reserved or excepted rights and liabilities is intended to cover those that should most frequently be reserved and that should be scrutinized at the time a settlement agreement is negotiated (see 49.109). The suggested language of the excepted items on the list may be varied at the discretion of the contracting officer. If accuracy or*

completeness can be achieved by referencing the number of a contract clause or provision covering the matter in question, then follow that method of enumerating reserved rights and liabilities. Omit any of the following that are not applicable and add any additional exceptions or reservations required.]

(i) All rights and liabilities, if any, of the parties, as to matters covered by any renegotiation authority.

(ii) All rights of the Government to take the benefit of agreements or judgments affecting royalties paid or payable in connection with the performance of the contract.

(iii) All rights and liabilities, if any, of the parties under those clauses inserted in the contract because of the requirements of Acts of Congress and Executive orders, including, without limitation, any applicable clauses relating to: labor law, contingent fees, domestic articles, and employment of aliens. [*If the contract contains clauses of this character inserted for reasons other than requirements of Acts of Congress or Executive orders, the suggested language should be appropriately modified*.]

(iv) All rights and liabilities of the parties arising under the contract and relating to reproduction rights, patent infringements, inventions, or applications for patents, including rights to assignments, invention reports, licenses, covenants of indemnity against patent risks, and bonds for patent indemnity obligations, together with all rights and liabilities under the bonds.

(v) All rights and liabilities of the parties, arising under the contract or otherwise, and concerning defects, guarantees, or warranties relating to any articles or component parts furnished to the Government by the Contractor under the contract or this agreement.

(vi) All rights and liabilities of the parties under the contract relating to any contract termination inventory stored for the Government.

(vii) All rights and liabilities of the parties under agreements relating to the future care and disposition by the Contractor of Government-owned property remaining in the Contractor's custody.

(viii) All rights and liabilities of the parties relating to Government property furnished to the Contractor for the performance of this contract.

(ix) All rights and liabilities of the parties under the contract relating to options (except options to continue or increase the work under the contract), covenants not to compete, and covenants of indemnity.

(x) All rights and liabilities, if any, of the parties under those clauses of the contract relating to price reductions for defective certified cost or pricing data.

(End of agreement)

49.603-2 Fixed-price contracts-partial termination.

[*Insert the following in Block 14 of SF 30 for settlements of fixed-price contracts partially terminated.*]

(a) This supplemental agreement settles the settlement proposal resulting from the Notice of Termination dated _____.

(b) The parties agree to the following:

(1) The terminated portion of the contract is as follows: [*specify the terminated portion clearly as to-*

(i) *Line item numbers,*

(ii) *Descriptions,*

(iii) *Quantity terminated,*

(iv) *Unit price of items,*

(v) *Total price of terminated items, and*

(vi) *Any other explanation necessary to avoid uncertainty or misunderstanding*].

(2) The Contractor certifies that all contract termination inventory (including scrap) has been retained or acquired by the Contractor, sold to third parties, returned to suppliers, delivered to or stored for the Government, or otherwise properly accounted for, and that all proceeds and retention credits have been used in arriving at this agreement.

(3) The Contractor certifies that each immediate subcontractor, whose settlement proposal is included in the proposal settled by this agreement, has furnished the Contractor a certificate stating-

(i) That all subcontract termination inventory (including scrap) has been retained or acquired by the subcontractor, sold to third parties, returned to suppliers, delivered to or stored for the Government, or otherwise properly accounted for, and that all proceeds and retention credits were used in arriving at the settlement of the subcontract; and

(ii) That the subcontractor has received a similar certificate from each immediate subcontractor whose proposal was included in its proposal.

(4) The Contractor certifies that all items of termination inventory, the costs of which were used in arriving at the amount of this settlement or the settlement of any subcontract settlement proposal included in this settlement, (i) are properly allocable to the terminated portion of the contract, (ii) do not exceed the reasonable quantitative requirements of the terminated portion of the contract, and (iii) do not include any items reasonably usable without loss to the Contractor on its other work. The Contractor further certifies that the Contracting Officer has been informed of any substantial change in the status of the items between the dates of the termination inventory schedules and the date of this agreement.

(5) The Contractor transfers, conveys, and assigns to the Government all the right, title, and interest, if any, that the Contractor has received, or is entitled to receive, in and to subcontract termination inventory not otherwise properly accounted for.

(6) The Contractor shall, within 10 days after receipt of the payment specified in this agreement, pay to each of its immediate subcontractors (or their respective assignees) the amounts to which they are entitled, after deducting any prior payments and, if the Contractor so elects, any amounts due and payable to the Contractor by those subcontractors.

(7)(i) The Government agrees to pay to the Contractor or its assignee, upon presentation of a proper invoice or voucher, the sum of $_____ [*insert net amount of settlement*], arrived at by deducting from $_____ [*insert gross amount of settlement*],

(A) the amount of $____ for all unliquidated partial or progress payments previously made to the Contractor or its assignee and all unliquidated advance payments (with any interest) applicable to the terminated portion of the contract and

(B) the amount of $_____ for all applicable property disposal credits.

(ii) The net settlement of $_____ in paragraph (b)(7)(i) of this agreement, together with sums previously paid, constitutes payment in full and complete settlement of the amount due the Contractor for the terminated portion of the contract, except as provided in paragraph (b)(8) of this agreement.

(iii) Upon payment of the net settlement of $_____, all obligations of the Contractor to perform further work or services or to make further deliveries under the terminated portion of the contract and all obligations of the Government to take further payments or carry out other undertakings concerning the terminated portion of the contract shall cease; provided, that nothing in this agreement shall impair or affect any covenants, terms, or conditions of the contract relating to the completed or continued portion of this contract.

(8) Regardless of any other provision of this agreement, the following rights and liabilities of the parties under the contract are reserved: [*The following list of reserved or excepted rights and liabilities is intended to cover those that should most frequently be reserved and that should be scrutinized at the time a settlement agreement is negotiated (see 49.109). The suggested language of the excepted items in the list may be varied at the discretion of the contracting officer. If accuracy or completeness can be achieved by referencing the number of a contract clause or provision covering the matter in question, then follow that method of enumerating reserved rights and liabilities. Omit any of the following that are not applicable and add any additional exceptions or reservations required*.]

(i) All rights and liabilities, if any, of the parties, as to matters covered by any renegotiation authority.

(ii) All rights of the Government to take the benefit of agreements or judgments affecting royalties paid or payable in connection with the performance of the contract.

(iii) All rights and liabilities, if any, of the parties under those clauses inserted in the contract because of the requirements of Acts of Congress and Executive orders, including, without limitation, any applicable clauses relating to: labor law, contingent fees, domestic articles, and employment of aliens. [*If the contract contains clauses of this character inserted for reasons other than requirements of Acts of Congress or Executive orders, the suggested language should be appropriately modified*.]

(iv) All rights and liabilities of the parties arising under the contract and relating to reproduction rights, patent infringements, inventions, or applications for patents, including rights to assignments, invention reports, licenses, covenants of indemnity against patent risks, and bonds for patent indemnity obligations, together with all rights and liabilities under the bonds.

(v) All rights and liabilities of the parties, arising under the contract or otherwise, and concerning defects, guarantees, or warranties relating to any articles or component parts furnished to the government by the Contractor under the contract or this agreement.

(vi) All rights and liabilities of the parties under the contract relating to any contract termination inventory stored for the Government.

(vii) All rights and liabilities, if any, of the parties under those clauses of the contract relating to price reductions for defective certified cost or pricing data.

(End of agreement)

49.603-3 Cost reimbursement contracts-complete termination, if settlement includes cost.

[*Insert the following in Block 14 of SF 30 for settlement of cost-reimbursement contracts that are completely terminated, if settlement includes costs.*]

(a) This supplemental agreement settles the settlement proposal resulting from the Notice of Termination dated _____.

(b) The parties agree to the following:

(1) The Contractor certifies that all contract termination inventory (including scrap) has been retained or acquired by the Contractor, sold to third parties, returned to suppliers, delivered to or stored for the Government, or otherwise properly accounted for, and that all proceeds and retention credits have been used in arriving at this agreement.

(2) The Contractor certifies that each immediate subcontractor, whose settlement proposal is included in the proposal settled by this agreement, has furnished the Contractor a certificate stating-

(i) That all subcontract termination inventory (including scrap) has been retained or acquired by the subcontractor, sold to third parties, returned to suppliers, delivered to or stored for the Government, or otherwise properly accounted for, and that all proceeds and retention credits were used in arriving at the settlement of the subcontract; and

(ii) That the subcontractor has received a similar certificate from each immediate subcontractor whose proposal was included in its proposal.

(3) The Contractor certifies that all items of termination inventory, the costs of which were used in arriving at the amount of this settlement or he settlement of any subcontract settlement proposal included in this settlement, (i) are properly allocable to the terminated portion of the contract, (ii) do not exceed the reasonable quantitative requirements of the terminated portion of the contract, and (iii) do not include any items reasonably usable without loss to the Contractor on its other work. The Contractor further certifies that the Contracting Officer has been informed of any substantial change in the status of the items between the dates of the termination inventory schedules and the date of this agreement.

(4) The Contractor transfers, conveys, and assigns to the Government all the right, title and interest, if any, that the Contractor has received, or is entitled to receive, in and to subcontract termination inventory not otherwise properly accounted for.

(5) The Contractor shall, within 10 days after receipt of the payment specified in this agreement, pay to each of its immediate subcontractors (or their respective assignees) the amounts to which they are entitled, after deducting any prior payments and, if the Contractor so elects, any amounts due and payable to the Contractor by those subcontractors.

(6)(i) The Contractor has received $_____ for work and services performed, or articles delivered, under the contract before the effective date of termination. The Government confirms the right of the Contractor, subject to paragraph (b)(7) of this agreement, to retain this sum and agrees that it constitutes a portion of the total amount to which the Contractor is entitled in complete and final settlement of the contract.

(ii) Further, the Government agrees to pay to the Contractor or its assignee, upon presentation of a proper invoice or voucher, the sum of $_____ [*insert net amount of settlement*], arrived at by deducting from the sum of $___ [*insert gross amount of settlement less amount shown in paragraph (b)(6)(i) of this agreement*]-

(A) The amount of $___ for all unliquidated partial or progress payments previously made to the Contractor or its assignee and all unliquidated advance payments (with any interest),

(B) The amount of $___ for all applicable property disposal credits [*insert if appropriate,* "and (C) the amount of $___ for all other amounts due the Government under this contract, except as provided in paragraph (b)(7) of this agreement."]

(iii) The net settlement of $_____ in subdivision (b)(6)(ii) of this section, together with sums previously paid, constitutes payment in full and complete settlement of the amount due the Contractor for the complete termination of the contract and of all other demands and liabilities of the Contractor and the Government under the contract, except as provided in paragraph (b)(7) in this section.

(7) Regardless of any other provision of this agreement, the following rights and liabilities of the parties under the contract are reserved: [*The following list of reserved or excepted rights and liabilities is intended to cover those that should most frequently be reserved and that should be scrutinized at the time a settlement agreement is negotiated (see 49.109). The suggested language of the excepted items on the list may be varied at the discretion of the contracting officer. If accuracy or completeness can be achieved by referencing the number of a contract clause or provision covering the matter in question, then follow that method of enumerating reserved rights and liabilities. Omit any of the following that are not applicable and add any additional exceptions or reservations required.*]

(i) All rights and liabilities, if any, of the parties, as to matters covered by any renegotiation authority.

(ii) All rights of the Government to take the benefit of agreements or judgments affecting royalties paid or payable in connection with the performance of the contract.

(iii) All rights and liabilities, if any, of the parties under those clauses inserted in the contract because of the requirements of Acts of Congress and Executive orders, including, without limitation, any applicable clauses relating to: labor law, contingent fees, domestic articles, and employment of aliens. [*If the contract contains clauses of this character inserted for reasons other than requirements of Acts of Congress or Executive orders, the suggested language should be appropriately modified*.]

(iv) All rights and liabilities of the parties arising under the contract and relating to reproduction rights, patent infringements, inventions, or applications for patents, including rights to assignments, invention reports, licenses, covenants of indemnity against patent risks, and bonds for patent indemnity obligations, together with all rights and liabilities under the bonds.

(v) All rights and liabilities of the parties, arising under the contract or otherwise, and concerning defects, guarantees, or warranties relating to any articles or component parts furnished to the Government by the Contractor under the contract or this agreement.

(vi) All rights and liabilities of the parties under the contract relating to any contract termination inventory stored for the Government.

(vii) All rights and liabilities of the parties under agreements relating to the future care and disposition by the Contractor of Government-owned property remaining in the Contractor's custody.

(viii) All rights and liabilities of the parties relating to Government property furnished to the Contractor for the performance of this contract.

(ix) All rights and liabilities of the parties under the contract relating to options (except options to continue or increase the work under the contract), covenants not to compete, and covenants of indemnity.

(x) Unresolved demands or assertions by the Contractor against the Government for costs under Government Accountability Office exceptions or other costs of the same nature that are excluded from the settlement without prejudice to the rights of either party, as follows: [*Insert amount and describe charges not waived*.]

(xi) Claims by the Contractor against the Government, when the Contractor's rights of reimbursement are disputed, that are excluded without prejudice to the rights of either party are as follows: [*Insert the amounts and describe the claims on which the Contracting Officer has made findings and has disallowed and on which the Contractor has taken, or intends to take, timely appeal*.]

(xii) Unresolved demands or assertions by the Contractor against the Government that are unknown in amount and involve costs alleged to be reimbursable under the contract are as follows: [*Insert the estimated amounts and describe the charges*.]

(xiii) Unknown amounts alleged by the Contractor against the Government, based upon responsibility of the Contractor to third parties that involve costs reimbursable under the contract.

(xiv) Debts due the Government by the Contractor that are based on refunds, rebates, credits, or other amounts not now known to the Government, with interest, now due or that may become due the Contractor from third parties, if the amounts arise out of transactions for which reimbursement has been made to the Contractor under the contract. The Contractor shall pay to the Government, within 30 days after receipt, any of these amounts that become due from any third party or any other source. Interest at the rate established by the Secretary of the Treasury under 41 U.S.C. 7109 shall accrue and shall be paid to the Government on any amounts that remain unpaid after the 30-day period.

(xv) All rights and liabilities, if any, of the parties under those clauses of the contract relating to price reductions for defective certified cost or pricing data.

(End of agreement)

49.603-4 Cost-reimbursement contracts-complete termination, with settlement limited to fee.

[*Insert the following in Block 14 of SF 30 for settlement of cost-reimbursement contracts that are completely terminated, if settlement is limited to fee*.]

(a) This supplemental agreement settles the amount of fee due under the contract, terminated in its entirety by Notice of Termination dated _____.

(b) The parties agree to the following:

(1) The Contractor has received $_____ on account of its fee under the contract before the effective date of termination.

(2) The Government agrees to pay to the Contractor or its assignee, upon presentation of a proper invoice or voucher, $_____ [*insert net amount to be paid on account of fee*]. This sum, with sums previously paid, constitutes payment in full and complete settlement of the amount due the Contractor on account of its fee under the contract.

(3) The Contractor's allowable costs under the contract will be paid under the terms and conditions of the contract and parts 31 and 49 of the Federal Acquisition Regulation. [*Insert paragraph (b)(3) of this agreement only if there are costs to be vouchered out (see 49.302) or if there are costs to be covered later by a separate settlement agreement*.]

(4) Regardless of any other provision of this agreement, the following rights and liabilities of the parties under the contract are reserved: [*The following list of reserved or excepted rights and liabilities is intended to cover those that should most frequently be reserved and that should be scrutinized at the time a settlement agreement is negotiated (see 49.109). The suggested language of the excepted items on the list may be varied at the discretion of the contracting officer. If accuracy or completeness can be achieved by referencing the number of a contract clause or provision covering the matter in question, then follow that method of enumerating reserved rights and liabilities. Omit any of the following that are not applicable and add any additional exceptions or reservations required.*]

(i) All rights and liabilities, if any, of the parties, as to matters covered by any renegotiation authority.

(ii) All rights and liabilities, if any, of the parties under those clauses inserted in the contract because of the requirements of Acts of Congress and Executive orders, including, without limitation, any applicable clauses relating to: labor law, contingent fees, domestic articles, and employment of aliens. [*If the contract contains clauses of this character inserted for reasons other than requirements of Acts of Congress or Executive orders, the suggested language should be appropriately modified.*]

(iii) All rights and liabilities of the parties arising under the contract and relating to reproduction rights, patent infringements, inventions, or applications for patents, including rights to assignments, invention reports, licenses, covenants of indemnity against patent risks, and bonds for patent indemnity obligations, together with all rights and liabilities under the bonds.

(iv) All rights and liabilities of the parties, arising under the contract or otherwise, and concerning defects, guarantees, or warranties relating to any articles or component parts furnished to the Government by the Contractor under the contract or this agreement.

(v) All rights and liabilities of the parties under agreements relating to the future care and disposition by the Contractor of Government-owned property remaining in the Contractor's custody.

(vi) All rights and liabilities of the parties relating to Government property furnished to, or acquired by, the Contractor for the performance of the contract.

(vii) All rights and liabilities of the parties under the contract relating to options (except options to continue or increase the work under the contract), covenants not to compete, and covenants of indemnity.

(viii) All rights and liabilities, if any, of the parties under those clauses of the contract relating to price reductions for defective certified cost or pricing data.

(End of agreement)

49.603-5 Cost-reimbursement contracts-partial termination.

[*Insert the following in Block 14 of SF 30, Amendment of Solicitation/Modification of Contract, for settlement agreements for cost-reimbursement contracts as a result of partial termination.*]

(a) This supplemental agreement settles the termination settlement proposal resulting from the Notice of Termination dated _____.

(b) The parties agree as follows:

(1) The contract is amended by deleting the terminated portion as follows: [*specify the terminated portion clearly as to-*

(i) *Line item numbers,*

(ii) *Descriptions,*

(iii) *Quantity terminated,*

(iv) *Unit and total price of terminated items, and*

(v) *Any other explanation necessary to avoid uncertainty or misunderstanding*].

(2) The fee stated in the contract is decreased by $____, from $____ to $____ [*Insert, if appropriate,*"(3) The estimated cost of the contract is decreased by $____, from $____ to $____"].

(c) The Contractor's allowable costs and earned fee, if any, for the terminated portion of the contract will continue to be reimbursed on SF 1034, Public Voucher for Purchase and Services Other Than Personal, under the applicable provisions of the contract and part 31 of the Federal Acquisition Regulation.

(End of agreement)

49.603-6 No-cost settlement agreement-complete termination.

[*Insert the following in Block 14 of SF 30 if a no-cost settlement agreement, under a complete termination, is to be executed.*]

(a) This supplemental agreement [*insert* "modifies the contract to reflect a no-cost settlement agreement with respect to the Notice of Termination dated ____" *or, if not previously terminated,* "terminates the contract in its entirety"].

(b) The parties agree as follows:

The Contractor unconditionally waives any charges against the Government because of the termination of the contract and, except as set forth below, releases it from all obligations under the contract or due to its termination. The Government agrees that all obligations under the contract are concluded, except as follows: [*List reserved or excepted rights and liabilities. See 49.109-2 and 49.603-1(b)(7).*]

(End of agreement)

49.603-7 No-cost settlement agreement-partial termination.

[*Insert the following in Block 14 of SF 30 if a no-cost settlement agreement, under partial termination, is to executed.*]

(a) This supplemental agreement modifies the contract to reflect a no-cost settlement agreement with respect to the Notice of Termination dated ____.

(b) The parties agree as follows:

(1) The terminated portion of the contract is as follows: [*Specify-*

(i) *Line item numbers,*

(ii) *Descriptions,*

(iii) *Quantity terminated,*

(iv) *Unit and total price of terminated items, and*

(v) *Any other explanation necessary to avoid uncertainty or misunderstanding*.]

(2) The Contractor unconditionally waives any charges against the Government arising under the terminated portion of the contract or by reason of its termination, including, without limitation, all obligations of the Government to make further payments or to carry out any further undertakings under the terminated portion of the contract. The Government acknowledges that the Contractor has no obligation to perform further work or services or to make further deliveries under the terminated portion of the contract. Nothing in this paragraph affects any other covenants, terms, or conditions of the contract. Under the terminated portion of the contract, the following rights and liabilities of the parties are reserved: [*List reserved or excepted rights and liabilities. See 49.109-2 and 49.603-1(b)(7).*]

(End of agreement)

49.603-8 Fixed-price contracts-settlements with subcontractors only.

[*Insert the following in Block 14 of SF 30 for settlements of fixed-price contracts covering only settlements with subcontractors.*]

(a) This agreement settles that portion of the settlement proposal of the contractor that is based upon termination of the following subcontracts entered into in performing this contract: [*Insert a list of the terminated subcontracts included in this settlement.*]

(b) The parties agree to the following:

(1) The Contractor certifies that each immediate subcontractor, whose settlement proposal is included in the proposal settled by the agreement, has furnished the Contractor a certificate stating-

(i) That all subcontract termination inventory (including scrap) has been retained or acquired by the subcontractor, sold to third parties, returned to suppliers, delivered to or stored for the Government, or otherwise properly accounted for, and that all proceeds and retention credits were used in arriving at the settlement of the subcontract; and

(ii) That the subcontractor has received a similar certificate from each immediate subcontractor whose proposal was included in its proposal.

(2) The Contractor certifies that all items of termination inventory, the costs of which were used in arriving at the amount of this settlement or the settlement of any subcontract settlement proposal included in this settlement-

(i) Are properly allocable to the terminated portion of the contract;

(ii) Do not exceed the reasonable quantitative requirements of the terminated portion of the contract; and

(iii) Do not include any items reasonably usable without loss to the Contractor on its other work. The Contractor further certifies that the Contracting Officer has been informed of any substantial change in the status of the items between the dates of the termination inventory schedules and the date of this agreement.

(3) The Contractor transfers, conveys, and assigns to the Government all the right, title, and interest, if any, that the Contractor has received or is entitled to receive, in and to subcontract termination inventory not otherwise properly accounted for.

(4) The Contractor shall, within 10 days after receipt of the payment specified in this agreement, pay to each of its immediate subcontractors (or their respective assignees) the amounts to which they are entitled, after deducting any prior payments and, if the Contractor so elects, any amounts due and payable to the Contractor by those subcontractors.

(5) The Government agrees to pay the Contractor or its assignee, upon presentation of a proper invoice or voucher, $____ [*insert net amount of settlement*], which, together with the amount of $____ previously paid the Contractor as partial, progress, or advance payments, constitutes payment in full and complete settlement, except as provided in paragraph (b)(6) of this agreement, of the amount due the Contractor for that portion of its settlement proposal that is based upon termination of the subcontracts listed above.

(6) Regardless of any other provision of this agreement, the following rights and liabilities of the parties under the contract are reserved: [*List reserved or excepted rights and liabilities. See 49.109-2 and 49.603-1(b)(7).*]

(End of agreement)

49.603-9 Settlement of reservations.

[*Insert the following in Block 14 of SF 30 for settlement of reservations.*]

(a) Supplemental Agreement No. ____, dated ____, was executed to reflect the settlement of the termination of this contract. The supplemental agreement excepted from the settlement certain items described in the agreement including the items described in paragraph (b) of this agreement. This supplemental agreement settles those items.

(b) The parties agree to the following:

(1) The Government agrees to pay the contractor $_____ for the following reserved or excepted items:* [*List items.*]

(2) The Contractor releases and forever discharges the Government from all liability and from all existing and future claims and demands that it may have under this contract, insofar as it pertains to the contract, for the items described in paragraph (b)(1) of this agreement.*

**When payment is due the Government, reverse the words "Governmen"t and "contracto"r in paragraphs (b)(1) and (b)(2).*

(End of agreement)

49.604 Release of excess funds under terminated contracts.

The following format shall be used to recommend the release of excess funds under terminated contracts, except if the contracting office retains responsibility for settlement of the termination-

From: Termination Contracting Officer _____ [address]
To: Contracting office _____[address]
Subj: Terminated Contract No _____ with _____ [Contractor]

Refs:

(a) [*Cite termination notice and effective date.*]

(b) [*Cite prior letters releasing excess funds, if any.*]

(1) Referenced termination notice, ____ [*insert* "completely" *or* "partially"] terminated contract _____.

(2) Based on the best information available, it is estimated that the gross settlement cost will be $_____ The amount available for release as excess to the contract is $___. Any payments previously made to the Contractor for terminated items have been considered in arriving at the above amounts.

[*If prior letters recommending release of excess funds are cited, use the following as paragraph 2:*

The estimated settlement costs previously reported by reference (b) in the amount of $____ are revised. On the best evidence now available, it is estimated that the settlement costs will be $___ The additional amount available for release is $_____.]

(3) The related appropriations and amounts involved are:

Appropriations	**Allocated Amounts**
_____	_____

Appropriations	Allocated Amounts
_____	_____

Copies to: Paying Office Accounting and Finance Office Other.

49.605 Request to settle subcontractor settlement proposals.

Contractors requesting authority to settle subcontractor settlement proposals shall furnish applicable information from the list below and any additional information required by the contracting officer-

(a) Name of contractor and address of principal office;

(b) Name and location of divisions of the applicant's plant for which authorization is requested;

(c) An explanation of the necessity and justification for the authorization requested;

(d) A full description of the applicant's organization for handling terminations, including the names of the officials in charge of processing and settling proposals;

(e) The number and dollar amount (estimated if necessary) of uncompleted contracts with Government agencies and the percentage applicable to each agency;

(f) The number and dollar amount (estimated if necessary) of uncompleted subcontracts under Government contracts and the percentage applicable to each agency;

(g) The extent of the applicant's experience in termination matters, including the handling of proposals of subcontractors;

(h) The approximate amount and general nature of terminations of the applicant currently in process;

(i) A statement that no other application has been made for any division of the applicant's plant covered by the application or, if one has been made, a full statement of the facts;

(j) The limit of authorization requested.

49.606 Granting subcontract settlement authorization.

Contracting officers shall use the following format when granting subcontract settlement authorization-

LETTER OF AUTHORIZATION

(a) Your request of ____ (date) is approved, and you are authorized, subject to the limitations of subsection 49.109-4 and those stated below, to settle, without further approval of the Government, all subcontracts and purchase orders terminated by you as a result of a Government contract being terminated or modified-

(1) For the convenience of the Government; or

(2) Under any other circumstances that may require the Government to bear the cost of their settlement.

(b) This authorization does not extend to the disposition of Government-furnished material or articles completed but undelivered under the subcontract or purchase order, as these require screening and approval of disposal actions by the Government, except that allocable completed articles may be disposed of without Government approval or screening if the total amount (at subcontract price) when added to the amount of settlement (as computed below) does not exceed $_____ [*insert limit of authorization being granted*].

(c) This authorization is subject to the following conditions and requirements-

(1) The amount of the subcontract termination settlement does not exceed $____ [*insert limit of authorization being granted*], computed as follows:

(i) Do not deduct advance or partial payments or credits for retention or other disposal of termination inventory allocated to the settlement proposal.

(ii) Deduct amounts payable for completed articles or work at the contract price or for the settlement of termination proposals of subcontractors (except those settlements that have not been approved by the Government).

(2) Any termination inventory involved has been disposed of under subsection 49.108-4, except that screening and Government approval of scrap and salvage determinations are not required.

(3) The Contracting Officer may incorporate into each Notice of Termination specific instructions about the disposition of specific items of termination inventory, or the Contracting Officer may, at any time before final settlement, issue specific instructions. These instructions will not affect any disposal action taken by you or your subcontractors before their receipt.

(4) The settlements made by you with your subcontractors and suppliers under this authorization, including sales, retention, or other dispositions of property involved in making these settlements, are reimbursable under part 49 and the Termination clause of the contract, and do not require approval of the Contracting Officer.

(5) Any number of separate settlements of $_____ [*insert limit of authorization granted*] or less may be made with a single subcontractor. Settlement proposals that would normally be included in a single proposal; *e.g.,* those based on a series of separate orders for the same item under one contract, should be consolidated whenever possible and shall not be divided to bring them within the authorization.

(6) This authorization does not apply if a subcontractor or supplier is affiliated with you. For this purpose, you should consider a contractor to be affiliated with you if you are under common control or if there is any common interest between you by reason of stock ownership, or otherwise, that is sufficient to create a reasonable doubt that the bargaining between you is completely at arm's length.

(7) A representative of this office will, from time to time, review the methods used in negotiating settlements with your subcontractors and will make a selective examination of the settlements made by you. If the review indicates that you are not adequately protecting the Government's interest, this delegation will be revoked.

(End of letter)

49.607 Delinquency notices.

The formats of the delinquency notices in this section may be used to satisfy the requirements of 49.402-3. All notices will be sent with proof of delivery requested. (See part 42 for stop-work orders.)

(a) *Cure notice.* If a contract is to be terminated for default before the delivery date, a "Cure Notice" is required by the Default clause. Before using this notice, it must be ascertained that an amount of time equal to or greater than the period of "cure" remains in the contract delivery schedule or any extension to it. If the time remaining in the contract delivery schedule is not sufficient to permit a realistic "cure" period of 10 days or more, the "Cure Notice" should not be issued. The "Cure Notice" may be in the following format:

Cure Notice

You are notified that the Government considers your ____ [*specify the contractor's failure or failures*] a condition that is endangering performance of the contract. Therefore, unless this condition is cured within 10 days after receipt of this notice [*or insert any longer time that the Contracting Officer may consider reasonably necessary*], the Government may terminate for default under the terms and conditions of the _____ [*insert clause title*] clause of this contract.

(End of notice)

(b) *Show cause notice*. If the time remaining in the contract delivery schedule is not sufficient to permit a realistic "cure" period of 10 days or more, the following "Show Cause Notice" may be used. It should be sent immediately upon expiration of the delivery period.

Show Cause Notice

Since you have failed to ____ [*insert* "perform Contract No. ___ within the time required by its terms," *or* "cure the conditions endangering performance under Contract No _____ as described to you in the Government's letter of _____ (date)"], the Government is considering terminating the contract under the provisions for default of this contract. Pending a final decision in this matter, it will be necessary to determine whether your failure to perform arose from causes beyond your control and without fault or negligence on your part. Accordingly, you are given the opportunity to present, in writing, any facts bearing on the question to ____ [*insert the name and complete address of the contracting officer*], within 10 days after receipt of this notice. Your failure to present any excuses within this time may be considered as an admission that none exist. Your attention is invited to the respective rights of the Contractor and the Government and the liabilities that may be invoked if a decision is made to terminate for default.

Any assistance given to you on this contract or any acceptance by the Government of delinquent goods or services will be solely for the purpose of mitigating damages, and it is not the intention of the Government to condone any delinquency or to waive any rights the Government has under the contract.

(End of notice)

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PART 50 - EXTRAORDINARY CONTRACTUAL ACTIONS AND THE SAFETY ACT

Sec.

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50.000 Scope of part.

This part—

(a) (1) Prescribes procedures and implements statutory and Executive Order requirements for entering into, amending, or modifying contracts in order to facilitate the national defense under the extraordinary emergency authority granted by Public Law 85-804 (50 U.S.C. 1431—1435) and Executive Order 10789, dated November 14, 1958. It does not cover advance payments (see Subpart 32.4); and

(2) Implements indemnification authority granted by Pub. L. 85-804 and paragraph 1A of E.O. 10789 with respect to any matter that has been, or could be, designated by the Secretary of Homeland Security as a qualified anti-terrorism technology as defined in the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act); and

(b) Implements SAFETY Act liability protections to promote development and use of anti-terrorism technologies.

Subpart 50.1 - Extraordinary Contractual Actions

50.100 Definitions.

As used in this part—

Approving authority means an agency official or contract adjustment board authorized to approve actions under Pub. L. 85-804 and E.O. 10789.

Secretarial level means a level at or above the level of a deputy assistant agency head, or a contract adjustment board.

50.101 General.

50.101-1 Authority.

(a) Pub. L. 85-804 empowers the President to authorize agencies exercising functions in connection with the national defense to enter into, amend, and modify contracts, without regard to other provisions of law related to making, performing, amending, or modifying contracts, whenever the President considers that such action would facilitate the national defense.

(b) E.O. 10789 authorizes the heads of the following agencies to exercise the authority conferred by Pub. L. 85-804 and to delegate it to other officials within the agency: the Government Publishing Office; the Department of Homeland Security; the Tennessee Valley Authority; the National Aeronautics and Space Administration; the General Services Administration; the Defense, Army, Navy, Air Force, Treasury, Interior, Agriculture, Commerce, and Transportation Departments; the Department of Energy for functions transferred to that Department from other authorized agencies; and any other agency that may be authorized by the President.

50.101-2 Policy.

(a) Actions authorized under Pub. L. 85-804 shall be accomplished as expeditiously as practicable, consistent with the exercise of sound judgment appropriate to the use of such extraordinary authority.

(b) Certain kinds of relief previously available only under Pub. L. 85-804; e.g., rescission or reformation for mutual mistake, are now available under the authority of 41 U.S.C. chapter 71, Contract Disputes. The disputes process in part 33 must be followed before pursuing extraordinary contract relief under this part because the authority under Pub. L. 85-804 may not be relied upon when other adequate legal authority exists. The contracting officer should seek legal advice when unsure as to whether part 33 applies.

50.101-3 Records.

Agencies must maintain complete records of all actions taken under this Subpart 50.1. For each request for relief processed, these records must include, at a minimum—

(a) The contractor's request;

(b) All relevant memorandums, correspondence, affidavits, and other pertinent documents;

(c) The Memorandum of Decision (see 50.103-6 and 50.104-2); and

(d) A copy of the contractual document implementing an approved request.

50.102 Delegation of and limitations on exercise of authority.

50.102-1 Delegation of authority.

An agency head may delegate in writing authority under Pub. L. 85-804 and E.O. 10789, subject to the following limitations:

(a) Authority delegated must be to a level high enough to ensure uniformity of action.

(b) Authority to approve requests to obligate the Government in excess of $90,000 may not be delegated below the secretarial level.

(c) Regardless of dollar amount, authority to approve any amendment without consideration that increases the contract price or unit price may not be delegated below the secretarial level, except in extraordinary cases or classes of cases when the agency head finds that special circumstances clearly justify such delegation.

(d) Regardless of dollar amount, authority to indemnify against unusually hazardous or nuclear risks, including extension of such indemnification to subcontracts, must be exercised only by the Secretary or Administrator of the agency concerned, the Public Printer, or the Chairman of the Board of Directors of the Tennessee Valley Authority (see 50.104-3).

50.102-2 Contract adjustment boards.

An agency head may establish a contract adjustment board with authority to approve, authorize, and direct appropriate action under this Subpart 50.1 and to make all appropriate determinations and findings. The decisions of the board must not be subject to appeal; however, the board may reconsider and modify, correct, or reverse its previous decisions. The board must determine its own procedures and have authority to take all action necessary or appropriate to conduct its functions.

50.102-3 Limitations on exercise of authority.

(a) Pub. L. 85-804 is not authority for—

(1) Using a cost-plus-a-percentage-of-cost system of contracting;

(2) Making any contract that violates existing law limiting profit or fees;

(3) Providing for other than full and open competition for award of contracts for supplies or services; or

(4) Waiving any bid bond, payment bond, performance bond, or other bond required by law.

(b) No contract, amendment, or modification shall be made under Pub. L. 85-804's authority-

(1) Unless the approving authority finds that the action will facilitate the national defense;

(2) Unless other legal authority within the agency concerned is deemed to be lacking or inadequate;

(3) Except within the limits of the amounts appropriated and the statutory contract authorization (however, indemnification agreements authorized by an agency head (50.104-3) are not limited to amounts appropriated or to contract authorization); and

(4) That will obligate the Government for any amount over $150 million unless the Senate and House Committees on Armed Services are notified in writing of the proposed obligation and 60 days of continuous session of Congress have passed since the transmittal of such notification. However, this paragraph (b)(4) does not apply to indemnification agreements authorized under 50.104-3.

(c) No contract shall be amended or modified unless the contractor submits a request before all obligations (including final payment) under the contract have been discharged. No amendment or modification shall increase the contract price to an amount higher than the lowest rejected bid of any responsible bidder, if the contract was negotiated under 14.404-1(f).

(d) No informal commitment will be formalized unless—

(1) The contractor submits a written request for payment within 6 months after furnishing, or arranging to furnish, supplies or services in reliance upon the commitment; and

(2) The approving authority finds that, at the time the commitment was made, it was impracticable to use normal contracting procedures.

(e) No executive department or agency will exercise the indemnification authority granted under paragraph 1 A of E.O. 10789 with respect to any supply or service that has been, or could be, designated by the Secretary of Homeland Security as a qualified anti-terrorism technology unless—

(1) For the Department of Defense, the Secretary of Defense has determined that the exercise of authority under E.O. 10789 is necessary for the timely and effective conduct of the United States military or intelligence activities, after consideration of the authority provided under the SAFETY Act (Subtitle G of title VIII of the Homeland Security Act of 2002, 6 U.S.C. 441-444); or

(2) For other departments and agencies that have authority under E.O. 10789—

(i) The Secretary of Homeland Security has advised whether the use of the authority under the SAFETY Act would be appropriate; and

(ii) The Director of the Office of Management and Budget has approved the exercise of authority under the Executive order.

50.103 Contract adjustments.

This section prescribes standards and procedures for processing contractors' requests for contract adjustment under Pub. L. 85-804 and E.O. 10789.

50.103-1 General.

The fact that losses occur under a contract is not sufficient basis for exercising the authority conferred by Pub. L. 85-804. Whether appropriate action will facilitate the national defense is a judgment to be made on the basis of all of the facts of the case. Although it is impossible to predict or enumerate all the types of cases in which action may be appropriate, examples are included in 50.103-2. Even if all of the factors in any of the examples are present, other considerations may warrant denying a contractor's request for contract adjustment. The examples are not intended to exclude other cases in which the approving authority determines that the circumstances warrant action.

50.103-2 Types of contract adjustment.

(a) Amendments without consideration. (1) When an actual or threatened loss under a defense contract, however caused, will impair the productive ability of a contractor whose continued performance on any defense contract or whose continued operation as a source of supply is found to be essential to the national defense, the contract may be amended without consideration, but only to the extent necessary to avoid such impairment to the contractor's productive ability.

(2) When a contractor suffers a loss (not merely a decrease in anticipated profits) under a defense contract because of Government action, the character of the action will generally determine whether any adjustment in the contract will be made, and its extent. When the Government directs its action primarily at the contractor and acts in its capacity as the other contracting party, the contract may be adjusted in the interest of fairness. Thus, when Government action, while not creating any liability on the Government's part, increases performance cost and results in a loss to the contractor, fairness may make some adjustment appropriate.

(b) Correcting mistakes. (1) A contract may be amended or modified to correct or mitigate the effect of a mistake. The following are examples of mistakes that may make such action appropriate:

(i) A mistake or ambiguity consisting of the failure to express, or express clearly, in a written contract, the agreement as both parties understood it.

(ii) A contractor's mistake so obvious that it was or should have been apparent to the contracting officer.

(iii) A mutual mistake as to a material fact.

(2) Amending contracts to correct mistakes with the least possible delay normally will facilitate the national defense by expediting the contracting program and assuring contractors that mistakes will be corrected expeditiously and fairly.

(c) *Formalizing informal commitments*. Under certain circumstances, informal commitments may be formalized to permit payment to persons who have taken action without a formal contract. An example of a circumstance where an informal commitment may be formalized is when a person, responding to an agency official's written or oral instructions and relying in good faith upon the official's apparent authority to issue them, has furnished or arranged to furnish supplies or services to the agency, or to a defense contractor or subcontractor, without formal contractual coverage. Formalizing commitments under such circumstances normally will facilitate the national defense by assuring such persons that they will be treated fairly and paid expeditiously.

50.103-3 Contract adjustment.

(a) *Contractor requests*. Contractors must submit two copies of requests for contract adjustments to the contracting officer or an authorized representative. The request must state—

(1) The precise adjustment requested;

(2) The essential facts, summarized chronologically in narrative form;

(3) The contractor's conclusions based on these facts, showing, in terms of the considerations set forth in 50.103-1 and 50.103-2, when the contractor considers itself entitled to the adjustment; and

(4) Whether or not-

(i) All obligations under the contracts involved have been discharged;

(ii) Final payment under the contracts involved has been made;

(iii) Any proceeds from the request will be subject to assignment or other transfer, and to whom; and

(iv) The contractor has sought the same, or a similar or related, adjustment from the Government Accountability Office or any other part of the Government, or anticipates doing so.

(b) *Contractor certification*. A contractor seeking a contract adjustment that exceeds the simplified acquisition threshold shall, at the time the request is submitted, submit a certification by a person authorized to certify the request on behalf of the contractor that-

(1) The request is made in good faith; and

(2) The supporting data are accurate and complete to the best of that person's knowledge and belief.

50.103-4 Facts and evidence.

(a) *General*. If a request is made under 50.103-3, the contracting officer or other agency official must request the contractor to support the request with any of the following information:

(1) A brief description of the contracts involved, the dates of execution and amendments, the items being acquired, the price or prices, the delivery schedules, and any special contract provisions relevant to the request.

(2) A history of performance indicating when work under the contracts or commitments began, the progress made to date, an exact statement of the contractor's remaining obligations, and the contractor's expectations regarding completion.

(3) A statement of payments received, due, and yet to be received or to become due, including advance and progress payments; amounts withheld by the Government; and information as to any obligations of the Government yet to be performed under the contracts.

(4) A detailed analysis of the request's monetary elements, including precisely how the actual or estimated dollar amount was determined and the effect of approval or denial on the contractor's profits before Federal income taxes.

(5) A statement of the contractor's understanding of why the request's subject matter cannot now, and could not at the time it arose, be disposed of under the contract terms.

(6) The best supporting evidence available to the contractor, including contemporaneous memorandums, correspondence, and affidavits.

(7) Relevant financial statements, cost analyses, or other such data, preferably certified by a certified public accountant, as necessary to support the request's monetary elements.

(8) A list of persons connected with the contracts who have factual knowledge of the subject matter, including, when possible, their names, offices or titles, addresses, and telephone numbers.

(9) A statement and evidence of steps taken to reduce losses and claims to a minimum.

(10) Any other relevant statements or evidence that may be required.

(b) *Amendments without consideration-essentiality a factor*. When a request involves the potential for an amendment without consideration, and essentiality to the national defense is a factor (50.103-2(a)(1)), the contractor may be asked to furnish, in addition to the facts and evidence listed in paragraph (a) of this subsection, any of the following information:

(1) A statement and evidence of the contractor's original breakdown of estimated costs, including contingency allowances, and profit.

(2) A statement and evidence of the contractor's present estimate of total costs under the contracts involved if it is enabled to complete them, broken down between costs accrued to date and completion costs, and between costs paid and those owed.

(3) A statement and evidence of the contractor's estimate of the final price of the contracts, taking into account all known or contemplated escalation, changes, extras, and the like.

(4) A statement of any claims known or contemplated by the contractor against the Government involving the contracts, other than those stated in response to paragraph (b)(3) of this subsection.

(5) An estimate of the contractor's total profit or loss under the contracts if it is enabled to complete them at the estimated final contract price, broken down between profit or loss to date and completion profit or loss.

(6) An estimate of the contractor's total profit or loss from other Government business and all other sources, from the date of the first contract involved to the estimated completion date of the last contract involved.

(7) A statement of the amount of any tax refunds to date, and an estimate of those anticipated, for the period from the date of the first contract involved to the estimated completion date of the last contract involved.

(8) A detailed statement of efforts the contractor has made to obtain funds from commercial sources to enable contract completion.

(9) A statement of the minimum amount the contractor needs as an amendment without consideration to enable contract completion, and the detailed basis for that amount.

(10) An estimate of the time required to complete each contract if the request is granted.

(11) A statement of the factors causing the loss under the contracts involved.

(12) A statement of the course of events anticipated if the request is denied.

(13) Balance sheets, preferably certified by a certified public accountant, (i) for the contractor's fiscal year immediately preceding the date of the first contract, (ii) for each subsequent fiscal year, (iii) as of the request date, and (iv) projected as of the completion date of all the contracts involved (assuming the contractor is enabled to complete them at the estimated final prices), together with income statements for annual periods subsequent to the date of the first balance sheet. Balance sheets and income statements should be both consolidated and broken down by affiliates. They should show all transactions between the contractor and its affiliates, stockholders, and partners, including loans to the contractor guaranteed by any stockholder or partner.

(14) A list of all salaries, bonuses, and other compensation paid or furnished to the principal officers or partners, and of all dividends and other withdrawals, and of all payments to stockholders in any form since the date of the first contract involved.

(c) *Amendments without consideration-essentiality not a factor*. When a request involves possible amendment without consideration because of Government action, and essentiality to the national defense is not a factor (50.103-2(a)(2)), the contractor may be asked to furnish, in addition to the facts and evidence listed in paragraph (a) of this subsection, any of the following information:

(1) A clear statement of the precise Government action that the contractor considers to have caused a loss under the contract, with evidence to support each essential fact.

(2) A statement and evidence of the contractor's original breakdown of estimated costs, including contingency allowances, and profit.

(3) The estimated total loss under the contract, with detailed supporting analysis.

(4) The estimated loss resulting specifically from the Government action, with detailed supporting analysis.

(d) *Correcting mistakes*. When a request involves possible correction of a mistake (50.103-2(b)), the contractor may be asked to furnish, in addition to the facts and evidence listed in paragraph (a) of this subsection, any of the following information:

(1) A statement and evidence of the precise error made, ambiguity existing, or misunderstanding arising, showing what it consists of, how it occurred, and the intention of the parties.

(2) A statement explaining when the mistake was discovered, when the contracting officer was given notice of it, and whether this notice was given before completion of work under, or the effective termination date of, the contract.

(3) An estimate of profit or loss under the contract, with detailed supporting analysis.

(4) An estimate of the increase in cost to the Government resulting from the adjustment requested, with detailed supporting analysis.

(e) *Formalizing informal commitments*. When a request involves possible formalizing of an informal commitment (50.103-2(c)), the contractor may be asked to furnish, in addition to the facts and evidence listed in paragraph (a) of this subsection, any of the following information:

(1) Copies of any written instructions or assurances (or a sworn statement of any oral instructions or assurances) given the contractor, and identification of the Government official who gave them.

(2) A statement as to when the contractor furnished or arranged to furnish the supplies or services involved, and to whom.

(3) Evidence that the contractor relied upon the instructions or assurances, with a full description of the circumstances that led to this reliance.

(4) Evidence that, when performing the work, the contractor expected to be compensated directly for it by the Government and did not anticipate recovering the costs in some other way.

(5) A cost breakdown supporting the amount claimed as fair compensation for the work performed.

(6) A statement and evidence of the impracticability of providing, in an appropriate contractual instrument, for the work performed.

50.103-5 Processing cases.

In response to a contractor request made in accordance with 50.103-3, the contracting officer or an authorized representative shall make a thorough investigation to establish the facts necessary to decide a given case. Facts and evidence,

including signed statements of material facts within the knowledge of individuals when documentary evidence is lacking, and audits if considered necessary to establish financial or cost facts, shall be obtained from contractor and Government personnel.

50.103-6 Disposition.

(a) When approving or denying a contractor's request made in accordance with 50.103-3, the approving authority must sign and date a Memorandum of Decision.

(b) If some adjustment is approved, the Memorandum of Decision will contain a statement in substantially the following form: "I find that the action authorized herein will facilitate the national defense." The case files supporting this statement will show the rationale and basis for the dollar amount of the award. When the dollar amount exceeds the amounts supported by audit or other independent reviews, the approving authority will further document the rationale for deviating from the recommendation.

50.103-7 Contract requirements.

(a) Pub. L. 85-804 and E.O. 10789 require that every contract entered into, amended, or modified under this Subpart 50.1 shall contain—

(1) A citation of Pub. L. 85-804 and E.O. 10789;

(2) A brief statement of the circumstances justifying the action; and

(3) A recital of the finding that the action will facilitate the national defense.

(b) The authority in 50.101-1(a) shall not be used to omit from contracts, when otherwise required, the clauses at 52.203-5, Covenant Against Contingent Fees; 52.215-2, Audit and Records—Negotiation; 52.222-4, Contract Work Hours and Safety Standards—Overtime Compensation; 52.222-6, Construction Wage Rate Requirements; 52.222-10, Compliance With Copeland Act Requirements; 52.222-20, Contracts for Materials, Supplies, Articles, and Equipment; 52.222-26, Equal Opportunity; and 52.232-23, Assignment of Claims.

50.104 Residual powers.

This section prescribes standards and procedures for exercising residual powers under Pub. L. 85-804. The term "residual powers" includes all authority under Pub. L. 85-804 except—

(a) That covered by section 50.103; and

(b) The authority to make advance payments (see Subpart 32.4).

50.104-1 Standards for use.

Subject to the limitations in 50.102-3, residual powers may be used in accordance with the policies in 50.101-2 when necessary and appropriate, all circumstances considered. In authorizing the inclusion of the clause at 52.250-1, Indemnification Under Public Law 85-804, in a contract or subcontract, an agency head may require the indemnified contractor to provide and maintain financial protection of the type and amount determined appropriate. In deciding whether to approve use of the indemnification clause, and in determining the type and amount of financial protection the indemnified contractor is to provide and maintain, an agency head must consider such factors as self-insurance, other proof of financial responsibility, workers' compensation insurance, and the availability, cost, and terms of private insurance. The approval and determination must be final.

50.104-2 General.

(a) When approving or denying a proposal for the exercise of residual powers, the approving authority must sign and date a Memorandum of Decision.

(b) Every contract entered into, amended, or modified under residual powers shall comply with the requirements of 50.103-7.

50.104-3 Special procedures for unusually hazardous or nuclear risks.

(a) *Indemnification requests*. (1) Contractor requests for the indemnification clause to cover unusually hazardous or nuclear risks should be submitted to the contracting officer and must include the following information:

(i) Identification of the contract for which the indemnification clause is requested.

(ii) Identification and definition of the unusually hazardous or nuclear risks for which indemnification is requested, with a statement indicating how the contractor would be exposed to them.

(iii) A statement, executed by a corporate official with binding contractual authority, of all insurance coverage applicable to the risks to be defined in the contract as unusually hazardous or nuclear, including-

(A) Names of insurance companies, policy numbers, and expiration dates;

(B) A description of the types of insurance provided (including the extent to which the contractor is self-insured or intends to self-insure), with emphasis on identifying the risks insured against and the coverage extended to persons or property, or both;

(C) Dollar limits per occurrence and annually, and any other limitation, for relevant segments of the total insurance coverage;

(D) Deductibles, if any, applicable to losses under the policies;

(E) Any exclusions from coverage under such policies for unusually hazardous or nuclear risks; and

(F) Applicable workers' compensation insurance coverage.

(iv) The controlling or limiting factors for determining the amount of financial protection the contractor is to provide and maintain, with information regarding the availability, cost, and terms of additional insurance or other forms of financial protection.

(v) Whether the contractor's insurance program has been approved or accepted by any Government agency; and whether the contractor has an indemnification agreement covering similar risks under any other Government program, and, if so, a brief description of any limitations.

(vi) If the contractor is a division or subsidiary of a parent corporation-

(A) A statement of any insurance coverage of the parent corporation that bears on the risks for which the contractor seeks indemnification; and

(B) A description of the precise legal relationship between parent and subsidiary or division.

(2) If the dollar value of the contractor's insurance coverage varies by 10 percent or more from that stated in an indemnification request submitted in accordance with paragraph (a)(1) of this subsection, or if other significant changes in insurance coverage occur after submission and before approval, the contractor shall immediately submit to the contracting officer a brief description of the changes.

(b) *Action on indemnification requests*. (1) The contracting officer, with assistance from legal counsel and cognizant program office personnel, shall review the indemnification request and ascertain whether it contains all required information. If the contracting officer, after considering the facts and evidence, denies the request, the contracting officer shall notify the contractor promptly of the denial and of the reasons for it. If recommending approval, the contracting officer shall forward the request (as modified, if necessary, by negotiation) through channels to the appropriate official specified in 50.102-1(d). The contracting officer's submission shall include all information submitted by the contractor and-

(i) All pertinent information regarding the proposed contract or program, including the period of performance, locations, and facilities involved;

(ii) A definition of the unusually hazardous or nuclear risks involved in the proposed contract or program, with a statement that the parties have agreed to it;

(iii) A statement by responsible authority that the indemnification action would facilitate the national defense;

(iv) A statement that the contract will involve unusually hazardous or nuclear risks that could impose liability upon the contractor in excess of financial protection reasonably available;

(v) A statement that the contractor is complying with applicable Government safety requirements;

(vi) A statement of whether the indemnification should be extended to subcontractors; and

(vii) A description of any significant changes in the contractor's insurance coverage (see 50.104-3(a)(2)) occurring since submission of the indemnification request.

(2) Approval of a request to include the indemnification clause in a contract shall be by a Memorandum of Decision executed by the appropriate official specified in 50.102-1(d).

(3) When use of the indemnification clause is approved under paragraph (b)(2) of this subsection, the definition of unusually hazardous or nuclear risks (see paragraph (b)(1)(ii) of this subsection) shall be incorporated into the contract, along with the clause.

(4) When approval is-

(i) Authorized in the Memorandum of Decision; and

(ii) Justified by the circumstances, the contracting officer may approve the contractor's written request to provide for indemnification of subcontractors, using the same procedures as those required for contractors.

50.104-4 Contract clause.

The contracting officer shall insert the clause at 52.250-1, Indemnification Under Public Law 85-804, in contracts whenever the approving official determines that the contractor must be indemnified against unusually hazardous or nuclear risks (also see 50.104-3(b)(3)). In cost-reimbursement contracts, the contracting officer shall use the clause with its Alternate I.

Subpart 50.2 - Support Anti-terrorism by Fostering Effective Technologies Act of 2002

50.200 Scope of subpart.

This subpart implements the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act) liability protections to promote development and use of anti-terrorism technologies.

50.201 Definitions.

Act of terrorism means any act determined to have met the following requirements or such other requirements as defined and specified by the Secretary of Homeland Security:

(1) Is unlawful.

(2) Causes harm, including financial harm, to a person, property, or entity, in the United States, or in the case of a domestic United States air carrier or a United States-flag vessel (or a vessel based principally in the United States on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), in or outside the United States.

(3) Uses or attempts to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.

Block certification means SAFETY Act certification of a technology class that the Department of Homeland Security (DHS) has determined to be an approved class of approved products for homeland security.

Block designation means SAFETY Act designation of a technology class that the DHS has determined to be a Qualified Anti-Terrorism Technology (QATT).

Pre-qualification designation notice means a notice in a procurement solicitation or other publication by the Government stating that the technology to be procured either affirmatively or presumptively satisfies the technical criteria necessary to be deemed a qualified anti-terrorism technology. A pre-qualification designation notice authorizes offeror(s) to submit streamlined SAFETY Act applications for SAFETY Act designation and receive expedited processing of those applications.

Qualified Anti-Terrorism Technology (QATT) means any technology designed, developed, modified, procured, or sold for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, for which a SAFETY Act designation has been issued. For purposes of defining a QATT, technology means any product, equipment, service (including support services), device, or technology (including information technology) or any combination of the foregoing. Design services, consulting services, engineering services, software development services, software integration services, threat assessments, vulnerability studies, and other analyses relevant to homeland security may be deemed a technology.

SAFETY Act certification means a determination by DHS pursuant to 6 U.S.C. 442(d), as further delineated in 6 CFR 25.8 and 25.9, that a QATT for which a SAFETY Act designation has been issued is an approved product for homeland security, i.e., it will perform as intended, conforms to the seller's specifications, and is safe for use as intended.

SAFETY Act designation means a determination by DHS pursuant to 6 U.S.C. 441(b) and 6 U.S.C. 443(a), as further delineated in 6 CFR 25.4, that a particular Anti-Terrorism Technology constitutes a QATT under the SAFETY Act.

50.202 Authorities.

The following authorities apply:

(a) Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), 6 U.S.C. 441-444.

(b) Executive Order 13286 of February 28, 2003, Amendment of Executive Orders, and Other Actions, in Connection With the Transfer of Certain Functions to the Secretary of Homeland Security.

(c) Executive Order 10789 of November 14, 1958, Contracting Authority of Government Agencies in Connection with National Defense Functions.

(d) 6 CFR Part 25.

50.203 General.

(a) As part of the Homeland Security Act of 2002, Pub. L. 107-296, Congress enacted the SAFETY Act to-

(1) Encourage the development and use of anti-terrorism technologies that will enhance the protection of the nation; and

(2) Provide risk management and litigation management protections for sellers of QATTs and others in the supply and distribution chain.

(b) The SAFETY Act’s liability protections are complementary to the Terrorism Risk Insurance Act of 2002.

(c) Questions concerning the SAFETY Act may be directed to DHS Office of SAFETY Act Implementation (OSAI). Additional information about the SAFETY Act may be found at http://www.SAFETYAct.gov. Included on this website are block designations and block certifications granted by DHS.

50.204 Policy.

(a) Agencies should-

(1) Determine whether the technology to be procured is appropriate for SAFETY Act protections and, if appropriate, formally relay this determination to DHS for purposes of supporting contractor application(s) for SAFETY Act protections in relation to criteria (b)(viii) of 6 CFR 25.4, Designation of Qualified Anti-Terrorism Technologies;

(2) Encourage offerors to seek SAFETY Act protections for their offered technologies, even in advance of the issuance of a solicitation; and

(3) Not mandate SAFETY Act protections for acquisitions because applying for SAFETY Act protections for a particular technology is the choice of the offeror.

(b) Agencies shall not solicit offers contingent upon SAFETY Act designation or certification occurring before contract award unless authorized in accordance with 50.205-3.

(c) Agencies shall not solicit offers or award contracts presuming DHS will issue a SAFETY Act designation or certification after contract award unless authorized in accordance with 50.205-4.

(d) The DHS determination to extend SAFETY Act protections for a particular technology is not a determination that the technology meets, or fails to meet, the requirements of a solicitation.

50.205 Procedures.

50.205-1 SAFETY Act Considerations.

(a) *SAFETY Act applicability*. Requiring activities should review requirements to identify potential technologies that prevent, detect, identify, or deter acts of terrorism or limit the harm such acts might cause, and may be appropriate for SAFETY Act protections. In questionable cases, the agency shall consult with DHS. For acquisitions involving such technologies, the requiring activity should ascertain through discussions with DHS whether a block designation or block certification exists for the technology being acquired.

(1) If one does exist, the requiring activity should request that the contracting officer notify offerors.

(2) If one does not exist, see 50.205-2, Pre-qualification designation notice.

(b) *Early consideration of the SAFETY Act*. Acquisition officials shall consider SAFETY Act issues as early in the acquisition cycle as possible (see 7.105(b)(20)(v)). Normally, this would be at the point where the required capabilities or performance characteristics are addressed. This is important because the processing times for issuing determinations on all types of SAFETY Act applications vary depending on many factors, including the influx of applications to DHS and the technical complexity of individual applications.

(c) *Industry outreach*. When applicable, acquisition officials should include SAFETY Act considerations in all industry outreach efforts including, but not limited to, requests for information, draft requests for proposal, and industry conferences.

(d) *Reciprocal waiver of claims*. For purposes of 6 CFR 25.5(e), the Government is not a customer from which a contractor must request a reciprocal waiver of claims.

50.205-2 Pre-qualification designation notice.

Upon receipt of documentation from the program office or requiring activity related to a DHS pre-qualification designation notice, the contracting officer shall—

(a) Include in any pre-solicitation notice (Subpart 5.2) that a pre-qualification designation notice has been—

(1) Requested and is under review by DHS;

(2) Denied by DHS; or

(3) Issued and a copy will be included with the solicitation; and

(b) Incorporate the pre-qualification designation notice into the solicitation.

50.205-3 Authorization of offers contingent upon SAFETY Act designation or certification before contract award.

(a) Contracting officers may authorize such contingent offers, only if-

(1) DHS has issued-

(i) For offers contingent upon SAFETY Act designation, a pre-qualification designation notice or a block designation; or

(ii) For offers contingent upon SAFETY Act certification, a block certification;

(2) To the contracting officer's knowledge, the Government has not provided advance notice so that potential offerors could have obtained SAFETY Act designations/ certifications for their offered technologies before release of any solicitation; and

(3) Market research shows that there will be insufficient competition without SAFETY Act protections or the subject technology would be sold to the Government only with SAFETY Act protections.

(b) Contracting officers shall not authorize offers contingent upon obtaining a SAFETY Act certification (as opposed to a SAFETY Act designation), unless a block certification applies to the class of technology to be acquired under the solicitation.

50.205-4 Authorization of awards made presuming SAFETY Act designation or certification after contract award.

(a) When necessary to award a contract prior to DHS issuing SAFETY Act protections, contracting officers may award contracts presuming that DHS will issue a SAFETY Act designation/certification to the contractor after contract award only if-

(1) The criteria of 50.205-3(a) are met;

(2) The chief of the contracting office (or other official designated in agency procedures) approves the action; and

(3) The contracting officer advises DHS of the timelines for potential award and consults DHS as to when DHS could reasonably complete evaluations of offerors' applications for SAFETY Act designations or certifications.

(b) Contracting officers shall not authorize offers presuming that SAFETY Act certification will be obtained (as opposed to a SAFETY Act designation), unless a block certification applies to the class of technology to be acquired under the solicitation.

50.206 Solicitation provisions and contract clause.

(a) Insert the provision at 52.250-2, SAFETY Act Coverage Not Applicable, in solicitations if—

(1) The agency consulted with DHS on a questionable case of SAFETY Act applicability to an acquisition in accordance with 50.205-1(a), and after the consultation, the agency has determined that SAFETY Act protection is not applicable for the acquisition; or

(2) DHS has denied approval of a pre-qualification designation notice.

(b) (1) Insert the provision at 52.250-3, SAFETY Act Block Designation/Certification, in a solicitation when DHS has issued a block designation/certification for the solicited technologies.

(2) Use the provision at 52.250-3 with its Alternate I when contingent offers are authorized in accordance with 50.205-3.

(3) Use the provision at 52.250-3 with its Alternate II when offers presuming SAFETY Act designation or certification are authorized in accordance with 50.205-4. If this alternate is used, the contracting officer may increase the number of days within which offerors must submit their SAFETY Act designation or certification application.

(c) (1) Insert the provision at 52.250-4, SAFETY Act Pre-qualification Designation Notice, in a solicitation for which DHS has issued a pre-qualification designation notice.

(2) Use the provision at 52.250-4 with its Alternate I when contingent offers are authorized in accordance with 50.205-3

(3) Use the provision at 52.250-4 with its Alternate II when offers presuming SAFETY Act designation or certification are authorized in accordance with 50.205-4. If this alternate is used, the contracting officer may increase the number of days within which offerors must submit their SAFETY Act designation or certification application.

(d) Insert the clause at 52.250-5, SAFETY Act—Equitable Adjustment

(1) In the solicitation, if the provision at 52.250-3 or 52.250-4 is used with its Alternate II; and

(2) In any resultant contract, if DHS has not issued SAFETY Act designation or certification to the successful offeror before contract award.

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PART 51 - RESERVED

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VOLUME II-PARTS 52 & 53

REVOLUTIONARY FEDERAL ACQUISITION REGULATION OVERHAUL

Issued Fiscal Year 2019 by the:

GENERAL SERVICES ADMINISTRATION

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NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

TITLE 48-FEDERAL ACQUISITION REGULATIONS SYSTEM

Chapter 1

FEDERAL ACQUISITION REGULATION

Volume I

FOREWORD

The FAR is the primary regulation for use by all executive agencies in their acquisition of supplies and services with appropriated funds. It became effective on April 1, 1984, and is issued within applicable laws under the joint authorities of the Administrator of General Services, the Secretary of Defense, and the Administrator for the National Aeronautics and Space Administration, under the broad policy guidelines of the Administrator, Office of Federal Procurement Policy, Office of Management and Budget.

The FAR precludes agency acquisition regulations that unnecessarily repeat, paraphrase, or otherwise restate the FAR, limits agency acquisition regulations to those necessary to implement FAR policies and procedures within an agency, and provides for coordination, simplicity, and uniformity in the Federal acquisition process. It also provides for agency and public participation in developing the FAR and agency acquisition regulation.

On April 17th, 2026, the Federal Acquisition Regulatory Council has updated the Revolutionary FAR Overhaul (RFO) to conform with the changes to support the implementation of Executive Order (E.O.) 14398, Addressing DEI Discrimination by Federal Contractors, dated March 26, 2026.

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52.247-41 [Reserved]
52.247-42 [Reserved]
52.247-43 [Reserved]
52.247-44 [Reserved]
52.247-45 [Reserved]
52.247-46 [Reserved]
52.247-47 [Reserved]
52.247-48 F.o.b. Destination-Evidence of Shipment.
52.247-49 [Reserved]
52.247-50 [Reserved]
52.247-51 [Reserved]
52.247-52 Clearance and Documentation Requirements-Shipments to DoD Air or Water Terminal Transshipment Points.
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52.247-54 [Reserved]
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52.247-57 [Reserved]
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52.247-60 [Reserved]
52.247-61 [Reserved]
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52.247-63 Preference for U.S.-Flag Air Carriers.
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52.247-65 [Reserved]
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52.249-11 [Reserved]
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52.251-1 [Reserved]
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52.252-1 Solicitation Provisions Incorporated by Reference.
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52.253-1 Computer Generated Forms.

Subpart 52.3 - Provision and Clause Matrix

52.000 Scope of part.

This part-

(a) Gives instructions for using provisions and clauses in solicitations and/or contracts;

(b) Sets forth the solicitation provisions and contract clauses prescribed by this regulation; and

(c) Presents a matrix listing the FAR provisions and clauses applicable to each principal contract type and/or purpose (*e.g.,* fixed-price supply, cost-reimbursement research and development).

Subpart 52.1 - Instructions for Using Provisions and Clauses

52.100 Scope of subpart.

This subpart-

(a) Gives instructions for using part 52, including the explanation and use of provision and clause numbers, prescriptions, prefaces, and the matrix;

(b) Prescribes procedures for incorporating, identifying, and modifying provisions and clauses in solicitations and contracts, and for using alternates; and

(c) Describes the derivation of FAR provisions and clauses.

52.101 Using Part 52.

(a) *Definition*. "Modification," as used in this subpart, means a minor change in the details of a provision or clause that is specifically authorized by the FAR and does not alter the substance of the provision or clause (see 52.104).

(b) *Numbering—* (1) *FAR provisions and clauses*. subpart 52.2 sets forth the text of all FAR provisions and clauses, each in its own separate subsection. The subpart is arranged by subject matter, in the same order as, and keyed to, the parts of the FAR. Each FAR provision or clause is uniquely identified. All FAR provision and clause numbers begin with "52.2," since the text of all FAR provisions and clauses appear in subpart 52.2. The next two digits of the provision or clause number correspond to the number of the FAR subject part in which the provision or clause is prescribed. The FAR provision or clause number is then completed by a hyphen and a sequential number assigned within each section of subpart 52.2. The following example illustrates the makeup of the FAR provision or clause number (see Figure 1 below).

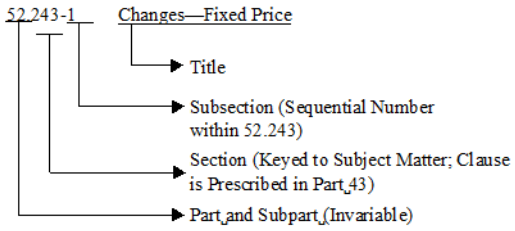

Figure 1

(2) *Provisions or clauses that supplement the FAR*. (i) Provisions or clauses that supplement the FAR are-

(A) Prescribed and included in authorized agency acquisition regulations issued within an agency to satisfy the specific needs of the agency as a whole;

(B) Prescribed and included in a regulation issued by a suborganization of an agency to satisfy the needs of that particular suborganization; or

(C) Developed for use at a suborganizational level of an agency, not meant for repetitive use, but intended to meet the needs of an individual acquisition and, thus, impractical to include in either an agency or suborganization acquisition regulation. (See 1.301(c).)

(ii) Supplemental provisions or clauses published in agency acquisition regulations shall be in full text and the prescription for the use of each shall be included. Supplemental provisions or clauses published in agency acquisition regulations shall be numbered in the same manner in which FAR provisions and clauses are numbered except that-

(A) If it is included in an agency acquisition regulation that is published in the *Federal Register* and is codified in Title 48, *Code of Federal Regulations* (48 CFR), the number shall be preceded by the chapter number within 48 CFR assigned by the CFR staff; and

(B) The sequential number shall be "70" or a higher number (see 1.303).

(iii) The sequential number at the end of the number of a provision or clause that supplements the FAR, like its counterpart at the end of any FAR provision or clause number, indicates the subsection location of the provision or clause in subpart 52.2 of the agency acquisition regulation that contains its full text. If, for example, an agency acquisition regulation contains only one provision followed by only one clause supplementing the FAR in its section 52.236 (Construction and Architect-Engineer Contracts), then the sequential numbers would be "70" for the provision and "71" for the clause.

(c) *Prescriptions*. Each provision or clause in subpart 52.2 is prescribed at that place in the FAR text where the subject matter of the provision or clause receives its primary treatment. The prescription includes all conditions, requirements, and instructions for using the provision or clause and its alternates, if any. The provision or clause may be referred to in other FAR locations.

(d) *Introductory text.* Within subpart 52.2, the introductory text of each provision or clause includes a cross-reference to the location in the FAR subject text that prescribes its use.

(e) Matrix. (1) The matrix in subpart 52.3 contains a column for each principal type and/or purpose of contract (*e.g.,* fixed-price supply, cost reimbursement research and development). The matrix lists the-

(i) Required solicitation provisions;

(ii) Required-when-applicable solicitation provisions;

(iii) Optional solicitation provisions;

(iv) Required contract clauses;

(v) Required-when-applicable contract clauses; and

(vi) Optional contract clauses.

(2) For each provision or clause listed, the matrix provides information on-

(i) Whether incorporation by reference is or is not authorized (see 52.102);

(ii) The section of the Uniform Contract Format (UCF) in which it is to be located, if it is used in an acquisition that is subject to the UCF;

(iii) Its number;

(iv) The citation of the FAR text that prescribes its use; and

(v) Its title.

(3) Since the matrix does not provide sufficient information to determine the applicability of a provision or clause in the "required-when-applicable" and "optional" categories, contracting officers shall refer to the FAR text (cited in the matrix) that prescribes its use.

(4) The FAR matrix may be reproduced at agency levels, and at subordinate levels, for the purpose of supplementing it with agency-developed provisions and clauses. The resulting consolidated matrices may be included in agency acquisition regulations.

(f) *Dates*. Since they are subject to revision from time to time, all provisions, clauses, and alternates are dated; *e.g.,*(*Dec* 1983). To avoid questions concerning which version of any provision, clause, or alternate is operative in any given solicitation or contract, its date shall be included whether it is incorporated by reference or in full text.

52.102 Incorporating provisions and clauses.

(a) Provisions and clauses should be incorporated by reference to the maximum practical extent, rather than being incorporated in full text, even if they-

(1) Are used with one or more alternates or on an optional basis;

(2) Are prescribed on a "substantially as follows" or "substantially the same as" basis, provided they are used verbatim;

(3) Require modification or the insertion by the Government of fill-in material (see 52.104); or

(4) Require completion by the offeror or prospective contractor. This instruction also applies to provisions completed as annual representations and certifications.

(b) Except for provisions and clauses prescribed in 52.107, any provision or clause that can be accessed electronically by the offeror or prospective contractor may be incorporated by reference in solicitations and/or contracts. However, the contracting officer, upon request, shall provide the full text of any provision or clause incorporated by reference.

(c) Agency approved provisions and clauses prescribed in agency acquisition regulations, and provisions and clauses not authorized by subpart 52.3 to be incorporated by reference, need not be incorporated in full text, provided the contracting officer includes in the solicitation and contract a statement that-

(1) Identifies all provisions and clauses that require completion by the offeror or prospective contractor;

(2) Specifies that the provisions and clauses must be completed by the offeror or prospective contractor and must be submitted with the quotation or offer; and

(3) Identifies to the offeror or prospective contractor at least one electronic address where the full text may be accessed.

(d) An agency may develop a group listing of provisions and clauses that apply to a specific category of contracts. An agency group listing may be incorporated by reference in solicitations and/or contracts in lieu of citing the provisions and clauses individually, provided the group listing is made available electronically to offerors and prospective contractors.

(e) A provision or clause that is not available electronically to offerors and prospective contractors shall be incorporated in solicitations and/or contracts in full text if it is-

(1) A FAR provision or clause that otherwise is not authorized to be incorporated by reference (see sub part 52.3); or

(2) A provision or clause prescribed for use in an agency acquisition regulation.

(f) Provisions or clauses may not be incorporated by reference by being listed in the-

(1) Provision at 52.252-3, Alterations in Solicitations; or

(2) Clause at 52.252-4, Alterations in Contract.

52.103 Identification of provisions and clauses.

(a) Whenever any FAR provision or clause is used without deviation in a solicitation or contract, whether it is incorporated by reference or in full text, it shall be identified by number, title, and date. This identification shall also be used if the FAR provision or clause is used with an authorized deviation, except that the contracting officer shall then insert "(DEVIATION)" after the date. Solicited firms and contractors will be advised of the meaning of this insertion through the use of the (1) provision at 52.252-5, Authorized Deviations in Provisions, or (2) clause at 52.252-6, Authorized Deviations in Clauses. The above mentioned provision and clause are prescribed in 52.107(e) and (f).

(b) Any provision or clause that supplements the FAR whether it is incorporated by reference or in full text shall be clearly identified by number, title, date, and name of the regulation. When a supplemental provision or clause is used with an authorized deviation, insert "(DEVIATION)" after the name of the regulation.

(c) A provision or clause of the type described in 52.101(b)(2)(i)(C) shall be identified by the title, date, and the name of the agency or suborganization within the agency that developed it.

(d) Except for provisions or clauses covered by 52.103(c), the following hypothetical examples illustrate how a provision or clause that supplements the FAR shall be identified when it is incorporated in solicitations and/or contracts by reference or in full text:

(1) If part 14 (Sealed Bidding) of the X Agency Acquisition Regulation, published in the *Federal Register* and codified as Chapter 99 in 48 CFR, prescribes the use of a provision entitled "Bid Envelopes," dated October 1983, and that provision is sequentially the first provision or clause appearing in Section 52.214 of the X Agency Acquisition Regulation, then the identification of that provision shall be "9952.214-70-Bid Envelopes (OCT 1983)."

(2) Assume that Y, a major organizational element of the X Agency, is authorized to issue the Y Acquisition Regulation, which is not published in the *Federal Register* and codified in 48 CFR. If part 36 (Construction and Architect-Engineer Contracts) of the Y Acquisition Regulation prescribes the use of a clause entitled "Refrigerated Display Cases," dated March 1983, pertaining to a specialized type of construction work, and that clause is sequentially the second provision or clause appearing in Section 52.236 of the Y Acquisition Regulation, then the identification of that clause shall be "52.236-71-Refrigerated Display Cases (MAR 1983)-Y Acquisition Regulation."

52.104 Procedures for modifying and completing provisions and clauses.

(a) The contracting officer must not modify provisions and clauses unless the FAR authorizes their modification. For example-

(1) "The contracting officer may use a period shorter than 60 days (but not less than 30 days) in paragraph (x) of the clause"; or

(2) "The contracting officer may substitute the words ‘task order’ for the word ‘Schedule’ wherever that word appears in the clause."

(b) When modifying provisions or clauses incorporated by reference, insert the changed wording directly below the title of the provision or clause identifying to the lowest level necessary (*e.g.,* paragraph, sentence, word), to clearly indicate what is being modified.

(c) When modifying provisions or clauses incorporated in full text, modify the language directly by substituting the changed wording as permitted.

(d) When completing blanks in provisions or clauses incorporated by reference, insert the fill-in information directly below the title of the provision or clause identifying to the lowest level necessary to clearly indicate the blanks being filled in.

(e) When completing blanks in provisions or clauses incorporated in full text, insert the fill-in information in the blanks of the provision or clause.

52.105 Procedures for using alternates.

(a) The FAR accommodates a major variation in a provision or clause by use of an alternate. The FAR prescribes alternates to a given provision or clause in the FAR subject text where the provision or clause is prescribed. The alternates to each provision or clause are titled "Alternate I," "Alternate II," "Alternate III," etc.

(b) When an alternate is used, its date shall be cited along with the date of the basic provision or clause; *e.g.,* 52.209-3 First Article Approval-Contractor Testing (OCT 1983)-Alternate I (DEC 1983).

(c) Under certain circumstances, a provision or clause may be used with two or more alternates. In these circumstances, each of the applicable alternates shall be cited, whether incorporated by reference or in full text; *e.g.,* 52.209-3 First Article Approval-Contractor Testing (OCT 1983)-Alternate I (DEC 1983) and Alternate II (FEB 1984). However, under no circumstances may an alternate to a specific provision or clause be applied to any other provision or clause.

52.106 [Reserved]

52.107 Provisions and clauses prescribed in subpart 52.1.

(a) The contracting officer shall insert the provision at 52.252-1, Solicitation Provisions Incorporated by Reference, in solicitations in order to incorporate provisions by reference.

(b) The contracting officer shall insert the clause at 52.252-2, Clauses Incorporated by Reference, in solicitations and contracts in order to incorporate clauses by reference.

(c) The contracting officer shall insert the provision at 52.252-3, Alterations in Solicitation, in solicitations in order to revise or supplement, as necessary, other parts of the solicitation that apply to the solicitation phase only, except for any provision authorized for use with a deviation.

(d) The contracting officer shall insert the clause at 52.252-4, Alterations in Contract, in solicitations and contracts in order to revise or supplement, as necessary, other parts of the contract, or parts of the solicitations that apply to the contract phase, except for any clause authorized for use with a deviation.

(e) The contracting officer shall insert the provision at 52.252-5, Authorized Deviations in Provisions, in solicitations that include any FAR or supplemental provision with an authorized deviation. Whenever any FAR or supplemental provision is used with an authorized deviation, the contracting officer shall identify it by the same number, title, and date assigned to the provision when it is used without deviation, include regulation name for any supplemental provision, except that the contracting officer shall insert "(DEVIATION)" after the date of the provision.

(f) The contracting officer shall insert the clause at 52.252-6, Authorized Deviations in Clauses, in solicitations and contracts that include any FAR or supplemental clause with an authorized deviation. Whenever any FAR or supplemental clause is used with an authorized deviation, the contracting officer shall identify it by the same number, title, and date assigned to the clause when it is used without deviation, include regulation name for any supplemental clause, except that the contracting officer shall insert "(DEVIATION)" after the date of the clause.

Subpart 52.2 - Text of Provisions and Clauses

52.200 Scope of subpart.

This subpart sets forth the text of all FAR provisions and clauses (see 52.101(b)(1)) and gives a cross-reference to the location in the FAR that prescribes the provision or clause.

52.201 [Reserved]

52.201-1 [Reserved]

(DEVIATION DATE)

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52.202 [Reserved]

52.202-1 Definitions.

As prescribed in 2.201, insert the following clause:

DEFINITIONS (JUN 2020)

When a solicitation provision or contract clause uses a word or term that is defined in the Federal Acquisition Regulation (FAR), the word or term has the same meaning as the definition in FAR 2.101 in effect at the time the solicitation was issued, unless-

(a) The solicitation, or amended solicitation, provides a different definition;

(b) The contracting parties agree to a different definition;

(c) The part, subpart, or section of the FAR where the provision or clause is prescribed provides a different meaning;

(d) The word or term is defined in FAR part 31, for use in the cost principles and procedures; or

(e) The word or term defines an acquisition-related threshold, and if the threshold is adjusted for inflation as set forth in FAR 1.108, then the changed threshold applies throughout the remaining term of the contract, unless there is a subsequent threshold adjustment; see FAR 1.108.

(End of clause)

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52.203 [Reserved]

52.203-1 [Reserved]

52.203-2 Certificate of Independent Price Determination.

As prescribed in 3.103-1 , insert the following provision. If the solicitation is a Request for Quotations, the terms "Quotation" and "Quoter" may be substituted for "Offer" and "Offeror."

CERTIFICATE OF INDEPENDENT PRICE DETERMINATION (APR 1985)

(a) The offeror certifies that-

(1) The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to-

(i) Those prices;

(ii) The intention to submit an offer; or

(iii) The methods or factors used to calculate the prices offered.

(2) The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and

(3) No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

(b) Each signature on the offer is considered to be a certification by the signatory that the signatory-

(1) Is the person in the offeror's organization responsible for determining the prices being offered in this bid or proposal, and that the signatory has not participated and will not participate in any action contrary to paragraphs (a)(1) through (a)(3) of this provision; or

(2) (i) Has been authorized, in writing, to act as agent for the following principals in certifying that those principals have not participated, and will not participate in any action contrary to paragraphs (a)(1) through (a)(3) of this provision _____ *[insert full name of person(s) in the offeror's organization responsible for determining the prices offered in this bid or proposal, and the title of his or her position in the offeror's organization]*;

(ii) As an authorized agent, does certify that the principals named in subdivision (b)(2)(i) of this provision have not participated, and will not participate, in any action contrary to paragraphs (a)(1) through (a)(3) of this provision; and

(iii) As an agent, has not personally participated, and will not participate, in any action contrary to paragraphs (a)(1) through (a)(3) of this provision.

(c) If the offeror deletes or modifies subparagraph (a)(2) above, the offeror must furnish with its offer a signed statement setting forth in detail the circumstances of the disclosure.

(End of provision)

52.203-3 Gratuities.

As prescribed in 3.202 , insert the following clause:

GRATUITIES (APR 1984)

(a) The right of the Contractor to proceed may be terminated by written notice if, after notice and hearing, the agency head or a designee determines that the Contractor, its agent, or another representative-

(1) Offered or gave a gratuity (*e.g.,* an entertainment or gift) to an officer, official, or employee of the Government; and

(2) Intended, by the gratuity, to obtain a contract or favorable treatment under a contract.

(b) The facts supporting this determination may be reviewed by any court having lawful jurisdiction.

(c) If this contract is terminated under paragraph (a) of this clause, the Government is entitled-

(1) To pursue the same remedies as in a breach of the contract; and

(2) In addition to any other damages provided by law, to exemplary damages of not less than 3 nor more than 10 times the cost incurred by the Contractor in giving gratuities to the person concerned, as determined by the agency head or a designee. (This paragraph (c)(2) is applicable only if this contract uses money appropriated to the Department of Defense.)

(d) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

(End of clause)

52.203-4 [Reserved]

52.203-5 Covenant Against Contingent Fees.

As prescribed in 3.404 , insert the following clause:

COVENANT AGAINST CONTINGENT FEES (MAY 2014)

(a) The Contractor warrants that no person or agency has been employed or retained to solicit or obtain this contract upon an agreement or understanding for a contingent fee, except a bona fide employee or agency. For breach or violation of this warranty, the Government shall have the right to annul this contract without liability or, to deduct from the contract price or consideration, or otherwise recover, the full amount of the contingent fee.

(b) *Bona fide agency*, as used in this clause, means an established commercial or selling agency, maintained by a contractor for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds itself out as being able to obtain any Government contract or contracts through improper influence.

Bona fide employee, as used in this clause, means a person, employed by a contractor and subject to the contractor's supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds out as being able to obtain any Government contract or contracts through improper influence.

Contingent fee, as used in this clause, means any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a Government contract.

Improper influence, as used in this clause, means any influence that induces or tends to induce a Government employee or officer to give consideration or to act regarding a Government contract on any basis other than the merits of the matter.

(End of clause)

52.203-6 Restrictions on Subcontractor Sales to the Government.

As prescribed in 3.503-2 , insert the following clause:

RESTRICTIONS ON SUBCONTRACTOR SALES TO THE GOVERNMENT (JUN 2020)

(a) Except as provided in (b) of this clause, the Contractor shall not enter into any agreement with an actual or prospective subcontractor, nor otherwise act in any manner, which has or may have the effect of restricting sales by such subcontractors directly to the Government of any item or process (including computer software) made or furnished by the subcontractor under this contract or under any follow-on production contract.

(b) The prohibition in (a) of this clause does not preclude the Contractor from asserting rights that are otherwise authorized by law or regulation.

(c) The Contractor agrees to incorporate the substance of this clause, including this paragraph (c), in all subcontracts under this contract which exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award.

(End of clause)

Alternate I (NOV 2021). As prescribed in 3.503-2 , substitute the following paragraph in place of paragraph (b) of the basic clause:

(b) The prohibition in paragraph (a) of this clause does not preclude the Contractor from asserting rights that are otherwise authorized by law or regulation. For acquisitions of commercial products or commercial services, the prohibition in paragraph

(a) applies only to the extent that any agreement restricting sales by subcontractors results in the Federal Government being treated differently from any other prospective purchaser for the sale of the commercial product(s) and commercial service(s).

52.203-7 Anti-Kickback Procedures.

As prescribed in 3.502-3 , insert the following clause:

ANTI-KICKBACK PROCEDURES (JUN 2020)

(a) *Definitions*.

Kickback, as used in this clause, means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided to any prime Contractor, prime Contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.

Person, as used in this clause, means a corporation, partnership, business association of any kind, trust, joint-stock company, or individual.

Prime contract, as used in this clause, means a contract or contractual action entered into by the United States for the purpose of obtaining supplies, materials, equipment, or services of any kind.

Prime Contractor, as used in this clause, means a person who has entered into a prime contract with the United States.

Prime Contractor employee, as used in this clause, means any officer, partner, employee, or agent of a prime Contractor.

Subcontract, as used in this clause, means a contract or contractual action entered into by a prime Contractor or subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract.

Subcontractor, as used in this clause, (1) means any person, other than the prime Contractor, who offers to furnish or furnishes any supplies, materials, equipment, or services of any kind under a prime contract or a subcontract entered into in connection with such prime contract, and (2) includes any person who offers to furnish or furnishes general supplies to the prime Contractor or a higher tier subcontractor.

Subcontractor employee, as used in this clause, means any officer, partner, employee, or agent of a subcontractor.

(b) 41 U.S.C. chapter 87, Kickbacks, prohibits any person from-

(1) Providing or attempting to provide or offering to provide any kickback;

(2) Soliciting, accepting, or attempting to accept any kickback; or

(3) Including, directly or indirectly, the amount of any kickback in the contract price charged by a prime Contractor to the United States or in the contract price charged by a subcontractor to a prime Contractor or higher tier subcontractor.

(c) (1) The Contractor shall have in place and follow reasonable procedures designed to prevent and detect possible violations described in paragraph (b) of this clause in its own operations and direct business relationships.

(2) When the Contractor has reasonable grounds to believe that a violation described in paragraph (b) of this clause may have occurred, the Contractor shall promptly report in writing the possible violation. Such reports shall be made to the inspector general of the contracting agency, the head of the contracting agency if the agency does not have an inspector general, or the Attorney General.

(3) The Contractor shall cooperate fully with any Federal agency investigating a possible violation described in paragraph (b) of this clause.

(4) The Contracting Officer may (i) offset the amount of the kickback against any monies owed by the United States under the prime contract and/or (ii) direct that the Prime Contractor withhold from sums owed a subcontractor under the prime contract the amount of the kickback. The Contracting Officer may order the monies withheld under subdivision (c)(4)(ii) of this clause be paid over to the Government unless the Government has already offset those monies under subdivision (c)(4)(i) of this clause. In either case, the Prime Contractor shall notify the Contracting Officer when the monies are withheld.

(5) The Contractor agrees to incorporate the substance of this clause, including this paragraph (c)(5) but excepting paragraph (c)(1) of this clause, in all subcontracts under this contract that exceed the threshold specified in Federal Acquisition Regulation 3.502-2(i) on the date of subcontract award.

(End of clause)

52.203-8 Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity.

As prescribed in 3.104-9(a), insert the following clause:

CANCELLATION, RESCISSION, AND RECOVERY OF FUNDS FOR ILLEGAL OR IMPROPER ACTIVITY (MAY 2014)

(a) If the Government receives information that a contractor or a person has violated 41 U.S.C. 2102-2104, Restrictions on Obtaining and Disclosing Certain Information, the Government may-

(1) Cancel the solicitation, if the contract has not yet been awarded or issued; or

(2) Rescind the contract with respect to which-

(i) The Contractor or someone acting for the Contractor has been convicted for an offense where the conduct violates 41 U.S.C.2102 for the purpose of either-

(A) Exchanging the information covered by such subsections for anything of value; or

(B) Obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract; or

(ii) The head of the contracting activity has determined, based upon a preponderance of the evidence, that the Contractor or someone acting for the Contractor has engaged in conduct punishable under 41 U.S.C. 2105(a).

(b) If the Government rescinds the contract under paragraph (a) of this clause, the Government is entitled to recover, in addition to any penalty prescribed by law, the amount expended under the contract.

(c) 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, regulation, or under this contract.

(End of clause)

52.203-9 [Reserved]

52.203-10 Price or Fee Adjustment for Illegal or Improper Activity.

As prescribed in 3.104-9(b), insert the following clause:

PRICE OR FEE ADJUSTMENT FOR ILLEGAL OR IMPROPER ACTIVITY (MAY 2014)

(a) The Government, at its election, may reduce the price of a fixed-price type contract and the total cost and fee under a cost-type contract by the amount of profit or fee determined as set forth in paragraph (b) of this clause if the head of the contracting activity or designee determines that there was a violation of 41 U.S.C.2102 or 2103, as implemented in section 3.104 of the Federal Acquisition Regulation.

(b) The price or fee reduction referred to in paragraph (a) of this clause shall be-

(1) For cost-plus-fixed-fee contracts, the amount of the fee specified in the contract at the time of award;

(2) For cost-plus-incentive-fee contracts, the target fee specified in the contract at the time of award, notwithstanding any minimum fee or "fee floor" specified in the contract;

(3) For cost-plus-award-fee contracts-

(i) The base fee established in the contract at the time of contract award;

(ii) If no base fee is specified in the contract, 30 percent of the amount of each award fee otherwise payable to the Contractor for each award fee evaluation period or at each award fee determination point.

(4) For fixed-price-incentive contracts, the Government may-

(i) Reduce the contract target price and contract target profit both by an amount equal to the initial target profit specified in the contract at the time of contract award; or

(ii) If an immediate adjustment to the contract target price and contract target profit would have a significant adverse impact on the incentive price revision relationship under the contract, or adversely affect the contract financing provisions, the Contracting Officer may defer such adjustment until establishment of the total final price of the contract. The total final price established in accordance with the incentive price revision provisions of the contract shall be reduced by an amount equal to the initial target profit specified in the contract at the time of contract award and such reduced price shall be the total final contract price.

(5) For firm-fixed-price contracts, by 10 percent of the initial contract price or a profit amount determined by the Contracting Officer from records or documents in existence prior to the date of the contract award.

(c) The Government may, at its election, reduce a prime contractor's price or fee in accordance with the procedures of paragraph (b) of this clause for violations of the statute by its subcontractors by an amount not to exceed the amount of profit or fee reflected in the subcontract at the time the subcontract was first definitively priced.

(d) In addition to the remedies in paragraphs (a) and (c) 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)

52.203-11 Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions.

As prescribed in 3.808(a), insert the following provision:

CERTIFICATION AND DISCLOSURE REGARDING PAYMENTS TO INFLUENCE CERTAIN FEDERAL TRANSACTIONS (SEP 2024)

(a) *Definitions.* As used in this provision-"Lobbying contact" has the meaning provided at 2 U.S.C. 1602(8). The terms "agency," "influencing or attempting to influence," "officer or employee of an agency," "person," "reasonable compensation," and "regularly employed" are defined in the FAR clause of this solicitation entitled "Limitation on Payments to Influence Certain Federal Transactions" (52.203-12).

(b) *Prohibition*. The prohibition and exceptions contained in the FAR clause of this solicitation entitled "Limitation on Payments to Influence Certain Federal Transactions" (52.203-12) are hereby incorporated by reference in this provision.

(c) *Certification*. The offeror, by signing its offer, hereby certifies to the best of its knowledge and belief that no Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress on its behalf in connection with the awarding of this contract.

(d) *Disclosure*. If any registrants under the Lobbying Disclosure Act of 1995 have made a lobbying contact on behalf of the offeror with respect to this contract, the offeror shall complete and submit, with its offer, OMB Standard Form LLL, Disclosure of Lobbying Activities, to provide the name of the registrants. The offeror need not report regularly employed officers or employees of the offeror to whom payments of reasonable compensation were made.

(e) *Penalties*. Submission of this certification and disclosure is a prerequisite for making or entering into this contract imposed by 31 U.S.C. 1352. Any person who makes an expenditure prohibited under this provision or who fails to file or amend the disclosure required to be filed or amended by this provision, shall be subject to civil penalties as provided in 31 U.S.C. 1352. An imposition of a civil penalty does not prevent the Government from seeking any other remedy that may be applicable.

(End of provision)

52.203-12 Limitation on Payments to Influence Certain Federal Transactions.

As prescribed in 3.808(b), insert the following clause:

LIMITATION ON PAYMENTS TO INFLUENCE CERTAIN FEDERAL TRANSACTIONS (JUN 2020)

(a) *Definitions*. As used in this clause-

Agency means "*executive agency*" as defined in Federal Acquisition Regulation (FAR) 2.101.

Covered Federal action means any of the following actions:

(1) Awarding any Federal contract.

(2) Making any Federal grant.

(3) Making any Federal loan.

(4) Entering into any cooperative agreement.

(5) Extending, continuing, renewing, amending, or modifying any Federal contract, grant, loan, or cooperative agreement.

Indian tribe and "tribal organization" have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b) and include Alaskan Natives.

Influencing or attempting to influence means making, with the intent to influence, any communication to or appearance before an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

Local government means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

Officer or employee of an agency includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under Title 5, United States Code, including a position under a temporary appointment.

(2) A member of the uniformed services, as defined in subsection 101(3), Title 37, United States Code.

(3) A special Government employee, as defined in section 202, Title 18, United States Code.

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, Title 5, United States Code, appendix 2.

Person means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit, or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization eligible to receive Federal contracts, grants, cooperative agreements, or loans from an agency, but only with respect to expenditures by such tribe or organization that are made for purposes specified in paragraph (b) of this clause and are permitted by other Federal law.

Reasonable compensation means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

Reasonable payment means, with respect to professional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

Recipient includes the Contractor and all subcontractors. This term excludes an Indian tribe, tribal organization, or any other Indian organization eligible to receive Federal contracts, grants, cooperative agreements, or loans from an agency, but only with respect to expenditures by such tribe or organization that are made for purposes specified in paragraph (b) of this clause and *are* permitted by other Federal law.

Regularly employed means, with respect to an officer or employee of a person requesting or receiving a Federal contract, an officer or employee who is employed by such person for at least 130 working days within 1 year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract. An officer or employee who is employed by such person for less than 130 working days within 1 year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

State means a State of the United States, the District of Columbia, or an outlying area of the United States, an agency or instrumentality of a State, and multi-State, regional, or interstate entity having governmental duties and powers.

(b) *Prohibition*. 31 U.S.C. 1352 prohibits a recipient of a Federal contract, grant, loan, or cooperative agreement from using appropriated funds to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal actions. In accordance with 31 U.S.C. 1352, the Contractor shall not use appropriated funds to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the award of this contractor the extension, continuation, renewal, amendment, or modification of this contract.

(1) The term *appropriated funds* does not include profit or fee from a covered Federal action.

(2) To the extent the Contractor can demonstrate that the Contractor has sufficient monies, other than Federal appropriated funds, the Government will assume that these other monies were spent for any influencing activities that would be unallowable if paid for with Federal appropriated funds.

(c) *Exceptions*. The prohibition in paragraph (b) of this clause does not apply under the following conditions:

(1) *Agency and legislative liaison by Contractor employees*. (i) Payment of reasonable compensation made to an officer or employee of the Contractor if the payment is for agency and legislative liaison activities not directly related to this contract. For purposes of this paragraph, providing any information specifically requested by an agency or Congress is permitted at any time.

(ii) Participating with an agency in discussions that are not related to a specific solicitation for any covered Federal action, but that concern-

(A) The qualities and characteristics (including individual demonstrations) of the person's products or services, conditions or terms of sale, and service capabilities; or

(B) The application or adaptation of the person's products or services for an agency's use.

(iii) Providing prior to formal solicitation of any covered Federal action any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(iv) Participating in technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and

(v) Making capability presentations prior to formal solicitation of any covered Federal action by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Pub. L. 95-507, and subsequent amendments.

(2) *Professional and technical services*. (i) A payment of reasonable compensation made to an officer or employee of a person requesting or receiving a covered Federal action or an extension, continuation, renewal, amendment, or modification of a covered Federal action, if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal action or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal action.

(ii) Any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action or an extension, continuation, renewal, amendment, or modification of a covered Federal action if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal action or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal action. Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(iii) As used in paragraph (c)(2) of this clause, "professional and technical services" are limited to advice and analysis directly applying any professional or technical discipline (for examples, see FAR 3.803(a)(2)(iii)).

(iv) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation and any other requirements in the actual award documents.

(3) Only those communications and services expressly authorized by paragraphs (c)(1) and (2) of this clause are permitted.

(d) *Disclosure*. (1) If the Contractor did not submit OMB Standard Form LLL, Disclosure of Lobbying Activities, with its offer, but registrants under the Lobbying Disclosure Act of 1995 have subsequently made a lobbying contact on behalf of the Contractor with respect to this contract, the Contractor shall complete and submit OMB Standard Form LLL to provide the name of the lobbying registrants, including the individuals performing the services.

(2) If the Contractor did submit OMB Standard Form LLL disclosure pursuant to paragraph (d) of the provision at FAR 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, and a change occurs that affects Block 10 of the OMB Standard Form LLL (name and address of lobbying registrant or individuals performing services), the Contractor shall, at the end of the calendar quarter in which the change occurs, submit to the Contracting Officer within 30 days an updated disclosure using OMB Standard Form LLL.

(e) *Penalties*. (1) Any person who makes an expenditure prohibited under paragraph (b) of this clause or who fails to file or amend the disclosure to be filed or amended by paragraph (d) of this clause shall be subject to civil penalties as provided for by 31 U.S.C. 1352. An imposition of a civil penalty does not prevent the Government from seeking any other remedy that may be applicable.

(2) Contractors may rely without liability on the representation made by their subcontractors in the certification and disclosure form.

(f) *Cost allowability*. Nothing in this clause makes allowable or reasonable any costs which would otherwise be unallowable or unreasonable. Conversely, costs made specifically unallowable by the requirements in this clause will not be made allowable under any other provision.

(g) *Subcontracts*. (1) The Contractor shall obtain a declaration, including the certification and disclosure in paragraphs (c) and (d) of the provision at FAR 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, from each person requesting or receiving a subcontract under this contract that exceeds the threshold specified in FAR 3.808 on the date of subcontract award. The Contractor or subcontractor that awards the subcontract shall retain the declaration.

(2) A copy of each subcontractor disclosure form (but not certifications) shall be forwarded from tier to tier until received by the prime Contractor. The prime Contractor shall, at the end of the calendar quarter in which the disclosure form is submitted by the subcontractor, submit to the Contracting Officer within 30 days a copy of all disclosures. Each subcontractor certification shall be retained in the subcontract file of the awarding Contractor.

(3) The Contractor shall include the substance of this clause, including this paragraph (g), in any subcontract that exceeds the threshold specified in FAR 3.808 on the date of subcontract award.

(End of clause)

52.203-13 Contractor Code of Business Ethics and Conduct.

As prescribed in 3.1004(a), insert the following clause:

CONTRACTOR CODE OF BUSINESS ETHICS AND CONDUCT (NOV 2021)

(a) *Definitions. As used in this clause—*

Agent means any individual, including a director, an officer, an employee, or an independent Contractor, authorized to act on behalf of the organization.

Full cooperation-

(1) Means disclosure to the Government of the information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct. It includes providing timely and complete response to Government auditors' and investigators' request for documents and access to employees with information;

(2) Does not foreclose any Contractor rights arising in law, the FAR, or the terms of the contract. It does not require-

(i) A Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine; or

(ii) Any officer, director, owner, or employee of the Contractor, including a sole proprietor, to waive his or her attorney client privilege or Fifth Amendment rights; and

(3) Does not restrict a Contractor from-

(i) Conducting an internal investigation; or

(ii) Defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation.

Principal means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (*e.g.*, general manager; plant manager; head of a division or business segment; and similar positions).

Subcontract means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract.

Subcontractor means any supplier, distributor, vendor, or firm that furnished supplies or services to or for a prime contractor or another subcontractor.

United States, means the 50 States, the District of Columbia, and outlying areas.

(b) *Code of business ethics and conduct.* (1) Within 30 days after contract award, unless the Contracting Officer establishes a longer time period, the Contractor shall—

(i) Have a written code of business ethics and conduct;

(ii) Make a copy of the code available to each employee engaged in performance of the contract.

(2) The Contractor shall-

(i) Exercise due diligence to prevent and detect criminal conduct; and

(ii) Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

(3) (i) The Contractor shall timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed-

(A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or

(B) A violation of the civil False Claims Act (31 U.S.C. 3729-3733).

(ii) The Government, to the extent permitted by law and regulation, will safeguard and treat information obtained pursuant to the Contractor's disclosure as confidential where the information has been marked "confidential" or "proprietary" by the company. To the extent permitted by law and regulation, such information will not be released by the Government to the public pursuant to a Freedom of Information Act request, 5 U.S.C. Section 552, without prior notification to the

Contractor. The Government may transfer documents provided by the Contractor to any department or agency within the Executive Branch if the information relates to matters within the organization's jurisdiction.

(iii) If the violation relates to an order against a Governmentwide acquisition contract, a multi-agency contract, a multiple-award schedule contract such as the Federal Supply Schedule, or any other procurement instrument intended for use by multiple agencies, the Contractor shall notify the OIG of the ordering agency and the IG of the agency responsible for the basic contract.

(c) Business ethics awareness and compliance program and internal control system. This paragraph (c) does not apply if the Contractor has represented itself as a small business concern pursuant to the award of this contract or if this contract is for the acquisition of a commercial product or commercial service as defined at FAR 2.101. The Contractor shall establish the following within 90 days after contract award, unless the Contracting Officer establishes a longer time period:

(1) An ongoing business ethics awareness and compliance program.

(i) This program shall include reasonable steps to communicate periodically and in a practical manner the Contractor's standards and procedures and other aspects of the Contractor's business ethics awareness and compliance program and internal control system, by conducting effective training programs and otherwise disseminating information appropriate to an individual's respective roles and responsibilities.

(ii) The training conducted under this program shall be provided to the Contractor's principals and employees, and as appropriate, the Contractor's agents and subcontractors.

(2) An internal control system.

(i) The Contractor's internal control system shall—

(A) Establish standards and procedures to facilitate timely discovery of improper conduct in connection with Government contracts; and

(B) Ensure corrective measures are promptly instituted and carried out.

(ii) At a minimum, the Contractor's internal control system shall provide for the following:

(A) Assignment of responsibility at a sufficiently high level and adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control system.

(B) Reasonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor's code of business ethics and conduct.

(C) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the Contractor's code of business ethics and conduct and the special requirements of Government contracting, including-

(1) Monitoring and auditing to detect criminal conduct;

(2) Periodic evaluation of the effectiveness of the business ethics awareness and compliance program and internal control system, especially if criminal conduct has been detected; and

(3) Periodic assessment of the risk of criminal conduct, with appropriate steps to design, implement, or modify the business ethics awareness and compliance program and the internal control system as necessary to reduce the risk of criminal conduct identified through this process.

(D) An internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.

(E) Disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct.

(F) Timely disclosure, in writing, to the agency OIG, with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of any Government contract performed by the Contractor or a subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C. or a violation of the civil False Claims Act (31 U.S.C. 3729-3733).

(1) If a violation relates to more than one Government contract, the Contractor may make the disclosure to the agency OIG and Contracting Officer responsible for the largest dollar value contract impacted by the violation.

(2) If the violation relates to an order against a Governmentwide acquisition contract, a multi-agency contract, a multiple-award schedule contract such as the Federal Supply Schedule, or any other procurement instrument intended for use by multiple agencies, the contractor shall notify the OIG of the ordering agency and the IG of the agency responsible for the basic contract, and the respective agencies' contracting officers.

(3) The disclosure requirement for an individual contract continues until at least 3 years after final payment on the contract.

(4) The Government will safeguard such disclosures in accordance with paragraph (b)(3)(ii) of this clause.

(G) Full cooperation with any Government agencies responsible for audits, investigations, or corrective actions.

(d) *Subcontracts*. (1) The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts that exceed the threshold specified in FAR 3.1004(a) on the date of subcontract award and a performance period of more than 120 days.

(2) In altering this clause to identify the appropriate parties, all disclosures of violation of the civil False Claims Act or of Federal criminal law shall be directed to the agency Office of the Inspector General, with a copy to the Contracting Officer.

(End of clause)

52.203-14 Display of Hotline Poster(s).

As prescribed in 3.1004(b), insert the following clause:

DISPLAY OF HOTLINE POSTER(S) (NOV 2021)

(a) *Definition.*

United States, as used in this clause, means the 50 States, the District of Columbia, and outlying areas.

(b) *Display of fraud hotline poster(s).* Except as provided in paragraph (c)—

(1) During contract performance in the United States, the Contractor shall prominently display in common work areas within business segments performing work under this contract and at contract work sites-

(i) Any agency fraud hotline poster or Department of Homeland Security (DHS) fraud hotline poster identified in paragraph (b)(3) of this clause; and

(ii) Any DHS fraud hotline poster subsequently identified by the Contracting Officer.

(2) Additionally, if the Contractor maintains a company website as a method of providing information to employees, the Contractor shall display an electronic version of the poster(s) at the website.

(3) Any required posters may be obtained as follows:

Poster(s)	***Obtain from***
_____	_____
_____	_____

(*Contracting Officer shall insert—*

(i) Appropriate agency name(s) and/or title of applicable Department of Homeland Security fraud hotline poster); and

(ii) The website(s) or other contact information for obtaining the poster(s).)

(c) If the Contractor has implemented a business ethics and conduct awareness program, including a reporting mechanism, such as a hotline poster, then the Contractor need not display any agency fraud hotline posters as required in paragraph (b) of this clause, other than any required DHS posters.

(d) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (d), in all subcontracts that exceed the threshold specified in Federal Acquisition Regulation 3.1004(b)(1) on the date of subcontract award, except when the subcontract—

(1) Is for the acquisition of a commercial product or commercial service; or

(2) Is performed entirely outside the United States.

(End of clause)

52.203-15 [Reserved]

(DEVIATION DATE)

52.203-16 Preventing Personal Conflicts of Interest.

As prescribed in 3.1106 , insert the following clause:

PREVENTING PERSONAL CONFLICTS OF INTEREST (JUN 2020)

(a) *Definitions*. As used in this clause—

Acquisition function closely associated with inherently governmental functions means supporting or providing advice or recommendations with regard to the following activities of a Federal agency:

(1) Planning acquisitions.

(2) Determining what supplies or services are to be acquired by the Government, including developing statements of work.

(3) Developing or approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria.

(4) Evaluating contract proposals.

(5) Awarding Government contracts.

(6) Administering contracts (including ordering changes or giving technical direction in contract performance or contract quantities, evaluating contractor performance, and accepting or rejecting contractor products or services).

(7) Terminating contracts.

(8) Determining whether contract costs are reasonable, allocable, and allowable.

Covered employee means an individual who performs an acquisition function closely associated with inherently governmental functions and is—

(1) An employee of the contractor; or

(2) A subcontractor that is a self-employed individual treated as a covered employee of the contractor because there is no employer to whom such an individual could submit the required disclosures.

Non-public information means any Government or third-party information that-

(1) Is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552) or otherwise protected from disclosure by statute, Executive order, or regulation; or

(2) Has not been disseminated to the general public and the Government has not yet determined whether the information can or will be made available to the public.

Personal conflict of interest means a situation in which a covered employee has a financial interest, personal activity, or relationship that could impair the employee's ability to act impartially and in the best interest of the Government when performing under the contract. (A de minimis interest that would not "impair the employee's ability to act impartially and in the best interest of the Government" is not covered under this definition.)

(1) Among the sources of personal conflicts of interest are-

(i) Financial interests of the covered employee, of close family members, or of other members of the covered employee's household;

(ii) Other employment or financial relationships (including seeking or negotiating for prospective employment or business); and

(iii) Gifts, including travel.

(2) For example, financial interests referred to in paragraph (1) of this definition may arise from-

(i) Compensation, including wages, salaries, commissions, professional fees, or fees for business referrals;

(ii) Consulting relationships (including commercial and professional consulting and service arrangements, scientific and technical advisory board memberships, or serving as an expert witness in litigation);

(iii) Services provided in exchange for honorariums or travel expense reimbursements;

(iv) Research funding or other forms of research support;

(v) Investment in the form of stock or bond ownership or partnership interest (excluding diversified mutual fund investments);

(vi) Real estate investments;

(vii) Patents, copyrights, and other intellectual property interests; or

(viii) Business ownership and investment interests.

(b) *Requirements*. The Contractor shall—

(1) Have procedures in place to screen covered employees for potential personal conflicts of interest, by-

(i) Obtaining and maintaining from each covered employee, when the employee is initially assigned to the task under the contract, a disclosure of interests that might be affected by the task to which the employee has been assigned, as follows:

(A) Financial interests of the covered employee, of close family members, or of other members of the covered employee's household.

(B) Other employment or financial relationships of the covered employee (including seeking or negotiating for prospective employment or business).

(C) Gifts, including travel; and

(ii) Requiring each covered employee to update the disclosure statement whenever the employee's personal or financial circumstances change in such a way that a new personal conflict of interest might occur because of the task the covered employee is performing.

(2) For each covered employee—

(i) Prevent personal conflicts of interest, including not assigning or allowing a covered employee to perform any task under the contract for which the Contractor has identified a personal conflict of interest for the employee that the Contractor or employee cannot satisfactorily prevent or mitigate in consultation with the contracting agency;

(ii) Prohibit use of non-public information accessed through performance of a Government contract for personal gain; and

(iii) Obtain a signed non-disclosure agreement to prohibit disclosure of non-public information accessed through performance of a Government contract.

(3) Inform covered employees of their obligation-

(i) To disclose and prevent personal conflicts of interest;

(ii) Not to use non-public information accessed through performance of a Government contract for personal gain; and

(iii) To avoid even the appearance of personal conflicts of interest;

(4) Maintain effective oversight to verify compliance with personal conflict-of-interest safeguards;

(5) Take appropriate disciplinary action in the case of covered employees who fail to comply with policies established pursuant to this clause; and

(6) Report to the Contracting Officer any personal conflict-of-interest violation by a covered employee as soon as it is identified. This report shall include a description of the violation and the proposed actions to be taken by the Contractor in response to the violation. Provide follow-up reports of corrective actions taken, as necessary. Personal conflict-of-interest violations include-

(i) Failure by a covered employee to disclose a personal conflict of interest;

(ii) Use by a covered employee of non-public information accessed through performance of a Government contract for personal gain; and

(iii) Failure of a covered employee to comply with the terms of a non-disclosure agreement.

(c) Mitigation or waiver. (1) In exceptional circumstances, if the Contractor cannot satisfactorily prevent a personal conflict of interest as required by paragraph (b)(2)(i) of this clause, the Contractor may submit a request through the Contracting Officer to the Head of the Contracting Activity for-

(i) Agreement to a plan to mitigate the personal conflict of interest; or

(ii) A waiver of the requirement.

(2) The Contractor shall include in the request any proposed mitigation of the personal conflict of interest.

(3) The Contractor shall-

(i) Comply, and require compliance by the covered employee, with any conditions imposed by the Government as necessary to mitigate the personal conflict of interest; or

(ii) Remove the Contractor employee or subcontractor employee from performance of the contract or terminate the applicable subcontract.

(d) *Subcontract*s. The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts—

(1) That exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award; and

(2) In which subcontractor employees will perform acquisition functions closely associated with inherently governmental functions (*i.e.*, instead of performance only by a self-employed individual).

(End of clause)

52.203-17 Contractor Employee Whistleblower Rights.

As prescribed in 3.906 , insert the following clause:

CONTRACTOR EMPLOYEE WHISTLEBLOWER RIGHTS (NOV 2023)

(a) This contract and employees working on this contract will be subject to the whistleblower rights and remedies established at 41 U.S.C. 4712 and Federal Acquisition Regulation (FAR) 3.900 through 3.905.

(b) The Contractor shall inform its employees in writing, in the predominant language of the workforce, of employee whistleblower rights and protections under 41 U.S.C. 4712, as described in FAR 3.900 through 3.905.

(c) The Contractor shall insert the substance of this clause, including this paragraph (c), in all subcontracts.

(End of clause)

52.203-18 Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements or Statements-Representation.

As prescribed in 3.909-3(a), insert the following provision:

PROHIBITION ON CONTRACTING WITH ENTITIES THAT REQUIRE CERTAIN INTERNAL CONFIDENTIALITY AGREEMENTS OR STATEMENTS-REPRESENTATION (JAN 2017)

(a) *Definition*. As used in this provision-

Internal confidentiality agreement or statement, subcontract, and subcontractor , are defined in the clause at 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements.

(b) In accordance with section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions), Government agencies are not permitted to use funds appropriated (or otherwise made available) for contracts with an entity that requires employees or subcontractors of such entity seeking to report waste, fraud, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

(c) The prohibition in paragraph (b) of this provision does not contravene requirements applicable to Standard Form 312, (Classified Information Nondisclosure Agreement), Form 4414 (Sensitive Compartmented Information Nondisclosure Agreement), or any other form issued by a Federal department or agency governing the nondisclosure of classified information.

(d) *Representation*. By submission of its offer, the Offeror represents that it will not require its employees or subcontractors to sign or comply with internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting waste, fraud, or abuse related to the performance of a Government contract to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information (e.g., agency Office of the Inspector General).

(End of provision)

52.203-19 Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements.

As prescribed in 3.909-3(b), insert the following clause:

PROHIBITION ON REQUIRING CERTAIN INTERNAL CONFIDENTIALITY AGREEMENTS OR STATEMENTS (JAN 2017)

(a) *Definitions*. As used in this clause-

Internal confidentiality agreement or statement means a confidentiality agreement or any other written statement that the contractor requires any of its employees or subcontractors to sign regarding nondisclosure of contractor information, except that it does not include confidentiality agreements arising out of civil litigation or confidentiality agreements that contractor employees or subcontractors sign at the behest of a Federal agency.

Subcontract means any contract as defined in subpart 2.1 entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

Subcontractor means any supplier, distributor, vendor, or firm (including a consultant) that furnishes supplies or services to or for a prime contractor or another subcontractor.

(b) The Contractor shall not require its employees or subcontractors to sign or comply with internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting waste, fraud, or abuse related to the performance of a Government contract to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information (*e.g.*, agency Office of the Inspector General).

(c) The Contractor shall notify current employees and subcontractors that prohibitions and restrictions of any preexisting internal confidentiality agreements or statements covered by this clause, to the extent that such prohibitions and restrictions are inconsistent with the prohibitions of this clause, are no longer in effect.

(d) The prohibition in paragraph (b) of this clause does not contravene requirements applicable to Standard Form 312 (Classified Information Nondisclosure Agreement), Form 4414 (Sensitive Compartmented Information Nondisclosure Agreement), or any other form issued by a Federal department or agency governing the nondisclosure of classified information.

(e) In accordance with section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015, (Pub. L. 113-235), and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions) use of funds appropriated (or otherwise made available) is prohibited, if the Government determines that the Contractor is not in compliance with the provisions of this clause.

(f) The Contractor shall include the substance of this clause, including this paragraph (f), in subcontracts under such contracts.

(End of clause)

52.204 [Reserved]

52.204-1 [Reserved]

(DEVIATION DATE)

52.204-2 [Reserved]

(DEVIATION DATE)

52.204-3 [Reserved]

(DEVIATION DATE)

52.204-4 [Reserved]

52.204-5 Women-Owned Business (Other Than Small Business).

As prescribed in 4.208(a), insert the following provision:

WOMEN-OWNED BUSINESS (OTHER THAN SMALL BUSINESS) (OCT 2014)

(a) *Definition.*"Women-owned business concern," as used in this provision, means a concern that is at least 51 percent owned by one or more women; or in the case of any publicly owned business, at least 51 percent of its stock is owned by one or more women; and whose management and daily business operations are controlled by one or more women.

(b) *Representation*. [*Complete only if the offeror is a women-owned business concern and has not represented itself as a small business concern in paragraph (c)(1) of FAR 52.219-1, Small Business Program Representations, of this solicitation*.] The offeror represents that it □ is a women-owned business concern.

(End of provision)

52.204-6 [Reserved]

(DEVIATION DATE)

52.204-7 System for Award Management—Registration.

As prescribed in 4.208(b)(1), insert the following provision:

SYSTEM FOR AWARD MANAGEMENT—REGISTRATION (DEVIATION DATE)

The Offeror shall have an active Federal Government contracts registration in the System for Award Management (SAM) when submitting an offer or quotation in response to this solicitation and at the time of award. As part of the SAM registration process, the Government collects information, as described in paragraphs (b) through (d) of this provision, that is necessary to identify the Offeror and for the Offeror to be awarded Federal Government contracts. To register in SAM, go to https://www.sam.gov. Allow for processing time when registering in SAM. If the Offeror is not registered in SAM, it should register immediately after receiving this solicitation.

(a) *Definitions*. As used in this provision—

Commercial and Government Entity (CAGE) code has the meaning provided in the clause at the Federal Acquisition Regulation (FAR) 52.204-13, System for Award Management—Maintenance, of this solicitation.

Electronic Funds Transfer (EFT) indicator means a bank account identifier to establish additional System for Award Management records for identifying alternative EFT accounts (see part 32) for the same entity.

Highest-level owner means the entity that owns or controls an immediate owner of the offeror, or that owns or controls one or more entities that control an immediate owner of the offeror. No entity owns or exercises control of the highest-level owner.

Immediate owner means an entity, other than the offeror, that has direct control of the offeror. Indicators of control include, but are not limited to, one or more of the following: ownership or interlocking management, identity of interests among family members, shared facilities and equipment, and the common use of employees. There may be more than one immediate owner (e.g., joint ventures).

Predecessor means an entity whose assets were acquired by the offeror or another entity (most often through merger or acquisition) and whose affairs are now carried out by the offeror or the other entity under a new name.

Taxpayer identification number means the number required by the Internal Revenue Service (IRS) to be used by the offeror to report income tax and other returns. It may be either a Social Security Number or an Employer Identification Number.

Unique entity identifier (UEI) has the meaning provided in the clause at FAR 52.204-13, System for Award Management—Maintenance, of this solicitation.

(b) *Identifiers*. The Offeror shall obtain and provide the following identifying information:

(1) *Unique entity identifier (UEI)*.

(i) The Offeror shall obtain a UEI to register in SAM. The Government will independently validate the existence and uniqueness of the Offeror before assigning a UEI to the Offeror. Go to https://www.sam.gov for instructions on obtaining a UEI.

(ii) The Offeror shall enter, in the block with its name and address on the cover page of its offer, the annotation "Unique Entity Identifier" followed by the UEI that identifies the Offeror's name and address exactly as stated in the offer. The Offeror shall also enter its EFT indicator, if applicable.

(iii) The Contracting Officer will use the UEI to verify that the Offeror has an active Federal Government contracts registration in SAM.

(2) *Taxpayer identification number (TIN)*.

(i) The Offeror shall provide its TIN or related information to comply with debt collection requirements of 31 U.S.C. 7701(c) and 3325(d); reporting requirements of 26 U.S.C. 6041, 6041A, and 6050M; and implementing regulations issued by the IRS. The Offeror shall consent for TIN validation; and

(3) *Commercial and Government Entity (CAGE) code*.

(i) The Offeror shall provide a CAGE code and legal business name (Do not use a "doing business as" name) for—

(A) Itself;

(B) Its immediate owner(s), if any;

(C) Its highest-level owner, if any; and

(D) Any predecessor(s), or predecessor of an Offeror's predecessor, that held a Federal contract or grant within the last three years.

(ii) If the Offeror is in the United States or its outlying areas and does not already have a CAGE code assigned, the DLA CAGE Branch will assign a CAGE code to the Offeror as a part of the SAM registration process. For information on obtaining a CAGE code go to https://cage.dla.mil/.

(iii) The Offeror shall get from any immediate and/or highest-level owner(s) their respective CAGE code(s) to provide the code(s) as part of the registration (FAR 52.204-7(b)(3)(i)).

(iv) If the Offeror is located outside of the United States or its outlying areas, and does not already have a CAGE code assigned, the Offeror may obtain a CAGE code as indicated in the following table.

If the Offeror is…	Then…
Located in a country that is a member of the North Atlantic Treaty Organization (NATO) or a sponsored nation	Contact the appropriate National Codification Bureau (https://www.nato.int/structur/ac/135/about/contacts)
Located in a country that is not a member of NATO or a sponsored nation	Contact the NATO Support and Procurement Agency (NSPA) (https://eportal.nspa.nato.int/AC135Public/scage/CageList.aspx)

(c) *Representations and certifications*.

(1) The following FAR solicitation provisions contain entity-level representations and certifications that the Offeror shall submit as part of their Federal Government contracts registration in SAM:

Provision	Title	Date

52.204-5	Women-Owned Business (Other Than Small Business)	Oct 2014
52.209-2	Prohibition on Contracting with Inverted Domestic Corporations—Representation	Nov 2015
52.209-5	Certification Regarding Responsibility Matters	Aug 2020
52.209-11	Representation by Corporations Regarding Delinquent Tax Liability or a Felony Conviction under any Federal Law	Feb 2016
52.219-1	Small Business Program Representations	Feb 2024
52.219-1 Alt I	Small Business Program Representations, with its Alternate I	Feb 2024
52.219-1 Alt II	Small Business Program Representations, with its Alternate II	Mar 2023
52.226-2	Historically Black College or University and Minority Institution Representation	Oct 2014

(2) By submitting its offer, the Offeror verifies that, as of the date of its offer, its representations and certifications posted electronically in SAM for the provisions listed in paragraph (c)(1) of this provision are current, accurate, and complete. The Offeror's representations and certifications in SAM are hereby incorporated by reference into its offer.

(d) *Other information*. The Offeror shall provide more information on its business operations and type that is necessary to be considered for award of certain contracts and financial information necessary to receive payment under contracts.

(End of provision)

Alternate I (DATE). As prescribed in 4.208(b)(1), replace the first sentence of the introductory paragraph of the basic provision with the following sentences:

The Offeror shall have an active Federal Government contracts registration in the System for Award Management (SAM) as soon as possible. If registration is not possible when submitting an offer or quotation, the awardee shall be registered in SAM according to the requirements of the Alternate I of clause at FAR 52.204-13, System for Award Management-Maintenance.

52.204-8 [Reserved]

(DEVIATION DATE)

52.204-9 Personal Identity Verification of Contractor Personnel.

As prescribed in 4.208(d), insert the following clause:

PERSONAL IDENTITY VERIFICATION OF CONTRACTOR PERSONNEL (JAN 2011)

(a) The Contractor shall comply with agency personal identity verification procedures identified in the contract that implement Homeland Security Presidential Directive-12 (HSPD-12), Office of Management and Budget (OMB) guidance M-05-24 and Federal Information Processing Standards Publication (FIPS PUB) Number 201.

(b) The Contractor shall account for all forms of Government-provided identification issued to the Contractor employees in connection with performance under this contract. The Contractor shall return such identification to the issuing agency at the earliest of any of the following, unless otherwise determined by the Government:

(1) When no longer needed for contract performance.

(2) Upon completion of the Contractor employee's employment.

(3) Upon contract completion or termination.

(c) The Contracting Officer may delay final payment under a contract if the Contractor fails to comply with these requirements.

(d) The Contractor shall insert the substance of this clause, including this paragraph (d), in all subcontracts when the subcontractor's employees are required to have routine physical access to a Federally-controlled facility and/or routine access to a Federally-controlled information system. It shall be the responsibility of the prime Contractor to return such identification to the issuing agency in accordance with the terms set forth in paragraph (b) of this section, unless otherwise approved in writing by the Contracting Officer.

(End of clause)

52.204-10 Reporting Executive Compensation and First-Tier Subcontract Awards.

As prescribed in 4.208(e) insert the following clause:

REPORTING EXECUTIVE COMPENSATION AND FIRST-TIER SUBCONTRACT AWARDS (DEVIATION DATE)

(a) *Definitions*. As used in this clause:

Executive means officers, managing partners, or any other employees in management positions.

First-tier subcontract means a subcontract awarded directly by the Contractor to acquire supplies or services (including construction) for performing a prime contract. It does not include the Contractor's supplier agreements with vendors, such as long-term arrangements for materials or supplies that benefit multiple contracts and/or the costs of which are normally applied to a contractor's general and administrative expenses or indirect costs.

Month of award means the month in which the Contracting Officer signs a contract or the month in which the Contractor signs a first-tier subcontract.

Total compensation means the cash and noncash dollar value earned by the executive during the Contractor's preceding fiscal year and includes the information described at 17 CFR 229.402(c)(2).

(b) *Requirement*. Section 2(d)(2) of the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109-282), as amended by section 6202 of the Government Funding Transparency Act of 2008 (Pub. L. 110-252), requires the Contractor to report information on subcontract awards. The law requires all reported information be made public; therefore, the Contractor is responsible for notifying its subcontractors that the required information will be made public. Nothing in this clause requires disclosing classified information.

(c) *Reporting*. Unless otherwise directed by the Contracting Officer, or as provided in paragraph (f) of this clause, the Contractor shall report the following in the System for Award Management at https://www.sam.gov as follows:

(1) Executive compensation of the prime contractor. The Contractor shall report the names and total compensation of each of the five most highly compensated executives for its preceding completed fiscal year, if—

(i) In the Contractor's preceding fiscal year, the Contractor received—

(A) 80 percent or more of its annual gross revenues from Federal contracts (and subcontracts); loans, grants (and subgrants); cooperative agreements; and other forms of Federal financial assistance; and

(B) $25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts); loans, grants (and subgrants); cooperative agreements; and other forms of Federal financial assistance; and

(ii) The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986. (To determine if the public has access to the compensation information, see the U.S. Security and Exchange Commission total compensation filings at http://www.sec.gov/answers/execomp.htm.).

(2) First-tier subcontract information. The Contractor shall report the following information by the end of the month following the month of award of each first-tier subcontract award:

(i) Unique entity identifier for the subcontractor receiving the award and for the subcontractor's ultimate parent company, if the subcontractor has a parent company.

(ii) Name of the subcontractor.

(iii) Amount of the subcontract award.

(iv) Date of the subcontract award.

(v) A description of the products or services (including construction) being provided under the subcontract, including the overall purpose and expected outcomes or results of the subcontract.

(vi) The subcontract number assigned by the Prime Contractor.

(vii) Subcontractor's physical address.

(viii) Subcontractor's primary performance location.

(ix) The prime contract number, and order number if applicable.

(x) Awarding agency name and code.

(xi) Funding agency name and code.

(xii) Government contracting office code.

(xiii) The applicable North American Industry Classification System code.

(3) Executive compensation of the first-tier subcontractor. The Contractor shall report by the end of the month following the month of award of a first-tier subcontract award and annually thereafter (calculated from the prime contract award date) the names and total compensation of each of the five most highly compensated executives for that subcontractor in the subcontractor's preceding completed fiscal year, if—

(i) In the subcontractor's preceding fiscal year, the subcontractor received—

(A) 80 percent or more of its annual gross revenues from Federal contracts (and subcontracts); loans, grants (and subgrants); cooperative agreements; and other forms of Federal financial assistance; and

(B) $25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts); loans, grants (and subgrants); cooperative agreements; and other forms of Federal financial assistance; and

(ii) The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986 (see http://www.sec.gov/answers/execomp.htm).

(d) *Restriction*. The Contractor shall not split or break down subcontracts to a value below the threshold at the Federal Acquisition Regulation 4.208(e), on the date of subcontract award, to avoid the reporting requirements in paragraph (c) of this clause.

(e) *Duration*. Continued reporting on first-tier subcontracts is not required unless one of the reported data elements changes during the performance of the subcontract. The Contractor is not required to make further reports after a first-tier subcontract expires.

(f) *Exceptions.* (1) If the Contractor in the previous tax year had gross income, from all sources, under $300,000, the Contractor is exempt from the requirement to report subcontractor awards.

(2) If a subcontractor in the previous tax year had gross income from all sources under $300,000, the Contractor does not need to report awards for that subcontractor.

(g) *Prepopulated data*. The Subcontract Reports in SAM will prepopulate with some information from SAM and the Federal Procurement Data System (FPDS). If the FPDS information is incorrect, the Contractor should notify the Contracting Officer. If the SAM information is incorrect, the Contractor is responsible for correcting this information.

(End of clause)

52.204-11 [Reserved]

52.204-12 [Reserved]

(DEVIATION DATE)

52.204-13 System for Award Management—Maintenance.

As prescribed in 4.208(b)(2), use the following clause:

SYSTEM FOR AWARD MANAGEMENT—MAINTENANCE (DEVIATION DATE)

(a) *Definitions*. As used in this clause—

Commercial and Government Entity code means—

(1) An identifier assigned to entities located in the United States or its outlying areas by the Defense Logistics Agency (DLA) Commercial and Government Entity (CAGE) Branch to identify a commercial or government entity by unique location (referred to as "CAGE code"); or

(2) An identifier assigned by a member of the North Atlantic Treaty Organization (NATO) or by the NATO Support and Procurement Agency to entities located outside the United States and its outlying areas that the DLA CAGE Branch records and maintains in the CAGE master file (referred to as "NCAGE code").

Unique Entity Identifier (UEI) means an identifier used to identify a specific commercial, nonprofit, or Government entity.

(b) *Active registration*.

(1) The Contractor shall maintain an active Federal Government contracts registration in the System for Award Management (SAM) at https://www.sam.gov during contract performance and through final payment under this contract. To maintain an active registration in SAM, the Contractor shall review at least annually its registration in SAM and validate that the information is current, accurate, and complete.

(2) The Contractor is responsible for the currency, accuracy, and completeness of the information provided within SAM, and for any liability resulting from the Government's reliance on inaccurate or incomplete information. Updating SAM does not alter the terms and conditions of this contract and is not a substitute for a properly executed contractual document.

(c) *Novation and change-of-name agreements*.

(1) If the Contractor has legally changed its business name or "doing business as" name (whichever is shown on the contract), or has transferred the assets used to perform the contract, but has not completed the necessary requirements regarding novation and change-of-name agreements in part 42 of the Federal Acquisition Regulation (FAR), the Contractor shall provide the responsible Contracting Officer a minimum of one business day's written notification of its intention to —

(i) Change the legal business name in SAM;

(ii) Comply with the requirements of FAR part 42; and

(iii) Agree in writing to the timeline and procedures specified by the responsible Contracting Officer. The Contractor shall provide with its written notification sufficient documentation to support the legally changed name.

(2) If the Contractor fails to comply with the requirements of paragraph (c)(1) of this clause, or fails to perform the agreement at paragraph (c)(1)(iii) of this clause, and, in the absence of a properly executed novation or change-of-name agreement, the SAM information that shows the Contractor to be other than the Contractor indicated in the contract will be considered to be incorrect information within the meaning of the "Suspension of Payment" paragraph of the electronic funds transfer (EFT) clause of this contract.

(d) *Assignees*.

(1) The Contractor shall not change the legal business name or address for EFT payments or manual payments, as appropriate, in the SAM record to reflect an assignee for the purpose of assignment of claims (see FAR part 32). Assignees shall be separately registered in SAM.

(2) Information provided to the Contractor's SAM record that indicates payments, including those made by EFT, to an ultimate recipient other than that Contractor will be incorrect information within the meaning of the "Suspension of Payment" paragraph of the EFT clause of this contract.

(e) Unique entity identifier (UEI). The Contractor shall ensure that its UEI is maintained throughout the life of the contract.

(f) Commercial and Government Entity (CAGE) code. The Contractor shall ensure that the CAGE code is maintained throughout the life of the contract. To update a CAGE code, the Contractor shall initiate the change by updating its SAM registration.

(g) Communicating changes. The Contractor shall communicate any change to its UEI or CAGE code to the Contracting Officer within 30 days after the change, so a modification can be issued to update the UEI or CAGE code on this contract. A change in the UEI does not necessarily require a novation.

(End of clause)

Alternate I (DATE). As prescribed in 4.208(b)(2), replace paragraph (b) of the basic clause with the following paragraph (b):

(b) *Active registration*.

(1) If the Contractor was unable to register for Federal Government contracts in the System for Award Management (SAM) at *https://www.sam.gov* before award, the Contractor shall register in SAM within 30 days after contract award or at least three days before submitting the first invoice, whichever occurs first.

(2) The Contractor shall maintain an active Federal Government contracts registration in SAM during contract performance and through final payment under this contract. To maintain an active registration in SAM, the Contractor shall review at least annually its registration in SAM and validate that the information is current, accurate, and complete.

(3) The Contractor is responsible for the currency, accuracy, and completeness of the information provided within SAM, and for any liability resulting from the Government's reliance on inaccurate or incomplete information. Updating SAM does not alter the terms and conditions of this contract and is not a substitute for a properly executed contractual document.

52.204-14 Service Contract Reporting Requirements.

As prescribed in 4.208(f)(2), insert the following clause:

SERVICE CONTRACT REPORTING REQUIREMENTS (DEVIATION DATE)

(a) *Definition.* As used in this clause—

First-tier subcontract means a subcontract awarded directly by the Contractor to acquire supplies or services (including construction) for performing a prime contract. It does not include the Contractor's supplier agreements with vendors, such as long-term arrangements for materials or supplies that benefit multiple contracts and/or the costs of which are normally applied to a contractor's general and administrative expenses or indirect costs.

(b) *Requirement*. The Contractor shall report, according to paragraphs (c) and (d) of this clause, annually by October 31, for services performed under this contract during the preceding Government fiscal year (October 1-September 30).

(c) *Report elements*. The Contractor shall report the following information:

(1) Contract number and, as applicable, order number.

(2) The total dollar amount invoiced for services performed during the previous Government fiscal year under the contract.

(3) The number of Contractor direct labor hours expended on the services performed during the previous Government fiscal year.

(4) Data reported by subcontractors under paragraph (f) of this clause.

(d) *Remedies*. The Contractor shall submit the information required in paragraph (c) of this clause in the System for Award Management (SAM) at https://www.sam.gov (see SAM User Guide). If the Contractor fails to submit the report in a timely manner, the Contracting Officer will exercise appropriate contractual remedies. In addition, the Contracting Officer will make the Contractor's failure to comply with the reporting requirements a part of the Contractor's performance information under the Federal Acquisition Regulation part 42.

(e) *Review*. Agencies will review Contractor-reported information for reasonableness and consistency with available contract information. If the agency believes that revisions to the Contractor's reported information are warranted, the agency will notify the Contractor no later than November 15. By November 30, the Contractor shall revise the report, or put its reason in writing for the agency.

(f) *First-tier subcontracts.* (1) The Contractor shall require each first-tier subcontractor providing services under this contract, with subcontract(s) each valued at or above the thresholds set forth in 4.303(b), to provide the following detailed information to the Contractor in sufficient time to submit the report:

(i) Subcontract number (including subcontractor name and unique entity identifier); and

(ii) The number of first-tier subcontractor direct-labor hours expended on the services performed during the previous Government fiscal year.

(2) The Contractor shall tell the subcontractor that the information will be made available to the public as required by section 743 of Division C of the Consolidated Appropriations Act, 2010.

(End of clause)

52.204-15 Service Contract Reporting Requirements for Indefinite-Delivery Contracts.

As prescribed in 4.208(f)(3), insert the following clause:

SERVICE CONTRACT REPORTING REQUIREMENTS FOR INDEFINITE-DELIVERY CONTRACTS (DEVIATION DATE)

(a) *Definition*. As used in this clause—

First-tier subcontract means a subcontract awarded directly by the Contractor to acquire supplies or services (including construction) for performing a prime contract. It does not include the Contractor's supplier agreements with vendors, such as long-term arrangements for materials or supplies that benefit multiple contracts and/or the costs of which are normally applied to a contractor's general and administrative expenses or indirect costs.

(b) *Requirement*. The Contractor shall report, according to paragraphs (c) and (d) of this clause, annually by October 31, for services performed during the preceding Government fiscal year (October 1-September 30) under this contract for orders that exceed the thresholds established in 4.303(b).

(c) *Report elements*. The Contractor shall report the following information:

(1) Contract number and order number.

(2) The total dollar amount invoiced for services performed during the previous Government fiscal year under the order.

(3) The number of Contractor direct labor hours expended on the services performed during the previous Government fiscal year.

(4) Data reported by subcontractors under paragraph (f) of this clause.

(d) *Remedies*. The Contractor shall submit the information required in paragraph (c) of this clause in the System for Award Management (SAM) at https://www.sam.gov (see SAM User Guide). If the Contractor fails to submit the report in a timely manner, the Contracting Officer will exercise appropriate contractual remedies. In addition, the Contracting Officer will make the Contractor's failure to comply with the reporting requirements a part of the Contractor's performance information under the Federal Acquisition Regulation part 42.

(e) *Review*. Agencies will review Contractor-reported information for reasonableness and consistency with available contract information. If the agency believes that revisions to the Contractor's reported information are warranted, the agency will notify the Contractor no later than November 15. By November 30, the Contractor shall revise the report, or put its reason in writing for the agency.

(f) *First-tier subcontracts*. (1) The Contractor shall require each first-tier subcontractor providing services under this contract, with subcontract(s) each valued at or above the thresholds set forth in 4.303(b), to provide the following detailed information to the Contractor in sufficient time to submit the report:

(i) Subcontract number (including subcontractor name and unique entity identifier); and

(ii) The number of first-tier subcontractor direct-labor hours expended on the services performed during the previous Government fiscal year.

(2) The Contractor shall tell the subcontractor that the information will be made available to the public as required by section 743 of Division C of the Consolidated Appropriations Act, 2010.

(End of clause)

52.204-16 [Reserved]

(DEVIATION DATE)

52.204-17 [Reserved]

(DEVIATION DATE)

52.204-18 [Reserved]

(DEVIATION DATE)

52.204-19 Incorporation by Reference of Representations and Certifications.

As prescribed in 4.208(g), insert the following clause:

INCORPORATION BY REFERENCE OF REPRESENTATIONS AND CERTIFICATIONS (DEC 2014)

The Contractor's representations and certifications, including those completed electronically via the System for Award Management (SAM), are incorporated by reference into the contract.

(End of clause)

52.204-20 [Reserved]

(DEVIATION DATE)

52.204-21 [Reserved]

(DEVIATION DATE)

52.204-22 [Reserved]

(DEVIATION DATE)

52.204-23 [Reserved]

(DEVIATION DATE)

52.204-24 [Reserved]

(DEVIATION DATE)

52.204-25 [Reserved]

(DEVIATION DATE)

52.204-26 [Reserved]

(DEVIATION DATE)

52.204-27 [Reserved]

(DEVIATION DATE)

52.204-28 [Reserved]

(DEVIATION DATE)

52.204-29 [Reserved]

(DEVIATION DATE)

52.204-30 [Reserved]

(DEVIATION DATE)

52.204-90 Offeror Identification.

As prescribed in 4.208(c)(1), insert the following provision:

OFFEROR IDENTIFICATION (DEVIATION DATE)

If the Offeror will not have an active Federal Government contracts registration in the System for Award Management (https://www.sam.gov) when submitting its offer, it shall complete paragraphs (c) and (d) of this provision and include its responses with its offer.

(a) *Definitions*. As used in this provision—

Commercial and Government Entity (CAGE) code has the meaning provided in the clause at FAR 52.204-91, Contractor Identification, of this solicitation.

Common parent means that corporate entity that owns or controls an affiliated group of corporations that files its Federal income tax returns on a consolidated basis, and of which the offeror is a member.

Electronic Funds Transfer (EFT) indicator means a bank account identifier to establish additional System for Award Management records for identifying alternative EFT accounts (see part 32) for the same entity.

Highest-level owner means the entity that owns or controls an immediate owner of the offeror, or that owns or controls one or more entities that control an immediate owner of the offeror. No entity owns or exercises control of the highest-level owner.

Immediate owner means an entity, other than the offeror, that has direct control of the offeror. Indicators of control include, but are not limited to, one or more of the following: ownership or interlocking management, identity of interests among family members, shared facilities and equipment, and the common use of employees. There may be more than one immediate owner (e.g., joint ventures).

Predecessor means an entity whose assets were acquired by the offeror or another entity (most often through merger or acquisition) and whose affairs are now carried out by the offeror or the other entity under a new name.

Taxpayer Identification Number means the number required by the Internal Revenue Service (IRS) to be used by the offeror to report income tax and other returns. It may be either a Social Security Number or an Employer Identification Number.

Unique entity identifier (UEI) has the meaning provided in the clause at FAR 52.204-91, Contractor Identification, of this solicitation.

(b) *Unique entity identifier (UEI)*.

(1) The Offeror shall enter, in the block with its name and address on the cover page of its offer, the annotation "Unique Entity Identifier" followed by the UEI that identifies the Offeror's name and address exactly as stated in the offer. The Offeror shall also enter its EFT indicator, if applicable.

(2) If the Offeror does not have a UEI, it shall go to https://www.sam.gov to obtain one. The Government will independently validate the existence and uniqueness of the Offeror before assigning a UEI.

(c) *Taxpayer identification*. The Offeror shall provide with its offer the following information that is necessary to comply with debt collection requirements of 31 U.S.C. 7701(c) and 3325(d); reporting requirements of 26 U.S.C. 6041, 6041A, and 6050M; and the implementing IRS regulations:

(1) Taxpayer identification number (TIN)

□ TIN: _____;

□ TIN has been applied for; or

□ TIN is not required because:

□ Offeror is a nonresident alien, foreign corporation, or foreign partnership that does not have income effectively connected with the conduct of a trade or business in the United States and does not have an office or place of business or a fiscal paying agent in the United States;

□ Offeror is an agency or instrumentality of a foreign government; or

□ Offeror is an agency or instrumentality of the Federal Government.

(2) *Type of organization.*

□ Sole proprietorship;

□ Partnership;

□ Corporate entity (not tax-exempt);

□ Corporate entity (tax-exempt);

□ Government entity (Federal, State, or local);

□ Foreign government;

□ International organization per 26 CFR 1.6049-4; or

□ Other.

(3) *Common parent.*

□ Offeror is not owned or controlled by a common parent as defined in paragraph (a) of this provision; or

□ Name and TIN of common parent:
Name: _____
TIN: _____

(4) The TIN provided in paragraph (c)(1) of this provision may be matched with IRS records to verify the accuracy of the Offeror's TIN. The Government may use the TIN to collect and report on any delinquent amounts arising out of the Offeror's relationship with the Government (31 U.S.C. 7701(c)(3)).

(d) Commercial and Government Entity (CAGE) code.

(1) The Offeror shall provide its CAGE code with its offer with its name and location address or otherwise include it prominently in its offer. The CAGE code shall be for that name and location address. Insert the word "CAGE" before the code. The Offeror may obtain a CAGE code as indicated in the following table.

If the Offeror is…	Then…
Located in the United States or its outlying areas	Submit a request to the DLA CAGE Branch via https://cage.dla.mil
Located outside the United States and its outlying areas and its country is a member of the North Atlantic Treaty Organization (NATO) or a sponsored nation	Contact the appropriate National Codification Bureau (https://www.nato.int/structur/ac/135/about/contacts)
Located outside the United States and its outlying areas and its country is not a member of NATO or a sponsored nation	Contact the NATO Support and Procurement Agency (NSPA) (https://eportal.nspa.nato.int/AC135Public/scage/CageList.aspx)

(2) The Offeror shall provide the CAGE code and legal business name (Do not use a "doing business as" name) for—

(i) Its immediate owner(s), if any;

(ii) Its highest-level owner, if any; and

(iii) Any predecessor(s), or predecessor of an Offeror's predecessor, that held a Federal contract or grant within the last three years.

Owner Type	CAGE Code	Legal Business Name
Immediate owner		
Highest-level owner		
Predecessor*		

* Predecessor CAGE code may be marked "Unknown."

(3) If the Offeror has more than one immediate owner (such as a joint venture), give the information for each owner (or joint venture participant). If the Offeror has more than one predecessor, provide information for each predecessor in reverse chronological order.

(End of provision)

52.204-91 Contractor Identification.

As prescribed in 4.208(c)(2), insert the following clause:

CONTRACTOR IDENTIFICATION (DEVIATION DATE)

Definitions. As used in this clause—

Commercial and Government Entity code means—

(1) An identifier assigned to entities located in the United States or its outlying areas by the Defense Logistics Agency (DLA) Commercial and Government Entity (CAGE) Branch to identify a commercial or government entity by unique location (referred to as "CAGE code"); or

(2) An identifier assigned by a member of the North Atlantic Treaty Organization (NATO) or by the NATO Support and Procurement Agency (NSPA) to entities located outside the United States and its outlying areas that the DLA CAGE Branch records and maintains in the CAGE master file (referred to as "NCAGE code").

Unique entity identifier means an identifier used to identify a specific commercial, nonprofit, or Government entity.

(b) *Unique entity identifier (UEI).* The Contractor shall ensure that its UEI is maintained throughout the life of the contract.

(c) *Commercial and Government Entity (CAGE) code.* The Contractor shall ensure that the CAGE code is maintained throughout the life of the contract. The Contractor shall request changes to a CAGE code as indicated in the following table.

If the Contractor is…	**Then…**
Registered in the System for Award Management (SAM)	Initiate the change by updating its SAM registration
Located in the United States or its outlying areas and is not registered in SAM	Submit a change request to the DLA CAGE Branch via https://cage.dla.mil
Located outside the United States and its outlying areas and is not registered in SAM	Request a change by contacting the appropriate National Codification Bureau (https://www.nato.int/structur/ac/135/about/contacts) or NSPA (https://eportal.nspa.nato.int/AC135Public/scage/CageList.aspx)

(d) *Communicating changes*. The Contractor shall communicate any change to its UEI or CAGE code to the Contracting Officer within 30 days after the change, so a modification can be issued to update the UEI or CAGE code on this contract. A change in the UEI does not necessarily require a novation.

(End of clause)

52.205 [Reserved]

52.206 [Reserved]

52.207 [Reserved]

52.207-1 [Reserved]

(DEVIATION DATE)

52.207-2 [Reserved]

(DEVIATION DATE)

52.207-3 [Reserved]

(DEVIATION DATE)

52.207-4 Economic Purchase Quantity-Supplies.

As prescribed in 7.203 , insert the following provision:

ECONOMIC PURCHASE QUANTITY-SUPPLIES (AUG 1987)

(a) Offerors are invited to state an opinion on whether the quantity(ies) of supplies on which bids, proposals or quotes are requested in this solicitation is (are) economically advantageous to the Government.

_____

_____

(b) Each offeror who believes that acquisitions in different quantities would be more advantageous is invited to recommend an economic purchase quantity. If different quantities are recommended, a total and a unit price must be quoted for applicable items. An economic purchase quantity is that quantity at which a significant price break occurs. If there are significant price breaks at different quantity points, this information is desired as well.

Offeror Recommendations			
Item	**Quantity**	**Price Quotation**	**Total**
_____	_____	_____	_____

(c) The information requested in this provision is being solicited to avoid acquisitions in disadvantageous quantities and to assist the Government in developing a data base for future acquisitions of these items. However, the Government reserves the right to amend or cancel the solicitation and resolicit with respect to any individual item in the event quotations received and the Government's requirements indicate that different quantities should be acquired.

(End of provision)

52.207-5 Option to Purchase Equipment.

As prescribed in 7.404 , insert a clause substantially the same as the following:

OPTION TO PURCHASE EQUIPMENT (FEB 1995)

(a) The Government may purchase the equipment provided on a lease or rental basis under this contract. The Contracting Officer may exercise this option only by providing a unilateral modification to the Contractor. The effective date of the

purchase will be specified in the unilateral modification and may be any time during the period of the contract, including any extensions thereto.

(b) Except for final payment and transfer of title to the Government, the lease or rental portion of the contract becomes complete and lease or rental charges shall be discontinued on the day immediately preceding the effective date of purchase specified in the unilateral modification required in paragraph (a) of this clause.

(c) The purchase conversion cost of the equipment shall be computed as of the effective date specified in the unilateral modification required in paragraph (a) of this clause, on the basis of the purchase price set forth in the contract, minus the total purchase option credits accumulated during the period of lease or rental, calculated by the formula contained elsewhere in this contract.

(d) The accumulated purchase option credits available to determine the purchase conversion cost will also include any credits accrued during a period of lease or rental of the equipment under any previous Government contract if the equipment has been on continuous lease or rental. The movement of equipment from one site to another site shall be "continuous rental."

(End of clause)

52.207-6 Solicitation of Offers from Small Business Concerns and Small Business Teaming Arrangements or Joint Ventures (Multiple-Award Contracts).

As prescribed in 7.107-4 , insert the following provision:

SOLICITATION OF OFFERS FROM SMALL BUSINESS CONCERNS AND SMALL BUSINESS TEAMING ARRANGEMENTS OR JOINT VENTURES (MULTIPLE-AWARD CONTRACTS) (AUG 2024)

(a) *Definition*. "Small Business Teaming Arrangement," as used in this provision-

(1) Means an arrangement where–

(i) Two or more small business concerns have formed a joint venture; or

(ii) A small business offeror agrees with one or more other small business concerns to have them act as its subcontractors under a specified Government contract. A Small Business Teaming Arrangement between the offeror and its small business subcontractor(s) exists through a written agreement between the parties that–

(A) Is specifically referred to as a "Small Business Teaming Arrangement"; and

(B) Sets forth the different responsibilities, roles, and percentages (or other allocations) of work as it relates to the acquisition;

(2) (i) For civilian agencies, may include two business concerns in a mentor-protégé relationship when both the mentor and the protégé are small or the protégé is small and the concerns have received an exception to affiliation pursuant to 13 CFR 121.103(h)(3)(ii) or (iii).

(ii) For DoD, may include two business concerns in a mentor-protégé relationship in the Department of Defense Mentor-Protégé Program (see 10 U.S.C. 4902) when both the mentor and the protégé are small. There is no exception to joint venture size affiliation for offers received from teaming arrangements under the DoD Mentor-Protégé Program; and

(3) See 13 CFR 121.103(b)(9) regarding the exception to affiliation for offers received from Small Business Teaming Arrangements in the case of a solicitation of offers for a bundled contract with a reserve.

(b) The Government is soliciting and will consider offers from any responsible source, including responsible small business concerns and offers from Small Business Teaming Arrangements or joint ventures of small business concerns.

(End of provision)

52.208 [Reserved]

52.208-1 [Reserved]

52.208-2 [Reserved]

52.208-3 [Reserved]

52.208-4 [Reserved]

(DEVIATION DATE)

52.208-5 [Reserved]

(DEVIATION DATE)

52.208-6 [Reserved]

(DEVIATION DATE)

52.208-7 [Reserved]

(DEVIATION DATE)

52.208-8 [Reserved]

52.208-9 Contractor Use of Mandatory Sources of Supply or Services.

As prescribed in 8.105-1(b), insert the following clause:

CONTRACTOR USE OF MANDATORY SOURCES OF SUPPLY OR SERVICES (DEVIATION DATE)

(a) Certain supplies or services to be provided under this contract for use by the Government are required by law to be obtained from nonprofit agencies participating in the program operated by the Committee for Purchase From People Who Are Blind or Severely Disabled (the Committee) under 41 U.S.C. 8504. The Committee operates under the name AbilityOne Commission. Additionally, some of these supplies are available from the Defense Logistics Agency (DLA), the General Services Administration (GSA), or the Department of Veterans Affairs (VA). The Contractor shall obtain mandatory supplies or services to be provided for Government use under this contract from the specific sources indicated in the contract schedule.

(b) The Contractor shall immediately notify the Contracting Officer if a mandatory source is unable to provide the supplies or services by the time required, or if the quality of supplies or services provided by the mandatory source is unsatisfactory. The Contractor shall not purchase the supplies or services from other sources until the Contracting Officer has notified the Contractor that the Committee or an AbilityOne central nonprofit agency has authorized purchase from other sources.

(c) Price and delivery information for the mandatory supplies is available from the Contracting Officer for the supplies obtained through the DLA/GSA/VA distribution facilities. For mandatory supplies or services that are not available from DLA/GSA/VA, price and delivery information is available from the appropriate central nonprofit agency. Payments shall be made directly to the source making delivery. Points of contact for AbilityOne central nonprofit agencies are:

(1) National Industries for the Blind (www.NIB.org), 1310 Braddock Place, Alexandria, VA 22314-1691, (703) 310-0500; and

(2) NISH/SourceAmerica (www.SourceAmerica.org), 8401 Old Courthouse Road, Vienna, VA 22182, (571) 226-4660.

(End of clause)

52.208-90 Government Supply Sources.

As prescribed in 8.105-2(c), insert the following clause:

GOVERNMENT SUPPLY SOURCES (DEVIATION DATE)

The Contracting Officer may issue the Contractor an authorization to use Government supply sources in the performance of this contract. Title to all property acquired by the Contractor under such an authorization shall vest in the Government unless otherwise specified in the contract. The provisions of the clause at FAR 52.245-1, Government Property, apply to all property acquired under such authorization.

(End of clause)

52.208-91 GSA Fleet Vehicles and Related Services.

As prescribed in 8.105-3(c), insert the following clause:

GSA FLEET VEHICLES AND RELATED SERVICES (DEVIATION DATE)

The Contracting Officer may issue the Contractor an authorization to obtain GSA Fleet vehicles and related services for use in the performance of this contract. The use, service, and maintenance of GSA Fleet vehicles and the use of related services by the Contractor shall be in accordance with 41 CFR 101-39 and 41 CFR 102-34.

(End of clause)

52.209 [Reserved]

52.209-1 Qualification Requirements.

As prescribed in 9.206-2 , insert the following clause:

QUALIFICATION REQUIREMENTS (DEVIATION DATE)

(a) *Definition*. As used in this clause—

Qualification requirement means a Government requirement for testing or other quality assurance demonstration that must be completed before award.

(b) One or more qualification requirements apply to the supplies or services covered by this contract. For those supplies or services requiring qualification, whether the covered product or service is an end item under this contract or simply a component of an end item, the product, manufacturer, or source must have demonstrated that it meets the standards prescribed for qualification before award of this contract. The product, manufacturer, or source must be qualified at the time of award whether or not the name of the product, manufacturer, or source is actually included on a qualified products list, qualified manufacturers list, or qualified bidders list. Offerors should contact the agency activity designated below to obtain all requirements that they or their products or services, or their subcontractors or their products or services, must satisfy to become qualified and to arrange for an opportunity to demonstrate their abilities to meet the standards specified for qualification.

(Name) _____

(Address) _____

(c) If an offeror, manufacturer, source, product or service covered by a qualification requirement has already met the standards specified, the relevant information noted below should be provided.

Offeror’s Name _____

Manufacturer’s Name_____

Source’s Name _____

Item Name _____

Service Identification _____

Test Number _____ (to the extent known)

(d) Even though a product or service subject to a qualification requirement is not itself an end item under this contract, the product, manufacturer, or source must nevertheless be qualified at the time of award of this contract. This is necessary whether the Contractor or a subcontractor will ultimately provide the product or service in question. If, after award, the Contracting Officer discovers that an applicable qualification requirement was not in fact met at the time of award, the Contracting Officer may either terminate this contract for default or allow performance to continue if adequate consideration is offered and the action is determined to be otherwise in the Government's best interests.

(e) If an offeror, manufacturer, source, product or service has met the qualification requirement but is not yet on a qualified products list, qualified manufacturers list, or qualified bidders list, the offeror must submit evidence of qualification prior to award of this contract. Unless determined to be in the Government's interest, award of this contract will not be delayed to permit an offeror to submit evidence of qualification.

(f) Any change in location or ownership of the plant where a previously qualified product or service was manufactured or performed requires reevaluation of the qualification. Similarly, any change in location or ownership of a previously qualified manufacturer or source requires reevaluation of the qualification. The reevaluation must be accomplished before the date of award.

(End of clause)

52.209-2 Prohibition on Contracting With Inverted Domestic Corporations-Representation.

As prescribed in 9.108-6(a), insert the following provision:

PROHIBITION ON CONTRACTING WITH INVERTED DOMESTIC CORPORATIONS-REPRESENTATION (DEVIATION DATE)

(a) *Definitions*. As used in this clause—

Inverted domestic corporation means a foreign incorporated entity that meets the definition of an inverted domestic corporation under 6 U.S.C. 395(b), applied in accordance with the rules and definitions of 6 U.S.C. 395(c).

Subsidiary means an entity in which more than 50 percent of the entity is owned—

(1) Directly by a parent corporation; or

(2) Through another subsidiary of a parent corporation.

(b) Government agencies are not permitted to use appropriated (or otherwise made available) funds for contracts with either an inverted domestic corporation, or a subsidiary of an inverted domestic corporation, unless the exception at 9.108-3(b) applies or the requirement is waived in accordance with the procedures at 9.108-5.

(c) *Representation*. The Offeror represents that-

(1) It □ is, □ is not an inverted domestic corporation; and

(2) It □ is, □ is not a subsidiary of an inverted domestic corporation.

(End of provision)

52.209-3 First Article Approval-Contractor Testing.

As prescribed in 9.308-1(a) and (b), insert the following clause:

FIRST ARTICLE APPROVAL-CONTRACTOR TESTING (DEVIATION DATE)

[*Contracting Officer inserts details*]

(a) The Contractor shall test _____ unit(s) of Lot/Item _____ as specified in this contract. At least _____ calendar days before the beginning of first article tests, the Contractor shall notify the Contracting Officer, in writing, of the time and location of the testing so that the Government may witness the tests.

(b) The Contractor shall submit the first article test report within _____ calendar days from the date of this contract to _____ [*insert address of the Government activity to receive the report*] marked "FIRST ARTICLE TEST REPORT: Contract No. _____, Lot/Item No. _____." Within _____ calendar days after the Government receives the test report, the Contracting Officer will notify the Contractor, in writing, of the conditional approval, approval, or disapproval of the first article. The notice of conditional approval or approval shall not relieve the Contractor from complying with all requirements of the specifications and all other terms and conditions of this contract. A notice of conditional approval will state any further action required of the Contractor. A notice of disapproval will cite reasons for the disapproval.

(c) If the first article is disapproved, the Contractor, upon Government request, shall repeat any or all first article tests. After each request for additional tests, the Contractor shall make any necessary changes, modifications, or repairs to the first article or select another first article for testing. All costs related to these tests are to be borne by the Contractor, including any and all costs for additional tests following a disapproval. The Contractor shall then conduct the tests and deliver another report to the Government under the terms and conditions and within the time specified by the Government. The Government will take action on this report within the time specified in paragraph (b) above. The Government reserves the right to require an equitable adjustment of the contract price for any extension of the delivery schedule, or for any additional costs to the Government related to these tests.

(d) If the Contractor fails to deliver any first article report on time, or the Contracting Officer disapproves any first article, the Contractor shall be deemed to have failed to make delivery within the meaning of the Default clause of this contract.

(e) Unless otherwise provided in the contract, and if the approved first article is not consumed or destroyed in testing, the Contractor may deliver the approved first article as part of the contract quantity if it meets all contract requirements for acceptance.

(f) If the Government does not act within the time specified in paragraph (b) or (c) above, the Contracting Officer will, upon timely written request from the Contractor, equitably adjust under the Changes clause of this contract the delivery or performance dates and/or the contract price, and any other contractual term affected by the delay.

(g) Before first article approval, the acquisition of materials or components for, or the commencement of production of, the balance of the contract quantity is at the sole risk of the Contractor. Before first article approval, the costs thereof shall not be allocable to this contract for (1) progress payments, or (2) termination settlements if the contract is terminated for the convenience of the Government.

(h) The Government may waive the requirement for first article approval test where supplies identical or similar to those called for in the schedule have been previously furnished by the offeror/contractor and have been accepted by the Government. The offeror/contractor may request a waiver.

(End of clause)

Alternate I (JAN 1997). As prescribed in 9.308-1(a)(2) and (b)(2), add the following paragraph (i) to the basic clause:

(i) The Contractor shall produce both the first article and the production quantity at the same facility.

Alternate II (Sept1989). As prescribed in 9.308-1(a)(3) and (b)(3), substitute the following paragraph (g) for paragraph (g) of the basic clause:

(g) Before first article approval, the Contracting Officer may, by written authorization, authorize the Contractor to acquire specific materials or components or to commence production to the extent essential to meet the delivery schedules. Until first article approval is granted, only costs for the first article and costs incurred under this authorization are allocable to this contract for (1) progress payments, or (2) termination settlements if the contract is terminated for the convenience of the Government. If first article tests reveal deviations from contract requirements, the Contractor shall, at the location designated by the Government, make the required changes or replace all items produced under this contract at no change in the contract price.

52.209-4 First Article Approval-Government Testing.

As prescribed in 9.308-2 (a) and (b), insert the following clause:

FIRST ARTICLE APPROVAL-GOVERNMENT TESTING (DEVIATION DATE)

[*Contracting Officer inserts details*]

(a) The Contractor shall deliver ___ unit(s) of Lot/Item ___ within ____ calendar days from the date of this contract to the Government at _____ [*insert name and address of the testing facility*] for first article tests. The shipping documentation shall contain this contract number and the Lot/Item identification. This contract elsewhere specifies the characteristics that the first article must meet and the testing requirements.

(b) Within _____ calendar days after the Government receives the first article, the Contracting Officer will notify the Contractor, in writing, of the conditional approval, approval, or disapproval of the first article. The notice of conditional approval or approval shall not relieve the Contractor from complying with all requirements of the specifications and all other terms and conditions of this contract. A notice of conditional approval will state any further action required of the Contractor. A notice of disapproval will cite reasons for the disapproval.

(c) If the Government disapproves the first article, the Contractor, upon Government request, shall submit an additional first article for testing. After each request, the Contractor shall make any necessary changes, modifications, or repairs to the first article or select another first article for testing. All costs related to these tests are to be borne by the Contractor, including any and all costs for additional tests following a disapproval. The Contractor shall furnish any additional first article to the Government under the terms and conditions and within the time the Government specifies. The Government will act on this first article within the time limit specified in paragraph (b) above. The Government reserves the right to require an equitable adjustment of the contract price for any extension of the delivery schedule or for any additional costs to the Government related to these tests.

(d) If the Contractor fails to deliver any first article on time, or the Contracting Officer disapproves any first article, the Contractor will have failed to make delivery within the meaning of the Default clause of this contract.

(e) Unless otherwise provided in the contract, the Contractor—

(1) May deliver the approved first article as a part of the contract quantity, provided it meets all contract requirements for acceptance and was not consumed or destroyed in testing; and

(2) Shall remove and dispose of any first article from the Government test facility at the Contractor's expense.

(f) If the Government does not act within the time specified in paragraph (b) or (c) above, the Contracting Officer will, upon timely written request from the Contractor, equitably adjust under the Changes clause of this contract the delivery or performance dates, the contract price, or both, and any other contractual term affected by the delay.

(g) The Contractor is responsible for providing operating and maintenance instructions, spare parts support, and repair of the first article during any first article test.

(h) Before first article approval, the acquisition of materials or components for, or the commencement of production of, the balance of the contract quantity is at the sole risk of the Contractor. Before first article approval, the costs thereof shall not be allocable to this contract for (1) progress payments, or (2) termination settlements if the contract is terminated for the convenience of the Government.

(i) The Government may waive the requirement for first article approval test where supplies identical or similar to those called for in the schedule have been previously furnished by the Offeror/Contractor and have been accepted by the Government. The Offeror/Contractor may request a waiver.

(End of clause)

Alternate I (JAN 1997). As prescribed in 9.308-2 (a)(2) and (b)(2), add the following paragraph (j) to the basic clause:

(j) The Contractor shall produce both the first article and the production quantity at the same facility.

Alternate II (SEP 1989). As prescribed in 9.308-2 (a)(3) and (b)(3), substitute the following paragraph (h) for paragraph (h) of the basic clause:

(h) Before first article approval, the Contracting Officer may, by written authorization, authorize the Contractor to acquire specific materials or components or to commence production to the extent essential to meet the delivery schedules. Until first article approval is granted, only costs for the first article and costs incurred under this authorization are allocable to this contract for (1) progress payments, or (2) termination settlements if the contract is terminated for the convenience of the Government. If first article tests reveal deviations from contract requirements, the Contractor shall, at the location designated by the Government, make the required changes or replace all items produced under this contract at no change in the contract price.

52.209-5 Certification Regarding Responsibility Matters.

As prescribed in 9.104-7(a), insert the following provision:

CERTIFICATION REGARDING RESPONSIBILITY MATTERS (DEVIATION DATE)

(a) (1) The Offeror certifies, to the best of its knowledge and belief, that—

(i) The Offeror and/or any of its Principals—

(A) Are □ are not □ presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any Federal agency;

(B) Have □ have not □, within a three-year period preceding this offer, been convicted of or had a civil judgment rendered against them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) contract or subcontract; violation of Federal or State antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property (if offeror checks "have", the offeror shall also see 52.209-7, if included in this solicitation);

(C) Are □ are not □ presently indicted for, or otherwise criminally or civilly charged by a governmental entity with, commission of any of the offenses enumerated in paragraph (a)(1)(i)(B) of this provision; and

(D) Have □, have not □, within a three-year period preceding this offer, been notified of any delinquent Federal taxes in an amount that exceeds the threshold at 9.104-5(a)(2) for which the liability remains unsatisfied. Federal taxes are considered delinquent if both of the following criteria apply:

(1) The tax liability is finally determined. The liability is finally determined if it has been assessed. A liability is not finally determined if a pending administrative or judicial challenge remains. In the case of a judicial challenge to the liability, the liability is not finally determined until all judicial appeal rights have been exhausted.

(2) The taxpayer is delinquent in making payment. A taxpayer is delinquent if the taxpayer has failed to pay the tax liability when full payment was due and required. A taxpayer is not delinquent in cases where enforced collection action is precluded.

(ii) The Offeror has □ has not □, within a 3-year period preceding this offer, had one or more contracts terminated for default by any Federal agency.

(2) "Principal," for the purposes of this certification, means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (*e.g.*, general manager; plant manager; head of a division or business segment; and similar positions).

(b) The Offeror shall provide immediate written notice to the Contracting Officer if, at any time prior to contract award, the Offeror learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

(c) A certification that any of the items in paragraph (a) of this provision exists will not necessarily result in withholding of an award under this solicitation. However, the Government will consider the certification in connection with a determination of the Offeror's responsibility. Failure of the Offeror to furnish a certification or provide such additional information as requested by the Contracting Officer may render the Offeror nonresponsible.

(d) This provision does not require establishment of a system of records in order to render, in good faith, the certification required by paragraph (a). The knowledge and information of an Offeror is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

(e) The certification in paragraph (a) of this provision is a material representation of fact upon which reliance was placed when making award. If the Government later determines that the Offeror knowingly rendered an erroneous certification, in addition to other remedies available to the Government, the Contracting Officer may terminate the contract resulting from this solicitation for default.

(End of provision)

52.209-6 Protecting the Government's Interest When Subcontracting With Contractors Debarred, Suspended, Proposed for Debarment, or Voluntarily Excluded.

As prescribed in 9.409 , insert the following clause:

PROTECTING THE GOVERNMENT'S INTEREST WHEN SUBCONTRACTING WITH CONTRACTORS DEBARRED, SUSPENDED, PROPOSED FOR DEBARMENT, OR VOLUNTARILY EXCLUDED (DEVIATION DATE)

(a) *Definition*. As used in this clause—

Commercially available off-the-shelf (COTS) item

(1) Means any item of supply (including construction material) that is–

(i) A commercial product (as defined in paragraph (1) of the definition of “commercial product” in Federal Acquisition Regulation (FAR) 2.101);

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

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

(b) The Government suspends or debars Contractors to protect the Government's interests. Other than a subcontract for a commercially available off-the-shelf item, the Contractor shall not enter into any subcontract, in excess of the threshold specified in FAR 9.405-2(b) on the date of subcontract award, with a Contractor that is debarred, suspended, or proposed for debarment by any executive agency unless a compelling reason exists to do so.

(c) The Contractor shall require each proposed subcontractor whose subcontract will exceed the threshold specified in FAR 9.405-2(b) on the date of subcontract award, other than a subcontractor providing a commercially available off-the-shelf item, to disclose to the Contractor, in writing, whether as of the time of award of the subcontract, the subcontractor, or its principals, is or is not debarred, suspended, proposed for debarment, or voluntarily excluded by the Federal Government.

(d) A corporate officer or a designee of the Contractor shall notify the Contracting Officer, in writing, before entering into a subcontract with a party (other than a subcontractor providing a commercially available off-the-shelf item) that is debarred, suspended, proposed for debarment, or voluntarily excluded (see FAR 9.404 for information on the System for Award Management (SAM) Exclusions). The notice must include the following:

(1) The name of the subcontractor.

(2) The Contractor’s knowledge of the reasons for the subcontractor being listed with an exclusion in SAM.

(3) The compelling reason(s) for doing business with the subcontractor notwithstanding its being listed with an exclusion in SAM.

(4) The systems and procedures the Contractor has established to ensure that it is fully protecting the Government's interests when dealing with such subcontractor in view of the specific basis for the party's debarment, suspension, proposed debarment, or voluntary exclusion.

(e) *Subcontracts*. Unless this is a contract for the acquisition of commercial products or commercial services, the Contractor shall include the requirements of this clause, including this paragraph (e) (appropriately modified for the identification of the parties), in each subcontract that—

(1) Exceeds the threshold specified in FAR 9.405-2(b) on the date of subcontract award; and

(2) Is not a subcontract for commercially available off-the-shelf items.

(End of clause)

52.209-7 Information Regarding Responsibility Matters.

As prescribed at 9.104-7(b), insert the following provision:

INFORMATION REGARDING RESPONSIBILITY MATTERS (DEVIATION DATE)

(a) *Definitions*. As used in this provision—

Administrative proceeding means a non-judicial process that is adjudicatory in nature in order to make a determination of fault or liability (*e.g.*, Securities and Exchange Commission Administrative Proceedings, Civilian Board of Contract Appeals Proceedings, and Armed Services Board of Contract Appeals Proceedings). This includes administrative proceedings at the Federal and State level but only in connection with performance of a Federal contract or grant. It does not include agency actions such as contract audits, site visits, corrective plans, or inspection of deliverables.

Federal contracts and grants with total value greater than $10,000,000 means—

(1) The total value of all current, active contracts and grants, including all priced options; and

(2) The total value of all current, active orders including all priced options under indefinite-delivery, indefinite-quantity, 8(a), or requirements contracts (including task and delivery and multiple-award Schedules).

Principal means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (*e.g.*, general manager; plant manager; head of a division or business segment; and similar positions).

(b) The offeror □ has □ does not have current active Federal contracts and grants with total value greater than $10,000,000.

(c) If the offeror checked "has" in paragraph (b) of this provision, the offeror represents, by submission of this offer, that the information it has entered in the Federal Awardee Performance and Integrity Information System (FAPIIS) is current, accurate, and complete as of the date of submission of this offer with regard to the following information:

(1) Whether the offeror, and/or any of its principals, has or has not, within the last five years, in connection with the award to or performance by the offeror of a Federal contract or grant, been the subject of a proceeding, at the Federal or State level that resulted in any of the following dispositions:

(i) In a criminal proceeding, a conviction.

(ii) In a civil proceeding, a finding of fault and liability that results in the payment of a monetary fine, penalty, reimbursement, restitution, or damages of $5,000 or more.

(iii) In an administrative proceeding, a finding of fault and liability that results in–

(A) The payment of a monetary fine or penalty of $5,000 or more; or

(B) The payment of a reimbursement, restitution, or damages in excess of $100,000.

(iv) In a criminal, civil, or administrative proceeding, a disposition of the matter by consent or compromise with an acknowledgment of fault by the Contractor if the proceeding could have led to any of the outcomes specified in paragraphs (c)(1)(i), (c)(1)(ii), or (c)(1)(iii) of this provision.

(2) If the offeror has been involved in the last five years in any of the occurrences listed in (c)(1) of this provision, whether the offeror has provided the requested information with regard to each occurrence.

(d) The offeror shall post the information in paragraphs (c)(1)(i) through (c)(1)(iv) of this provision in FAPIIS as required through maintaining an active registration in the System for Award Management, which can be accessed via https://www.sam.gov (see 52.204-7).

(End of provision)

52.209-8 [Reserved]

52.209-9 Updates of Publicly Available Information Regarding Responsibility Matters.

As prescribed at 9.104-7(c), insert the following clause:

UPDATES OF PUBLICLY AVAILABLE INFORMATION REGARDING RESPONSIBILITY MATTERS (DEVIATION DATE)

(a) The Contractor shall update the information in the Federal Awardee Performance and Integrity Information System (FAPIIS) on a semi-annual basis, throughout the life of the contract, by posting the required information in the System for Award Management via https://www.sam.gov.

(b) All information posted in FAPIIS on or after April 15, 2011, except past performance reviews, will be publicly available. FAPIIS consists of two segments—

(1) The non-public segment, into which Government officials and the Contractor post information, which can only be viewed by-

(i) Government personnel and authorized users performing business on behalf of the Government; or

(ii) The Contractor, when viewing data on itself; and

(2) The publicly-available segment, to which all data in the non-public segment of FAPIIS is automatically transferred after a waiting period of 14 calendar days, except for-

(i) Past performance reviews required by part 42.

(ii) Information that was entered prior to April 15, 2011; or

(iii) Information that is withdrawn during the 14-calendar-day waiting period by the Government official who posted it in accordance with paragraph (c)(1) of this clause.

(c) The Contractor will receive notification when the Government posts new information to the Contractor's record.

(1) If the Contractor asserts in writing within 7 calendar days, to the Government official who posted the information, that some of the information posted to the non-public segment of FAPIIS is covered by a disclosure exemption under the Freedom of Information Act, the Government official who posted the information must within 7 calendar days remove the posting from FAPIIS and resolve the issue in accordance with agency Freedom of Information procedures, prior to reposting the releasable information. The contractor must cite 52.209-9 and request removal within 7 calendar days of the posting to FAPIIS.

(2) The Contractor will also have an opportunity to post comments regarding information that the Government has posted. FAPIIS will retain the comments as long as the associated information is retained, i.e., for a total period of 6 years. Contractor comments will remain a part of the record unless the Contractor revises them.

(3) All information posted in FAPIIS on or after April 15, 2011, except past performance reviews, will be publicly available (section 3010 of Pub. L. 111-212).

(d) The Government will handle public requests for system information posted prior to April 15, 2011, under Freedom of Information Act procedures, including, where appropriate, procedures promulgated under E.O. 12600.

(End of clause)

52.209-10 Prohibition on Contracting With Inverted Domestic Corporations.

As prescribed in 9.108-6(b), insert the following clause:

PROHIBITION ON CONTRACTING WITH INVERTED DOMESTIC CORPORATIONS (DEVIATION DATE)

(a) *Definitions*. As used in this clause-

Inverted domestic corporation means a foreign incorporated entity that meets the definition of an inverted domestic corporation under 6 U.S.C. 395(b), applied in accordance with the rules and definitions of 6 U.S.C. 395(c).

Subsidiary means an entity in which more than 50 percent of the entity is owned—

(1) Directly by a parent corporation; or

(2) Through another subsidiary of a parent corporation.

(b) If the contractor reorganizes as an inverted domestic corporation or becomes a subsidiary of an inverted domestic corporation at any time during the period of performance of this contract, applicable law may prohibit the Government from paying for Contractor activities performed after the date when it becomes an inverted domestic corporation or subsidiary. The Government may seek any available remedies in the event the Contractor fails to perform in accordance with the terms and conditions of the contract as a result of Government action under this clause.

(c) Exceptions to this prohibition are located at 9.108-3.

(d) In the event the Contractor becomes either an inverted domestic corporation, or a subsidiary of an inverted domestic corporation during contract performance, the Contractor shall give written notice to the Contracting Officer within five business days from the date of the inversion event.

(End of clause)

52.209-11 Representation by Corporations Regarding Delinquent Tax Liability or a Felony Conviction under any Federal Law.

As prescribed in 9.104-7(d), insert the following provision:

REPRESENTATION BY CORPORATIONS REGARDING DELINQUENT TAX LIABILITY OR A FELONY CONVICTION UNDER ANY FEDERAL LAW (DEVIATION DATE)

(a) The Government will not enter into a contract with any corporation that—

(1) Has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability, where the awarding agency is aware of the unpaid tax liability, unless an agency has considered suspension or debarment of the corporation and made a determination that suspension or debarment is not necessary to protect the interests of the Government; or

(2) Was convicted of a felony criminal violation under any Federal law within the preceding 24 months, where the awarding agency is aware of the conviction, unless an agency has considered suspension or debarment of the corporation and made a determination that this action is not necessary to protect the interests of the Government.

(b) The Offeror represents that–

(1) It is □ is not □ a corporation that has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability; and

(2) It is □ is not □ a corporation that was convicted of a felony criminal violation under a Federal law within the preceding 24 months.

(End of provision)

52.209-12 Certification Regarding Tax Matters.

As prescribed in 9.104-7(e), insert the following provision:

CERTIFICATION REGARDING TAX MATTERS (OCT 2025)

(a) This provision implements section 523 of Division B of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235), and similar provisions, if contained in subsequent appropriations acts.

(b) If the Offeror is proposing a total contract price that will exceed $7 million (including options), the Offeror shall certify that, to the best of its knowledge and belief, it

(1) Has □ filed all Federal tax returns required during the three years preceding the certification;

(2) Has not □ been convicted of a criminal offense under the Internal Revenue Code of 1986; and

(3) Has not □, more than 90 days prior to certification, been notified of any unpaid Federal tax assessment for which the liability remains unsatisfied, unless the assessment is the subject of an installment agreement or offer in compromise that has been approved by the Internal Revenue Service and is not in default, or the assessment is the subject of a non-frivolous administrative or judicial proceeding.

(End of provision)

52.209-13 Violation of Arms Control Treaties or Agreements-Certification.

As prescribed in 9.109-5 , insert the following provision:

VIOLATION OF ARMS CONTROL TREATIES OR AGREEMENTS-CERTIFICATION (DEVIATION DATE)

(a) This provision does not apply to acquisitions at or below the simplified acquisition threshold or to acquisitions of commercial products and commercial services as defined in Federal Acquisition Regulation 2.101.

(b) *Certification*. [*Offeror shall check either (1) or (2).*]

__ (1) The Offeror certifies that–

(i) It does not engage and has not engaged in any activity that contributed to or was a significant factor in the President's or Secretary of State's determination that a foreign country is in violation of its obligations undertaken in any arms control, nonproliferation, or disarmament agreement to which the United States is a party, or is not adhering to its arms control, nonproliferation, or disarmament commitments in which the United States is a participating state. The determinations are described in the most recent unclassified annual report provided to Congress pursuant to section 403 of the Arms Control and Disarmament Act (22 U.S.C. 2593a). The report is available athttps://www.state.gov/bureaus-offices/under-secretary-for-arms-control-and-international-security-affairs/bureau-of-arms-control-verification-and-compliance/; and

(ii) No entity owned or controlled by the Offeror has engaged in any activity that contributed to or was a significant factor in the President's or Secretary of State's determination that a foreign country is in violation of its obligations undertaken in any arms control, nonproliferation, or disarmament agreement to which the United States is a party, or is not adhering to its arms control, nonproliferation, or disarmament commitments in which the United States is a participating state. The determinations are described in the most recent unclassified annual report provided to Congress pursuant to section 403 of the Arms Control and Disarmament Act (22 U.S.C. 2593a). The report is available at https://www.state.gov/bureaus-offices/under-secretary-for-arms-control-and-international-security-affairs/bureau-of-arms-control-verification-and-compliance/; or

__ (2) The Offeror is providing separate information with its offer in accordance with paragraph (d)(2) of this provision.

(c) Procedures for reviewing the annual unclassified report (see paragraph (b)(1) of this provision). For clarity, references to the report in this section refer to the entirety of the annual unclassified report, including any separate reports that are incorporated by reference into the annual unclassified report.

(1) Check the table of contents of the annual unclassified report and the country section headings of the reports incorporated by reference to identify the foreign countries listed there. Determine whether the Offeror or any person owned or controlled by the Offeror may have engaged in any activity related to one or more of such foreign countries.

(2) If such activity might have occurred, review all findings in the report associated with those foreign countries to determine whether or not each such foreign country was determined to be in violation of its obligations undertaken in an arms control, nonproliferation, or disarmament agreement to which the United States is a party, or to be not adhering to its arms control, nonproliferation, or disarmament commitments in which the United States is a participating state. For clarity, in the annual report an explicit certification of non-compliance is equivalent to a determination of violation. However, the following statements in the annual report are not equivalent to a determination of violation:

(i) An inability to certify compliance.

(ii) An inability to conclude compliance.

(iii) A statement about compliance concerns.

(3) If so, determine whether the Offeror or any person owned or controlled by the Offeror has engaged in any activity that contributed to or is a significant factor in the determination in the report that one or more of these foreign countries is in violation of its obligations undertaken in an arms control, nonproliferation, or disarmament agreement to which the United States is a party, or is not adhering to its arms control, nonproliferation, or disarmament commitments in which the United States is a participating state. Review the narrative for any such findings reflecting a determination of violation or non-

adherence related to those foreign countries in the report, including the finding itself, and to the extent necessary, the conduct giving rise to the compliance or adherence concerns, the analysis of compliance or adherence concerns, and efforts to resolve compliance or adherence concerns.

(4) The Offeror may submit any questions with regard to this report by email to NDAA1290Cert@state.gov. To the extent feasible, the Department of State will respond to such email inquiries within 3 business days.

(d) Do not submit an offer unless—

(1) A certification is provided in paragraph (b)(1) of this provision and submitted with the offer; or

(2) In accordance with paragraph (b)(2) of this provision, the Offeror provides with its offer information that the President of the United States has

(i) Waived application under 22 U.S.C. 2593e(d) or (e); or

(ii) Determined under 22 U.S.C. 2593e(g)(2) that the entity has ceased all activities for which measures were imposed under 22 U.S.C. 2593e(b).

(e) *Remedies*. The certification in paragraph (b)(1) of this provision is a material representation of fact upon which reliance was placed when making award. If the Government later determines that the Offeror knowingly submitted a false certification, in addition to other remedies available to the Government, such as suspension or debarment, the Contracting Officer may terminate any contract resulting from the false certification.

(End of provision)

52.209-14 Reserve Officer Training Corps and Military Recruiting on Campus.

As prescribed in 9.110-5 , insert the following clause:

RESERVE OFFICER TRAINING CORPS AND MILITARY RECRUITING ON CAMPUS (NOV 2021)

(a) Definitions. As used in this clause—

Covered agency means—

(1) The Department of Defense;

(2) Any department or agency for which regular appropriations are made in a Department of Labor, Health and Human Services; and Education, and Related Agencies Appropriations Act;

(3) The Department of Homeland Security;

(4) The National Nuclear Security Administration of the Department of Energy;

(5) The Department of Transportation; or

(6) The Central Intelligence Agency.

Institution of higher education means an institution that meets the requirements of 20 U.S.C. 1001 and includes all sub-elements of such an institution.

(b) *Limitation on contract award*. Except as provided in paragraph (c) of this clause, an institution of higher education is ineligible for contract award if the Secretary of Defense determines that the institution has a policy or practice (regardless of when implemented) that prohibits or in effect prevents—

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

(2) A student at that institution (or any sub-element of that institution) from enrolling in a unit of the Senior ROTC at another institution of higher education;

(3) The Secretary of a military department or the Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting; or

(4) Military recruiters from accessing, for purposes of military recruiting, the following information pertaining to students (who are 17 years of age or older) enrolled at that institution:

(i) Name, address, and telephone listings.

(ii) Date and place of birth, educational level, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

(c) *Exception*. The limitation in paragraph (b) of this clause does not apply to an institution of higher education if the Secretary of Defense determines that—

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

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

(d) Notwithstanding any other clause of this contract, if the Secretary of Defense determines that the institution has violated the contract in paragraph (b) of this clause—

(1) The institution will be ineligible for further payments under this and any other contracts with this agency and any other covered agency, except for contracts at or below the simplified acquisition threshold or contracts for the acquisition of commercial products and commercial services; and

(2) The Government will terminate this contract for default for the institution's material failure to comply with the terms and conditions of award.

(End of clause)

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52.210 [Reserved]

52.210-1 Market Research.

As prescribed in 10.002 , insert the following clause:

MARKET RESEARCH (DEVIATION DATE)

(a) *Definition*. As used in this clause—

Commercial product, commercial service, and nondevelopmental item have the meaning contained in Federal Acquisition Regulation (FAR) 2.101.

(b) Before awarding subcontracts for noncommercial acquisitions, where the subcontracts are over the simplified acquisition threshold, as defined in FAR 2.101 on the date of subcontract award, the Contractor shall conduct market research to determine, in the following order of priority, whether—

(1) A commercial product or commercial service can meet the agency's requirements;

(2) The requirements could be modified so the agency could use an existing commercial product or commercial service;

(3) A commercial product or commercial service could be modified to meet the agency's requirements; or

(4) The requirement can only be satisfied by a nondevelopmental item.

(End of clause)

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52.211 [Reserved]

52.211-1 [Reserved]

(DEVIATION DATE)

52.211-2 [Reserved]

(DEVIATION DATE)

52.211-3 [Reserved]

(DEVIATION DATE)

52.211-4 [Reserved]

(DEVIATION DATE)

52.211-5 Material Requirements.

As prescribed in 11.302, insert the following clause:

MATERIAL REQUIREMENTS (DEVIATION DATE)

(a) *Definitions*.

As used in this clause—

Reconditioned means restored to the original normal operating condition by readjustments and material replacement.

Remanufactured means factory rebuilt to original specifications.

(b) A proposal to provide unused former Government surplus property shall include a complete description of the material, the quantity, the name of the Government agency from which acquired, and the date of acquisition.

(c) A proposal to provide used, reconditioned, or remanufactured supplies shall include a detailed description of such supplies and shall be submitted to the Contracting Officer for approval.

(d) Used, reconditioned, or remanufactured supplies, or unused former Government surplus property, may be used in contract performance if the Contractor has proposed the use of such supplies, and the Contracting Officer has authorized their use.

(End of clause)

52.211-6 [Reserved]

(DEVIATION DATE)

52.211-7 [Reserved]

(DEVIATION DATE)

52.211-8 [Reserved]

(DEVIATION DATE)

52.211-9 [Reserved]

(DEVIATION DATE)

52.211-10 [Reserved]

(DEVIATION DATE)

52.211-11 Liquidated Damages-Supplies, Services, or Research and Development.

As prescribed in 11.403(a), insert the following clause in solicitations and contracts:

LIQUIDATED DAMAGES-SUPPLIES, SERVICES, OR RESEARCH AND DEVELOPMENT (SEPT 2000)

(a) If the Contractor fails to deliver the supplies or perform the services within the time specified in this contract, the Contractor shall, in place of actual damages, pay to the Government liquidated damages of $_____ per calendar day of delay [*Contracting Officer insert amount*].

(b) If the Government terminates this contract in whole or in part under the Default-Fixed-Price Supply and Service clause, the Contractor is liable for liquidated damages accruing until the Government reasonably obtains delivery or performance of similar supplies or services. These liquidated damages are in addition to excess costs of repurchase under the Termination clause.

(c) The Contractor will not be charged with liquidated damages when the delay in delivery or performance is beyond the control and without the fault or negligence of the Contractor as defined in the Default-Fixed-Price Supply and Service clause in this contract.

(End of clause)

52.211-12 Liquidated Damages-Construction.

As prescribed in 11.403(b), insert the following clause in solicitations and contracts:

LIQUIDATED DAMAGES-CONSTRUCTION (SEPT 2000)

(a) If the Contractor fails to complete the work within the time specified in the contract, the Contractor shall pay liquidated damages to the Government in the amount of _____ *[Contracting Officer insert amount]* for each calendar day of delay until the work is completed or accepted.

(b) If the Government terminates the Contractor's right to proceed, liquidated damages will continue to accrue until the work is completed. These liquidated damages are in addition to excess costs of repurchase under the Termination clause.

(End of clause)

52.211-13 Time Extensions.

As prescribed in 11.403(c), insert the following clause:

TIME EXTENSIONS (SEPT 2000)

Time extensions for contract changes will depend upon the extent, if any, by which the changes cause delay in the completion of the various elements of construction. The change order granting the time extension may provide that the contract completion date will be extended only for those specific elements related to the changed work and that the remaining contract completion dates for all other portions of the work will not be altered. The change order also may provide an equitable readjustment of liquidated damages under the new completion schedule.

(End of clause)

52.211-14 Notice of Priority Rating for National Defense, Emergency Preparedness, and Energy Program Use.

As prescribed in 11.504(a), insert the following provision:

NOTICE OF PRIORITY RATING FOR NATIONAL DEFENSE,
EMERGENCY PREPAREDNESS, AND ENERGY PROGRAM USE (APR 2008)

Any contract awarded as a result of this solicitation will be □ DX rated order; □ DO rated order certified for national defense, emergency preparedness, and energy program use under the Defense Priorities and Allocations System (DPAS) (15 CFR700), and the Contractor will be required to follow all of the requirements of this regulation. [*Contracting Officer check appropriate box*.]

(End of provision)

52.211-15 Defense Priority and Allocation Requirements.

As prescribed in 11.504(b), insert the following clause:

DEFENSE PRIORITY AND ALLOCATION REQUIREMENTS (APR 2008)

This is a rated order certified for national defense, emergency preparedness, and energy program use, and the Contractor shall follow all the requirements of the Defense Priorities and Allocations System regulation (15 CFR part 700).

(End of clause)

52.211-16 [Reserved]

(DEVIATION DATE)

52.211-17 [Reserved]

(DEVIATION DATE)

52.211-18 [Reserved]

(DEVIATION DATE)

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52.212 [Reserved]

52.212-1 Instructions to Offerors—Commercial Products and Commercial Services.

As prescribed in 12.205(a)(1), insert a clause substantially as follows:

INSTRUCTIONS TO OFFERORS—COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES (DEVIATION DATE)

(a) *Submission of offers*. Submit signed and dated offers to the office specified in this solicitation at or before the exact time specified in this solicitation. As a minimum, offers shall include—

(1) The solicitation number;

(2) The name, address, telephone number of the Offeror;

(3) The Offeror's Unique Entity Identifier (UEI) and, if applicable, Electronic Funds Transfer (EFT) indicator;

(4) Information necessary to evaluate the factors contained in the provision at 52.212-2 or as described in the solicitation;

(5) Responses to provisions that require Offeror completion of information, representations, and certifications (other than those collected via the System for Award Management (SAM)); and

(6) A statement specifying the extent of agreement with all terms, conditions, and provisions included in the solicitation and any solicitation amendments.

(b) *Period for acceptance of offers*. The Offeror agrees to hold the prices in its offer firm for 60 calendar days from the date specified for receipt of offers, unless another time period is specified in an addendum to the solicitation.

(c) *Late submissions, modifications, revisions, and withdrawals of offers*.

(1) Offerors are responsible for submitting offers and any modifications or revisions to the Government office designated in the solicitation by the time specified in the solicitation.

(2) Any offer, modification, or revision received after the time specified for receipt of offers is "late" and will not be considered unless it is received before award is made and the Contracting Officer determines that accepting the late offer would not unduly delay the acquisition. However, a late modification of an otherwise successful offer that makes its terms more favorable to the Government will be considered at any time it is received and may be accepted.

(3) If an emergency or unanticipated event interrupts normal Government processes so that offers cannot be received at the Government office designated for receipt of offers 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 offers 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.

(4) Offerors may withdraw their offers by written notice to the Government received at any time before award.

(d) *Contract award (not applicable to Invitation for Bids)*. The Government intends to evaluate offers and award a contract without discussions with Offerors. Therefore, the Offeror's initial offer should contain the Offeror's best terms. However, the Government reserves the right to conduct discussions, if necessary. The Government may reject any or all offers if such action is in the public interest, accept other than the lowest offer, and waive informalities and minor irregularities in offers received.

(e) *Debriefings*. If a postaward debriefing is given to requesting Offerors, the Government will disclose the following information, if applicable:

(1) The agency's evaluation of the significant weak or deficient factors in the debriefed Offeror's offer.

(2) The overall evaluated cost or price and technical rating of the successful Offeror and the debriefed Offeror and past performance information on the debriefed Offeror.

(3) The overall ranking of all Offerors when any ranking was developed by the agency during source selection.

(4) A summary of the rationale for award.

(5) For acquisitions of commercial products, the make and model of the product to be delivered by the successful Offeror.

(6) Reasonable responses to relevant questions posed by the debriefed Offeror as to whether the agency followed source-selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities.

(End of provision)

52.212-2 Evaluation—Commercial Products and Commercial Services.

As prescribed in 12.205(a)(2), insert a provision substantially as follows:

EVALUATION—COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES (DEVIATION DATE)

(a) Evaluation factors. The Government will award a contract resulting from this solicitation to the responsible Offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered. The following factors will be used to evaluate offers:

[Insert evaluation factors in the relative order of importance. For requests for proposals, state: Evaluation factors other than price when combined are [significantly more important than price/approximately equal to price/significantly less important] than price. For invitations for bids, list only price and price-related factors.]

(b) *Options (if applicable)*. The Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. The Government may determine that an offer is unacceptable if the option prices are significantly unbalanced. The evaluation of options does not obligate the Government to exercise the option(s).

(c) *Notice of award*. A written notice of award or acceptance of an offer furnished to the successful Offeror within the time for acceptance specified in the offer, shall result in a binding contract without further action by either party. Before the offer's specified expiration time, the Government may accept an offer (or part of an offer), whether or not there are negotiations after its receipt, unless a written notice of withdrawal is received before award.

(End of provision)

52.212-3 [Reserved]

(DEVIATION DATE)

52.212-4 Terms and Conditions—Commercial Products and Commercial Services.

As prescribed in 12.205(b)(3), insert the following clause:

TERMS AND CONDITIONS—COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES (DEVIATION DATE)

(a) *Definitions*. The clause at Federal Acquisition Regulation (FAR) 52.202-1, Definitions, is incorporated by reference.

(b) *Inspection/Acceptance*. The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. If repair/replacement or reperformance will not correct the defects or is not possible, the Government may seek an equitable price reduction or adequate consideration for acceptance of nonconforming supplies or services. The Government must exercise its post acceptance rights—

(1) Within a reasonable time after the defect was discovered or should have been discovered; and

(2) Before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

(c) *Assignment*. The Contractor or its assignee may assign its rights to receive payment due as a result of performance of this contract to a bank, trust company, or other financing institution, including any Federal lending agency in accordance with the Assignment of Claims Act (31 U.S.C. 3727). However, when a third party makes payment (*e.g.,* use of the Governmentwide commercial purchase card), the Contractor may not assign its rights to receive payment under this contract.

(d) *Changes*. Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

(e) *Disputes*. This contract is subject to 41 U.S.C. chapter 71, Contract Disputes. Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal, or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause FAR 52.233-1, Disputes, which is incorporated in this contract by reference. The Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.

(f) *Excusable delays*. The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence. Examples of occurrences include acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics,

quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. When an excusable delay occurs, the Contractor shall—

(1) Notify the Contracting Officer in writing as soon as possible;

(2) Remedy the delay as quickly as possible; and

(3) Notify the Contracting Officer when the occurrence is over.

(g) Invoice. The Government will handle invoices according to the Prompt Payment Act (31 U.S.C. 3903) and 5 CFR part 1315. The Contractor shall submit invoices to the address designated in the contract to receive invoices. An invoice must include the information required by 5 CFR part 1315.9(b).

(h) *Patent indemnity*. The Contractor shall indemnify the Government and its officers, employees, and agents against liability, including costs, for actual or alleged direct or contributory infringement of, or inducement to infringe, any United States or foreign patent, trademark, or copyright, arising out of the performance of this contract, provided the Contractor is reasonably notified of such claims and proceedings.

(i) *Payment*—

(1) *Items accepted*. Payment shall be made for items accepted by the Government that have been delivered to the delivery destinations set forth in this contract.

(2) *Prompt payment*. The Government will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and prompt payment regulations at 5 CFR part 1315.

(3) *Discount*. In connection with any discount offered for early payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date that appears on the payment check or the specified payment date if an electronic funds transfer payment is made.

(4) *Overpayments*. If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the Contractor shall—

(i) Remit the overpayment amount to the payment office cited in the contract along with a description of the overpayment including the—

(A) Circumstances of the overpayment (*e.g.*, duplicate payment, erroneous payment, liquidation errors, date(s) of overpayment);

(B) Affected contract number and delivery order number, if applicable;

(C) Affected line item or subline item, if applicable;

(D) Contractor point of contact; and

(ii) Provide a copy of the remittance and supporting documentation to the Contracting Officer.

(5) *Interest*. (i) All amounts that become payable by the Contractor to the Government under this contract shall bear simple interest from the date due until paid unless paid within 30 days of becoming due. The interest rate shall be the interest rate established by the Secretary of the Treasury as provided in 41 U.S.C. 7109, which is applicable to the period in which the amount becomes due, as provided in (i)(6)(v) of this clause, and then at the rate applicable for each six-month period as fixed by the Secretary until the amount is paid.

(ii) The Government may issue a demand for payment to the Contractor upon finding a debt is due under the contract.

(iii) *Final decisions*. The Contracting Officer will issue a final decision as required by FAR part 33 if–

(A) The Contracting Officer and the Contractor are unable to reach agreement on the existence or amount of a debt within 30 days;

(B) The Contractor fails to liquidate a debt previously demanded by the Contracting Officer within the timeline specified in the demand for payment unless the amounts were not repaid because the Contractor has requested an installment payment agreement; or

(C) The Contractor requests a deferment of collection on a debt previously demanded by the Contracting Officer (see FAR part 32).

(iv) If a demand for payment was previously issued for the debt, the demand for payment included in the final decision shall identify the same due date as the original demand for payment.

(v) Amounts shall be due at the earliest of the following dates:

(A) The date fixed under this contract.

(B) The date of the first written demand for payment, including any demand for payment resulting from a termination for cause.

(vi) The interest charge shall be computed for the actual number of calendar days involved beginning on the due date and ending on-

(A) The date on which the designated office receives payment from the Contractor;

(B) The date of issuance of a Government check to the Contractor from which an amount otherwise payable has been withheld as a credit against the contract debt; or

(C) The date on which an amount withheld and applied to the contract debt would otherwise have become payable to the Contractor.

(vii) The interest charge made under this clause may be reduced under the procedures for interest credits prescribed in FAR part 32 in effect on the date of this contract.

(j) *Risk of loss*. Unless the contract specifically provides otherwise, risk of loss or damage to the supplies provided under this contract shall remain with the Contractor until, and shall pass to the Government upon—

(1) Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or

(2) Delivery of the supplies to the Government at the destination specified in the contract, if transportation is f.o.b. destination.

(k) *Taxes*. The contract price includes all applicable Federal, State, and local taxes and duties.

(l) *Termination for the Government's convenience*. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

(m) *Termination for cause*. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. The Government will send a cure notice to the Contractor, unless the reason for the termination is late delivery. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(n) *Title*. Unless specified elsewhere in this contract, title to items furnished under this contract shall pass to the Government upon acceptance, regardless of when or where the Government takes physical possession.

(o) *Warranty*. The Contractor warrants and implies that the items delivered under this contract are merchantable and fit for use for the particular purpose described in this contract.

(p) *Limitation of liability*. Except as otherwise provided by an express warranty, the Contractor will not be liable to the Government for consequential damages resulting from any defect or deficiencies in accepted items.

(q) *Compliance with laws unique to Government contracts*. The Contractor agrees to comply with 31 U.S.C. 1352 relating to limitations on the use of appropriated funds to influence certain Federal contracts; 40 U.S.C. chapter 37, Contract Work Hours and Safety Standards; 41 U.S.C. chapter 87, Kickbacks; 49 U.S.C. 40118, Government-financed air transportation; and 41 U.S.C. chapter 21 relating to procurement integrity.

(r) *Order of precedence*. Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order:

(1) The schedule of supplies/services;

(2) The Disputes, Payments, Invoice, Compliance with Laws Unique to Government Contracts, and Unauthorized Obligations paragraphs of this clause;

(3) Other contract clauses incorporated in the solicitation or contract;

(4) Addenda to this solicitation or contract;

(5) Solicitation provisions incorporated in the solicitation;

(6) Other paragraphs of this clause;

(7) Other documents, exhibits, and attachments; and

(8) The specification.

(s) *Unauthorized obligations*.

(1) Except as stated in paragraph (s)(2) of this clause, when any supply or service acquired under this contract is subject to any End User License Agreement (EULA), Terms of Service (TOS), or similar legal instrument or agreement, that includes

any clause requiring the Government to indemnify the Contractor or any person or entity for damages, costs, fees, or any other loss or liability that would create an Anti-Deficiency Act violation (31 U.S.C. 1341), the following shall govern:

(i) Any such clause is unenforceable against the Government.

(ii) Neither the Government nor any Government-authorized end user shall be deemed to have agreed to such clause by virtue of it appearing in the EULA, TOS, or similar legal instrument or agreement. If the EULA, TOS, or similar legal instrument or agreement is invoked through an "I agree" click box or other comparable mechanism (e.g., "click-wrap" or "browse-wrap" agreements), execution does not bind the Government or any Government authorized end user to such clause.

(iii) Any such clause is deemed to be stricken from the EULA, TOS, or similar legal instrument or agreement.

(2) Paragraph (s)(1) of this clause does not apply to indemnification by the Government that is expressly authorized by statute and specifically authorized under applicable agency regulations and procedures.

(t) *Comptroller General examination of record*. This paragraph applies if this contract was awarded using other than sealed bid procedures and is in excess of the simplified acquisition threshold on the date of award of this contract.

(1) The Comptroller General of the United States, or an authorized representative of the Comptroller General, shall have access to and right to examine any of the Contractor's directly pertinent records involving transactions related to this contract.

(2) The Contractor shall make available at its offices, at all reasonable times, the records, materials, and other evidence for examination, audit, or reproduction, until 3 years after final payment under this contract or for any shorter period specified in FAR part 4, longer period required by statute, or periods specified in other clauses of this contract. If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement. Records relating to appeals under the disputes clause or to litigation or the settlement of claims arising under or relating to this contract shall be made available until such appeals, litigation, or claims are finally resolved.

(3) As used in this clause, records include books, documents, accounting procedures and practices, and other data, regardless of type and regardless of form. This clause does not require the Contractor to create or maintain any record that the Contractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(u) *Incorporation by reference*. The Contractor's representations and certifications, including those completed electronically via the System for Award Management (SAM), are incorporated by reference into the contract.

(End of clause)

Alternate I (DEVIATION DATE). When contemplating a time-and-materials or labor-hour contract, substitute the following paragraphs (a), (b), (i), (l), and (m) for those in the basic clause.

(a) The clause at Federal Acquisition Regulation (FAR) 52.202-1, Definitions, is incorporated by reference. As used in this clause—

Direct materials means those materials that enter directly into the end product, or that are used or consumed directly in connection with the furnishing of the end product or service.

Hourly rate means the rate(s) prescribed in the contract for payment for labor that meets the labor category qualifications of a labor category specified in the contract that are—

(1) Performed by the contractor;

(2) Performed by the subcontractors; or

(3) Transferred between divisions, subsidiaries, or affiliates of the contractor under a common control.

Materials means—

(1) Direct materials, including supplies transferred between divisions, subsidiaries, or affiliates of the contractor under a common control;

(2) Subcontracts for supplies and incidental services for which there is not a labor category specified in the contract;

(3) Other direct costs (e.g., incidental services for which there is not a labor category specified in the contract, travel, computer usage charges, etc.);

(4) The following subcontracts for services which are specifically excluded from the hourly rate: *[Insert any subcontracts for services to be excluded from the hourly rates prescribed in the schedule.]*; and

(5) Indirect costs specifically provided for in this clause.

Subcontract means any contract, as defined in FAR 2.101, entered into with a subcontractor to furnish supplies or services for performance of the prime contract or a subcontract including transfers between divisions, subsidiaries, or affiliates of a

contractor or subcontractor. It includes, but is not limited to, purchase orders, and changes and modifications to purchase orders.

(b) *Inspection/Acceptance*.

(1) The Government has the right to inspect and test all materials furnished and services performed under this contract at all places and times before acceptance. The Government will perform inspections and tests in a manner that will not unduly delay the work.

(2) If the Government performs inspection or tests on the premises of the Contractor or a subcontractor, the Contractor shall furnish and shall require subcontractors to furnish all reasonable facilities and assistance for the safe and convenient performance of these duties.

(3) Unless otherwise specified in the contract, the Government will accept or reject services and materials at the place of delivery as promptly as practicable after delivery, and they will be presumed accepted 60 days after the date of delivery, unless accepted earlier.

(4) At any time during contract performance, but not later than 6 months (or such other time as may be specified in the contract) after acceptance of the services or materials last delivered under this contract, the Government may require the Contractor to replace or correct services or materials that at time of delivery failed to meet contract requirements. Except as otherwise specified in paragraph (b)(6) of this clause, the cost of replacement or correction shall be determined under paragraph (i) of this clause, but the "hourly rate" for labor hours incurred in the replacement or correction shall be reduced to exclude that portion of the rate attributable to profit. Unless otherwise specified below, the portion of the "hourly rate" attributable to profit shall be 10 percent. The Contractor shall not tender for acceptance materials and services required to be replaced or corrected without disclosing the former requirement for replacement or correction, and, when required, shall disclose the corrective action taken. *[Insert portion of labor rate attributable to profit.]*

(5)(i) If the Contractor fails to proceed with reasonable promptness to perform required replacement or correction, and if the replacement or correction can be performed within the ceiling price (or the ceiling price as increased by the Government), the Government may—

(A) By contract or otherwise, perform the replacement or correction, charge to the Contractor any increased cost, or deduct such increased cost from any amounts paid or due under this contract; or

(B) Terminate this contract for cause.

(ii) Failure to agree to the amount of increased cost to be charged to the Contractor shall be a dispute under the Disputes clause of the contract.

(6) Notwithstanding paragraphs (b)(4) and (5) of this clause, the Government may, at any time, require the Contractor to remedy by correction or replacement, without cost to the Government, any failure by the Contractor to comply with the requirements of this contract, if the failure is due to—

(i) Fraud, lack of good faith, or willful misconduct on the part of the Contractor's managerial personnel; or

(ii) The conduct of one or more of the Contractor's employees selected or retained by the Contractor after any of the Contractor's managerial personnel has reasonable grounds to believe that the employee is habitually careless or unqualified.

(7) This clause applies in the same manner and to the same extent to corrected or replacement materials or services as to materials and services originally delivered under this contract.

(8) The Contractor has no obligation or liability under this contract to correct or replace materials and services that at time of delivery do not meet contract requirements, except as provided in this clause or as may be otherwise specified in the contract.

(9) Unless otherwise specified in the contract, the Contractor's obligation to correct or replace Government-furnished property shall be governed by the clause pertaining to Government property.

(i) *Payments*.

(1) *Work performed*. The Government will pay the Contractor as follows upon the submission of commercial invoices approved by the Contracting Officer:

(i) *Hourly rate*.

(A) The amounts shall be computed by multiplying the appropriate hourly rates prescribed in the contract by the number of direct labor hours performed. Fractional parts of an hour shall be payable on a prorated basis.

(B) The rates shall be paid for all labor performed on the contract that meets the labor qualifications specified in the contract. Labor hours incurred to perform tasks for which labor qualifications were specified in the contract will not be paid to the extent the work is performed by individuals that do not meet the qualifications specified in the contract, unless specifically authorized by the Contracting Officer.

(C) Invoices may be submitted once each month (or at more frequent intervals, if approved by the Contracting Officer) to the Contracting Officer or the authorized representative.

(D) When requested by the Contracting Officer or the authorized representative, the Contractor shall substantiate invoices (including any subcontractor hours reimbursed at the hourly rate in the schedule) by evidence of actual payment, individual daily job timecards, records that verify the employees meet the qualifications for the labor categories specified in the contract, or other substantiation specified in the contract.

(E) Unless the Schedule prescribes otherwise, the hourly rates in the Schedule shall not be varied by virtue of the Contractor having performed work on an overtime basis.

(*1*) If no overtime rates are provided in the Schedule and the Contracting Officer approves overtime work in advance, overtime rates shall be negotiated.

(*2*) Failure to agree upon these overtime rates shall be treated as a dispute under the Disputes clause of this contract.

(*3*) If the Schedule provides rates for overtime, the premium portion of those rates will be reimbursable only to the extent the overtime is approved by the Contracting Officer.

(ii) *Materials*.

(A) If the Contractor furnishes materials that meet the definition of a commercial product at FAR 2.101, the price to be paid for such materials shall not exceed the Contractor's established catalog or market price, adjusted to reflect the—

(*1*) Quantities being acquired; and

(*2*) Any modifications necessary because of contract requirements.

(B) Except as provided for in paragraph (i)(1)(ii)(A) and (D)(2) of this clause, the Government will reimburse the Contractor the actual cost of materials (less any rebates, refunds, or discounts received by the contractor that are identifiable to the contract) provided the Contractor—

(*1*) Has made payments for materials in accordance with the terms and conditions of the agreement or invoice; or

(*2*) Makes these payments within 30 days of the submission of the Contractor's payment request to the Government and such payment is in accordance with the terms and conditions of the agreement or invoice.

(C) To the extent able, the Contractor shall—

(*1*) Obtain materials at the most advantageous prices available with due regard to securing prompt delivery of satisfactory materials; and

(*2*) Give credit to the Government for cash and trade discounts, rebates, scrap, commissions, and other amounts that are identifiable to the contract.

(D) Unless listed below, other direct and indirect costs will not be reimbursed.

(*1*) *Other direct costs*. The Government will reimburse the Contractor on the basis of actual cost for the following, provided such costs comply with the requirements in paragraph (i)(1)(ii)(B) of this clause: *[Insert each element of other direct costs (e.g., travel, computer usage charges, etc. Insert "None" if no reimbursement for other direct costs will be provided. If this is an indefinite delivery contract, the Contracting Officer may insert "Each order must list separately the elements of other direct charge(s) for that order or, if no reimbursement for other direct costs will be provided, insert 'None'".]*

(*2) Indirect costs (material handling, subcontract administration, etc.)*. The Government will reimburse the Contractor for indirect costs on a pro-rata basis over the period of contract performance at the following fixed price: *[Insert a fixed amount for the indirect costs and payment schedule. Insert "$0" if no fixed price reimbursement for indirect costs will be provided. (If this is an indefinite delivery contract, the Contracting Officer may insert "Each order must list separately the fixed amount for the indirect costs and payment schedule or, if no reimbursement for indirect costs, insert 'None')."]*

(2) *Total cost*. The total cost to the Government for the performance of this contract shall not exceed the ceiling price set forth in the Schedule. The Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within such ceiling price. If at any time the Contractor has reason to believe that the hourly rate payments and material costs that will accrue in performing this contract in the next succeeding 30 days, if added to all other payments and costs previously accrued, will exceed 85 percent of the ceiling price in the Schedule, the Contractor shall notify the Contracting Officer giving a revised estimate of the total price to the Government for performing this contract with supporting reasons and documentation. If at any time during the performance of this contract, the Contractor has reason to believe that the total price to the Government for performing this contract will be substantially greater or less than the stated ceiling price, the Contractor shall so notify the Contracting Officer, giving a revised estimate of the total price for performing this contract, with supporting reasons and documentation. If at any time during performance of this contract, the Government has reason to believe that the work to be required in performing this contract will be substantially greater or less than the

stated ceiling price, the Contracting Officer will so advise the Contractor, giving the revised estimate of the total amount of effort to be required under the contract.

(3) *Ceiling price*. The Government will not be obligated to pay the Contractor any amount in excess of the ceiling price in the Schedule, and the Contractor shall not be obligated to continue performance if to do so would exceed the ceiling price set forth in the Schedule, unless and until the Contracting Officer notifies the Contractor in writing that the ceiling price has been increased and specifies in the notice a revised ceiling that shall constitute the ceiling price for performance under this contract. When and to the extent that the ceiling price set forth in the Schedule has been increased, any hours expended and material costs incurred by the Contractor in excess of the ceiling price before the increase shall be allowable to the same extent as if the hours expended and material costs had been incurred after the increase in the ceiling price.

(4) *Access to records*. At any time before final payment under this contract, the Contracting Officer (or authorized representative) will have access to the following (access shall be limited to the listing below unless otherwise agreed to by the Contractor and the Contracting Officer):

(i) Records that verify that the employees whose time has been included in any invoice meet the qualifications for the labor categories specified in the contract;

(ii) For labor hours (including any subcontractor hours reimbursed at the hourly rate in the schedule), when timecards are required as substantiation for payment—

(A) The original timecards (paper-based or electronic);

(B) The Contractor's timekeeping procedures;

(C) Contractor records that show the distribution of labor between jobs or contracts; and

(D) Employees whose time has been included in any invoice for the purpose of verifying that these employees have worked the hours shown on the invoices.

(iii) For material and subcontract costs that are reimbursed on the basis of actual cost—

(A) Any invoices or subcontract agreements substantiating material costs; and

(B) Any documents supporting payment of those invoices.

(5) *Overpayments/Underpayments*. Each payment previously made shall be subject to reduction to the extent of amounts, on preceding invoices, that are found by the Contracting Officer not to have been properly payable and shall also be subject to reduction for overpayments or to increase for underpayments. The Contractor shall promptly pay any such reduction within 30 days unless the parties agree otherwise. The Government will pay any such increases within 30 days, unless the parties agree otherwise. The Contractor's payment will be made by check. If the Contractor becomes aware of a duplicate invoice payment or that the Government has otherwise overpaid on an invoice payment, the Contractor shall—

(i) Remit the overpayment amount to the payment office cited in the contract along with a description of the overpayment including the—

(A) Circumstances of the overpayment (e.g., duplicate payment, erroneous payment, liquidation errors, date(s) of overpayment);

(B) Affected contract number and delivery order number, if applicable;

(C) Affected line item or subline item, if applicable; and

(D) Contractor point of contact.

(ii) Provide a copy of the remittance and supporting documentation to the Contracting Officer.

(6) *Interest*.

(i) All amounts that become payable by the Contractor to the Government under this contract shall bear simple interest from the date due until paid unless paid within 30 days of becoming due. The interest rate shall be the interest rate established by the Secretary of the Treasury, as provided in 41 U.S.C. 7109, which is applicable to the period in which the amount becomes due, and then at the rate applicable for each six-month period as established by the Secretary until the amount is paid.

(ii) The Government may issue a demand for payment to the Contractor upon finding a debt is due under the contract.

(iii) The Contracting Officer will issue a final decision if—

(A) The Contracting Officer and the Contractor are unable to reach agreement on the existence or amount of a debt in a timely manner;

(B) The Contractor fails to liquidate a debt previously demanded by the Contracting Officer within the timeline specified in the demand for payment unless the amounts were not repaid because the Contractor has requested an installment payment agreement; or

(C) The Contractor requests a deferment of collection on a debt previously demanded by the Contracting Officer.

(iv) If a demand for payment was previously issued for the debt, the demand for payment included in the final decision shall identify the same due date as the original demand for payment.

(v) Amounts shall be due at the earliest of the following dates:

(A) The date fixed under this contract.

(B) The date of the first written demand for payment, including any demand for payment resulting from a default termination.

(vi) The interest charge shall be computed for the actual number of calendar days involved beginning on the due date and ending on—

(A) The date on which the designated office receives payment from the Contractor;

(B) The date of issuance of a Government check to the Contractor from which an amount otherwise payable has been withheld as a credit against the contract debt; or

(C) The date on which an amount withheld and applied to the contract debt would otherwise have become payable to the Contractor.

(vii) The interest charge made under this clause may be reduced under the procedures prescribed in FAR part 32 in effect on the date of this contract.

(viii) Upon receipt and approval of the invoice designated by the Contractor as the "completion invoice" and supporting documentation, and upon compliance by the Contractor with all terms of this contract, any outstanding balances will be paid within 30 days unless the parties agree otherwise. The completion invoice, and supporting documentation, shall be submitted by the Contractor as promptly as practicable following completion of the work under this contract, but in no event later than 1 year (or such longer period as the Contracting Officer may approve in writing) from the date of completion.

(7) *Release of claims*. The Contractor, and each assignee under an assignment entered into under this contract and in effect at the time of final payment under this contract, shall execute and deliver, at the time of and as a condition precedent to final payment under this contract, a release discharging the Government, its officers, agents, and employees of and from all liabilities, obligations, and claims arising out of or under this contract, subject only to the following exceptions:

(i) Specified claims in stated amounts, or in estimated amounts if the amounts are not susceptible to exact statement by the Contractor.

(ii) Claims, together with reasonable incidental expenses, based upon the liabilities of the Contractor to third parties arising out of performing this contract, that are not known to the Contractor on the date of the execution of the release, and of which the Contractor gives notice in writing to the Contracting Officer not more than 6 years after the date of the release or the date of any notice to the Contractor that the Government is prepared to make final payment, whichever is earlier.

(iii) Claims for reimbursement of costs (other than expenses of the Contractor by reason of its indemnification of the Government against patent liability), including reasonable incidental expenses, incurred by the Contractor under the terms of this contract relating to patents.

(8) *Prompt payment*. The Government will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and prompt payment regulations at 5 CFR part 1315.

(9) Discount. In connection with any discount offered for early payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date that appears on the payment check or the specified payment date if an electronic funds transfer payment is made.

(l) *Termination for the Government's convenience*. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work under this contract and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid an amount for direct labor hours (as defined in the Schedule of the contract) determined by multiplying the number of direct labor hours expended before the effective date of termination by the hourly rate(s) in the contract, less any hourly rate payments already made to the Contractor plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system that have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred that reasonably could have been avoided.

(m) *Termination for cause*. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon written request, with adequate assurances of future performance. The Government will send a cure notice to the Contractor, unless the reason for the termination is late delivery. Subject to the terms of this contract, the Contractor shall be paid an amount computed under paragraph (i), Payments, of this clause, but the "hourly rate" for

labor hours expended in furnishing work not delivered to or accepted by the Government shall be reduced to exclude that portion of the rate attributable to profit. Unless otherwise specified in paragraph (b)(4) of this clause, the portion of the "hourly rate" attributable to profit shall be 10 percent. In the event of termination for cause, the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

52.212-5 [Reserved]

(DEVIATION DATE)

52.213 [Reserved]

52.213-1 [Reserved]

(DEVIATION DATE)

52.213-2 [Reserved]

(DEVIATION DATE)

52.213-3 [Reserved]

(DEVIATION DATE)

52.213-4 Terms and Conditions—Simplified Acquisitions (Noncommercial).

As prescribed in 13.204(b), insert the following clause:

TERMS AND CONDITIONS—SIMPLIFIED ACQUISITIONS (NONCOMMERCIAL) (DEVIATION DATE)

(a) *Inspection/Acceptance*. The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. If repair/replacement or reperformance will not correct the defects or is not possible, the Government may seek an equitable price reduction or adequate consideration for acceptance of nonconforming supplies or services. The Government must exercise its post acceptance rights—

(1) Within a reasonable period of time after the defect was discovered or should have been discovered; and

(2) Before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

(b) *Excusable delays*. The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence. Examples of occurrences include acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. When an excusable delay occurs, the Contractor shall—

(1) Notify the Contracting Officer in writing as soon as possible;

(2) Remedy the delay as quickly as possible; and

(3) Notify the Contracting Officer when the occurrence is over.

(c) *Termination for the Government's convenience*. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

(d) *Termination for cause*. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. The Government will send a cure notice to the Contractor, unless the reason for the termination is late delivery. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(e) *Warranty*. The Contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this contract.

(End of clause)

52.214 [Reserved]

52.214-1 [Reserved]

52.214-2 [Reserved]

52.214-3 Amendments to Invitations for Bids.

As prescribed in 14.207(b)(1), insert the following provision:

AMENDMENTS TO INVITATIONS FOR BIDS (DEVIATION DATE)

(a) If this solicitation is amended, then all terms and conditions which are not modified remain unchanged.

(b) (1) Bidders shall acknowledge receipt of any amendment to this solicitation-

(i) By signing and returning the amendment;

(ii) By identifying the amendment number and date in space provided for this purpose on the form for submitting a bid;

(iii) By letter; or

(iv) By email, if email bids are authorized in the solicitation.

(2) The Government shall receive the acknowledgement by the time and at the place specified for receipt of bids.

(End of provision)

52.214-4 False Statements in Bids.

As prescribed in 14.207(b)(2), insert the following provision:

FALSE STATEMENTS IN BIDS (APR 1984)

Bidders shall provide full, accurate, and complete information as required by this solicitation and its attachments. The penalty for making false statements in bids is prescribed in 18 U.S.C. 1001.

(End of provision)

52.214-5 Submission of Bids.

As prescribed in 14.207(b)(3), insert the following provision:

SUBMISSION OF BIDS (DEVIATION DATE)

(a) Bids and bid modifications shall be submitted in sealed envelopes or packages (unless submitted by electronic means) (1) addressed to the office specified in the solicitation, and (2) showing the time and date specified for receipt, the solicitation number, and the name and address of the bidder.

(b) Bidders using commercial carrier services shall ensure that the bid is addressed and marked on the outermost envelope or wrapper as prescribed in subparagraphs (a) (1) and (2) of this provision when delivered to the office specified in the solicitation.

(c) Bids submitted by electronic commerce shall be considered only if the electronic commerce method was specifically stipulated or permitted by the solicitation.

(End of provision)

52.214-6 Explanation to Prospective Bidders.

As prescribed in 14.207(b)(4), insert the following provision:

EXPLANATION TO PROSPECTIVE BIDDERS (APR 1984)

Any prospective bidder desiring an explanation or interpretation of the solicitation, drawings, specifications, etc., shall request it in writing soon enough to allow a reply to reach all prospective bidders before the submission of their bids. Oral explanations or instructions given before the award of a contract will not be binding. Any information given a prospective bidder concerning a solicitation will be furnished promptly to all other prospective bidders as an amendment to the solicitation, if that information is necessary in submitting bids or if the lack of it would be prejudicial to other prospective bidders.

(End of provision)

52.214-7 Late Submissions, Modifications, and Withdrawals of Bids.

As prescribed in 14.207(b)(5), insert the following provision:

LATE SUBMISSIONS, MODIFICATIONS, AND WITHDRAWALS OF BIDS (DEVIATION DATE)

(a) Bidders are responsible for submitting bids, and any modifications or withdrawals, so as to reach the Government office designated in the invitation for bids (IFB) by the time specified in the IFB. If no time is specified in the IFB, the time for receipt is 4:30 p.m., local time, for the designated Government office on the date that bids are due.

(b) (1) Any bid, modification, or withdrawal received at the Government office designated in the IFB after the exact time specified for receipt of bids is "late" and will not be considered unless it is received before award is made, the Contracting Officer determines that accepting the late bid would not unduly delay the acquisition; and—

(i) If it was transmitted through an electronic commerce method authorized by the IFB, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of bids; or

(ii) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of bids and was under the Government's control prior to the time set for receipt of bids.

(2) However, a late modification of an otherwise successful bid that makes its terms more favorable to the Government, will be considered at any time it is received and may be accepted.

(c) Acceptable evidence to establish the time of receipt at the Government installation includes the time/date stamp of that installation on the bid wrapper, other documentary evidence of receipt maintained by the installation, or oral testimony or statements of Government personnel.

(d) If an emergency or unanticipated event interrupts normal Government processes so that bids cannot be received at the Government office designated for receipt of bids by the exact time specified in the IFB and urgent Government requirements preclude amendment of the IFB, the time specified for receipt of bids 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.

(e) Bids may be withdrawn by written notice received at any time before the exact time set for receipt of bids. A bid may be withdrawn in person by a bidder or its authorized representative if, before the exact time set for receipt of bids, the identity of the person requesting withdrawal is established and the person signs a receipt for the bid.

(End of provision)

52.214-8 [Reserved]

52.214-9 [Reserved]

52.214-10 Contract Award-Sealed Bidding.

As prescribed in 14.207(c), insert the following provision:

CONTRACT AWARD-SEALED BIDDING (JULY 1990)

(a) The Government will evaluate bids in response to this solicitation without discussions and will award a contract to the responsible bidder whose bid, conforming to the solicitation, will be most advantageous to the Government considering only price and the price-related factors specified elsewhere in the solicitation.

(b) The Government may-

(1) Reject any or all bids;
(2) Accept other than the lowest bid; and
(3) Waive informalities or minor irregularities in bids received.

(c) The Government may accept any item or group of items of a bid, unless the bidder qualifies the bid by specific limitations. Unless otherwise provided in the Schedule, bids may be submitted for quantities less than those specified. The Government reserves the right to make an award on any item for a quantity less than the quantity offered, at the unit prices offered, unless the bidder specifies otherwise in the bid.

(d) A written award or acceptance of a bid mailed or otherwise furnished to the successful bidder within the time for acceptance specified in the bid shall result in a binding contract without further action by either party.

(e) The Government may reject a bid as nonresponsive if the prices bid are materially unbalanced between line items or subline items. A bid is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the Government even though it may be the low evaluated bid, or if it is so unbalanced as to be tantamount to allowing an advance payment.

(End of provision)

52.214-11 [Reserved]

52.214-12 Preparation of Bids.

As prescribed in 14.207(d), insert the following provision:

PREPARATION OF BIDS (APR 1984)

(a) Bidders are expected to examine the drawings, specifications, Schedule, and all instructions. Failure to do so will be at the bidder’s risk.

(b) Each bidder shall furnish the information required by the solicitation. The bidder shall sign the bid and print or type its name on the Schedule and each continuation sheet on which it makes an entry. Erasures or other changes shall be initialed by the person signing the bid. Bids signed by an agent shall be accompanied by evidence of that agent’s authority, unless that evidence has been previously furnished to the issuing office.

(c) For each item offered, bidders shall (1) show the unit price, including, unless otherwise specified, packaging, packing, and preservation and (2) enter the extended price for the quantity of each item offered in the "Amount" column of the Schedule. In case of discrepancy between a unit price and an extended price, the unit price will be presumed to be correct, subject, however, to correction to the same extent and in the same manner as any other mistake.

(d) Bids for supplies or services other than those specified will not be considered unless authorized by the solicitation.

(e) Bidders shall state a definite time for delivery of supplies or for performance of services, unless otherwise specified in the solicitation.

(f) Time, if stated as a number of days, will include Saturdays, Sundays, and holidays.

(End of provision)

52.214-13 [Reserved]

52.214-14 Place of Performance-Sealed Bidding.

As prescribed in 14.207(e), insert the following provision:

PLACE OF PERFORMANCE-SEALED BIDDING (APR 1985)

(a) The bidder, in the performance of any contract resulting from this solicitation, □ intends, □ does not intend [*check applicable box*] to use one or more plants or facilities located at a different address from the address of the bidder as indicated in this bid.

(b) If the bidder checks "intends" in paragraph (a) of this provision, it shall insert in the spaces provided below the required information:

PLACE OF PERFORMANCE (STREET ADDRESS, CITY, COUNTY, STATE, ZIP CODE)	NAME AND ADDRESS OF OWNER AND OPERATOR OF THE PLANT OR FACILITY IF OTHER THAN BIDDER
_____	_____
_____	_____

(End of provision)

52.214-15 Period for Acceptance of Bids.

As prescribed in 14.207(f), insert the following provision:

PERIOD FOR ACCEPTANCE OF BIDS (APR 1984)

In compliance with the solicitation, the bidder agrees, if this bid is accepted within _____ calendar days (60 calendar days unless a different period is inserted by the bidder) from the date specified in the solicitation for receipt of bids, to furnish any or all items upon which prices are bid at the price set opposite each item, delivered at the designated point(s), within the time specified in the Schedule.

(End of provision)

52.214-16 Minimum Bid Acceptance Period.

As prescribed in 14.207(g), insert the following provision:

MINIMUM BID ACCEPTANCE PERIOD (APR 1984)

(a) "Acceptance period," as used in this provision, means the number of calendar days available to the Government for awarding a contract from the date specified in this solicitation for receipt of bids.

(b) This provision supersedes any language pertaining to the acceptance period that may appear elsewhere in this solicitation.

(c) The Government requires a minimum acceptance period of _____ calendar days [*the Contracting Officer shall insert the number of days*].

(d) In the space provided immediately below, bidders may specify a longer acceptance period than the Government's minimum requirement.

The bidder allows the following acceptance period: _____ calendar days.

(e) A bid allowing less than the Government's minimum acceptance period will be rejected.

(f) The bidder agrees to execute all that it has undertaken to do, in compliance with its bid, if that bid is accepted in writing within-

(1) The acceptance period stated in paragraph (c) of this clause; or

(2) Any longer acceptance period stated in paragraph (d) of this clause.

(End of clause)

52.214-17 [Reserved]

52.214-18 Preparation of Bids-Construction.

As prescribed in 14.207(h), insert the following provision:

PREPARATION OF BIDS-CONSTRUCTION (APR 1984)

(a) Bids must be-

(1) Submitted on the forms furnished by the Government or on copies of those forms, and

(2) *Manually signed.* The person signing a bid must initial each erasure or change appearing on any bid form.

(b) The bid form may require bidders to submit bid prices for one or more items on various bases, including-

(1) Lump sum bidding;
(2) Alternate prices;
(3) Units of construction; or
(4) Any combination of paragraphs (b)(1) through (b)(3) of this provision.

(c) If the solicitation requires bidding on all items, failure to do so will disqualify the bid. If bidding on all items is not required, bidders should insert the words "no bid" in the space provided for any item on which no price is submitted.

(d) Alternate bids will not be considered unless this solicitation authorizes their submission.

(End of provision)

52.214-19 Contract Award-Sealed Bidding-Construction.

As prescribed in 14.207(i), insert the following provision:

CONTRACT AWARD-SEALED BIDDING-CONSTRUCTION (AUG 1996)

(a) The Government will evaluate bids in response to this solicitation without discussions and will award a contract to the responsible bidder whose bid, conforming to the solicitation, will be most advantageous to the Government, considering only price and the price-related factors specified elsewhere in the solicitation.

(b) The Government may reject any or all bids, and waive informalities or minor irregularities in bids received.

(c) The Government may accept any item or combination of items, unless doing so is precluded by a restrictive limitation in the solicitation or the bid.

(d) The Government may reject a bid as nonresponsive if the prices bid are materially unbalanced between line items or subline items. A bid is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the Government even though it may be the low evaluated bid, or if it is so unbalanced as to be tantamount to allowing an advance payment.

(End of provision)

52.214-20 Bid Samples.

As prescribed in 14.207(j)(1), insert the following provision:

BID SAMPLES (APR 2002)

(a) "Bid sample" means a product sample required to be submitted by a bidder to show those characteristics of the offered products that cannot adequately be described by specifications, purchase descriptions, or the invitation for bid (*e.g.,* balance, facility of use, or pattern).

(b) Bidders must furnish bid samples as part of the bid. The Government must receive the bid samples by the time specified in the invitation for bids. If the bidder fails to submit samples on time, the Government will reject the bid, except that the Contracting Officer will consider a late sample sent by mail under the Late Submissions, Modifications, and Withdrawals of Bids provision of this solicitation.

(c) The Government will test or evaluate bid samples to determine compliance with all the characteristics listed for examination in this solicitation. The Government will reject the bid when the sample fails to conform to the required characteristics. Products delivered under any resulting contract must conform to-

(1) The approved sample for the characteristics listed for test or evaluation; and
(2) The specifications for all other characteristics.

(d) Unless otherwise specified in the solicitation, bid samples shall be-

(1) Submitted at no expense to the Government; and
(2) Returned at the bidder’s request and expense, unless they are destroyed during preaward testing.

(End of provision)

Alternate I (MAY 2002). As prescribed in 14.207(j)(2)(i), insert the following Alternate I:

(e) At the discretion of the Contracting Officer, the requirement for furnishing bid samples may be waived for a bidder if-

(1) The bid states that the offered product is the same as a product offered by the bidder to the _____ *[as appropriate, the Contracting Officer shall designate the contracting office or an alternate activity or office]*; and

(2) The Contracting Officer determines that the previously offered product was accepted or tested and found to comply with specification and other requirements for technical acceptability conforming in every material respect with those in this solicitation.

Alternate II (MAY 2002). As prescribed in 14.207(j)(2)(ii), insert the following Alternate II:

(e) At the discretion of the Contracting Officer, the requirements for furnishing bid samples may be waived for a bidder if-

(1) The bid states that the offered product is the same as a product offered by the bidder to the _____ *[as appropriate, the Contracting Officer shall designate the contracting office or an alternate activity or office]* on a previous acquisition;

(2) The Contracting Officer determines that the previously offered product was accepted or tested and found to comply with specification and other requirements for technical acceptability conforming in every material respect with those of this solicitation; and

(3) The product offered under this solicitation will be produced under a resulting contract at the same plant in which the previously acquired or tested product was produced.

52.214-21 Descriptive Literature.

As prescribed in 14.207(k)(1), insert the following provision:

DESCRIPTIVE LITERATURE (APR 2002)

(a) "Descriptive literature," as used in this provision, means information furnished by a bidder, such as cuts, illustrations, drawings, and brochures, that shows a product's characteristics or construction or explains its operation. The term includes only that information required to evaluate the acceptability of the product and excludes other information for operating or maintaining the product.

(b) Descriptive literature is required to establish, for the purpose of evaluation and award, details of the product offered that are specified elsewhere in the solicitation and pertain to significant elements such as-

(1) Design;

(2) Materials;

(3) Components;

(4) Performance characteristics; and

(5) Methods of manufacture, assembly, construction, or operation.

(c) Descriptive literature, required elsewhere in this solicitation, shall be-

(1) Identified to show the item(s) of the offer to which it applies; and

(2) Received by the time specified in this solicitation.

(d) If the bidder fails to submit descriptive literature on time, the Government will reject the bid, except that late descriptive literature sent by mail may be considered under the Late Submissions, Modifications, and Withdrawals of Bids provision of this solicitation.

(e) If the descriptive literature fails to show that the product offered conforms to the requirements of the solicitation, the Government will reject the bid.

(End of provision)

Alternate I (JAN 2017). As prescribed in 14.207(k)(2), add the following paragraphs (f) and (g) to the basic provision:

(f) The Contracting Officer may waive the requirement for furnishing descriptive literature if the offeror has supplied a product that is the same as that required by this solicitation under a prior contract. A bidder that requests a waiver of this requirement shall provide the following information:

Prior contract number _____

Date of prior contract _____

Line item number of product supplied _____

Name and address of Government activity to which delivery was made _____

Date of final delivery of product supplied _____

(g) Bidders shall submit bids on the basis of required descriptive literature or on the basis of a previously supplied product under paragraph (f) of this provision. A bidder submitting a bid on one of these two bases may not elect to have its bid considered on the alternative basis after the time specified for receipt of bids. The Government will disregard a bidder's request for a waiver under paragraph (f) if that bidder has submitted the descriptive literature requested under this solicitation.

52.214-22 Evaluation of Bids for Multiple Awards.

As prescribed in 14.207(l), insert the following provision:

EVALUATION OF BIDS FOR MULTIPLE AWARDS (MAR 1990)

In addition to other factors, bids will be evaluated on the basis of advantages and disadvantages to the Government that might result from making more than one award (multiple awards). It is assumed, for the purpose of evaluating bids, that $500 would be the administrative cost to the Government for issuing and administering each contract awarded under this solicitation, and individual awards will be for the items or combinations of items that result in the lowest aggregate cost to the Government, including the assumed administrative costs.

(End of provision)

52.214-23 Late Submissions, Modifications, Revisions, and Withdrawals of Technical Proposals under Two-Step Sealed Bidding.

As prescribed in 14.207(m), insert the following provision:

LATE SUBMISSIONS, MODIFICATIONS, REVISIONS, AND WITHDRAWALS OF TECHNICAL PROPOSALS UNDER TWO-STEP SEALED BIDDING (DEVIATION DATE)

(a) Bidders are responsible for submitting technical proposals, and any modifications or revisions, so as to reach the Government office designated in the request for technical proposals by the time specified in the invitation for bids (IFB). If no time is specified in the IFB, the time for receipt is 4:30 p.m., local time, for the designated Government office on the date that bids or revisions are due.

(b) (1) Any technical proposal under step one of two-step sealed bidding or modification, revision, or withdrawal of such proposal received at the Government office designated in the request for technical proposals after the exact time specified for receipt will not be considered unless the Contracting Officer determines that accepting the late technical proposal would not unduly delay the acquisition; and—

(i) If it was transmitted through an electronic commerce method authorized by the request for technical proposals, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals; or

(ii) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of offers and was under the Government's control prior to the time set for receipt; or

(iii) It is the only proposal received and it is negotiated under part 15 of the Federal Acquisition Regulation.

(2) However, a late modification 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.

(c) Acceptable evidence to establish the time of receipt at the Government installation includes the time/date stamp of that installation on the technical proposal wrapper, other documentary evidence of receipt maintained by the installation, or oral testimony or statements of Government personnel.

(d) If an emergency or unanticipated event interrupts normal Government processes so that technical proposals cannot be received at the Government office designated for receipt of technical proposals by the exact time specified in the request for technical proposals, and urgent Government requirements preclude amendment of the request for technical proposals, the time specified for receipt of technical proposals will be deemed to be extended to the same time of day specified in the request for technical proposals on the first work day on which normal Government processes resume.

(e) Technical proposals may be withdrawn by written notice received at any time before the exact time set for receipt of technical proposals. A technical proposal may be withdrawn in person by a bidder or its authorized representative if, before the exact time set for receipt of technical proposals, the identity of the person requesting withdrawal is established and the person signs a receipt for the technical proposal.

(End of provision)

52.214-24 Multiple Technical Proposals.

As prescribed in 14.207(n), insert the following provision:

MULTIPLE TECHNICAL PROPOSALS (APR 1984)

In the first step of this two-step acquisition, solicited sources are encouraged to submit multiple technical proposals presenting different basic approaches. Each technical proposal submitted will be separately evaluated and the submitter will be notified as to its acceptability.

(End of provision)

52.214-25 Step Two of Two-Step Sealed Bidding.

As prescribed in 14.207(o), insert the following provision:

STEP TWO OF TWO-STEP SEALED BIDDING (DEVIATION DATE)

(a) This invitation for bids is issued to initiate step two of two-step sealed bidding under section 14.211 of the Federal Acquisition Regulation.

(b) The only bids that the Contracting Officer may consider for award of a contract are those received from bidders that have submitted acceptable technical proposals in step one of this acquisition under _____*[the Contracting Officer shall insert the identification of the step-one request for technical proposals]*.

(c) Any bidder that has submitted multiple technical proposals in step one of this acquisition may submit a separate bid on each technical proposal that was determined to be acceptable to the Government.

(End of provision)

52.214-26 Audit and Records-Sealed Bidding.

As prescribed in 14.208(a), insert the following clause:

AUDIT AND RECORDS-SEALED BIDDING (DEVIATION DATE)

(a) As used in this clause, records includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.

(b) *Certified cost or pricing data*. If the Contractor has been required to submit certified cost or pricing data in connection with the pricing of any modification to this contract, the Contracting Officer, or an authorized representative of the Contracting Officer, in order to evaluate the accuracy, completeness, and currency of the certified cost or pricing data, shall have the right to examine and audit all of the Contractor's records, including computations and projections, related to—

(1) The proposal for the modification;

(2) The discussions conducted on the proposal(s), including those related to negotiating;

(3) Pricing of the modification; or

(4) Performance of the modification.

(c) *Comptroller General*. In the case of pricing any modification, the Comptroller General of the United States, or an authorized representative, shall have the same rights as specified in paragraph (b) of this clause and also the right to interview any current employee regarding such transactions.

(d) *Availability*. The Contractor shall make available at its office at all reasonable times the materials described in paragraph (b) of this clause, for examination, audit, or reproduction, until 3 years after final payment under this contract, or for any other period specified in subpart 4.7 of the Federal Acquisition Regulation (FAR). FAR Subpart 4.7, Contractor Records Retention, in effect on the data of this contract, is incorporated by reference in its entirety and made a part of this contract.

(1) If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement.

(2) Records pertaining to appeals under the Disputes clause or to litigation or the settlement of claims arising under or relating to the performance of this contract shall be made available until disposition of such appeals, litigation, or claims.

(e) *Subcontracts.* The Contractor shall insert a clause containing all the provisions of this clause, including this paragraph (e), in all subcontracts expected to exceed the threshold for submission of certified cost or pricing data in FAR 15.403-4(a)(1) on the date of subcontract award.

(End of clause)

52.214-27 Price Reduction for Defective Certified Cost or Pricing Data-Modifications-Sealed Bidding.

As prescribed in 14.208(b)(1), insert the following clause:

PRICE REDUCTION FOR DEFECTIVE CERTIFIED COST OR PRICING DATA-MODIFICATIONS-SEALED BIDDING (JUN 2020)

(a) This clause shall become operative only for any modification to this contract involving aggregate increases and/or decreases in costs, plus applicable profits, expected to exceed the threshold for the submission of certified cost or pricing data in Federal Acquisition Regulation (FAR) 15.403-4(a)(1) on the date of execution of the modification, except that this clause does not apply to a modification if an exception under FAR 15.403-1(b) applies.

(b) If any price, including profit, negotiated in connection with any modification under this clause, was increased by any significant amount because (1) the Contractor or a subcontractor furnished certified cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data, (2)a subcontractor or prospective subcontractor furnished the Contractor certified cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data, or (3) any of these parties furnished data of any description that were not accurate, the price shall be reduced accordingly and the contract shall be modified to reflect the reduction. This right to a price reduction is limited to that resulting from defects in data relating to modifications for which this clause becomes operative under paragraph (a) of this clause

(c) Any reduction in the contract price under paragraph (b) of this clause due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (1) the actual subcontract or (2) the actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor; provided, that the actual subcontract price was not itself affected by defective certified cost or pricing data.

(d) (1) If the Contracting Officer determines under paragraph (b) of this clause that a price or cost reduction should be made, the Contractor agrees not to raise the following matters as a defense:

(i) The Contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the price of the contract would not have been modified even if accurate, complete, and current certified cost or pricing data had been submitted.

(ii) The Contracting Officer should have known that the certified cost or pricing data in issue were defective even though the Contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the Contracting Officer.

(iii) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under the contract.

(iv) The Contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data.

(2) (i) Except as prohibited by subdivision (d)(2)(ii) of this clause, an offset in an amount determined appropriate by the Contracting Officer based upon the facts shall be allowed against the amount of a contract price reduction if-

(A) The Contractor certifies to the Contracting Officer that, to the best of the Contractor's knowledge and belief, the Contractor is entitled to the offset in the amount requested; and

(B) The Contractor proves that the certified cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification) and that the data were not submitted before such date.

(ii) An offset shall not be allowed if-

(A) The understated data was known by the Contractor to be understated when the Certificate of Current Cost or Pricing Data was signed; or

(B) The Government proves that the facts demonstrate that the contract price would not have increased in the amount to be offset even if the available data had been submitted before the date of agreement on price.

(e) If any reduction in the contract price under this clause reduces the price of 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 at the time such overpayment is repaid-

(1) Interest compounded daily, as required by 26U.S.C.6622, 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 for each quarter prescribed by the Secretary of the Treasury under 26 U.S.C. 6621(a)(2); and

(2) A penalty equal to the amount of the overpayment, if the Contractor or subcontractor knowingly submitted certified cost or pricing data which were incomplete, inaccurate, or noncurrent.

(End of clause)

52.214-28 Subcontractor Certified Cost or Pricing Data-Modifications-Sealed Bidding.

As prescribed in 14.208(c), insert the following clause:

SUBCONTRACTOR CERTIFIED COST OR PRICING DATA-MODIFICATIONS-SEALED BIDDING (DEVIATION DATE)

(a) The requirements of paragraphs (b) and (c) of this clause shall—

(1) Become operative only for any modification to this contract involving aggregate increases and/or decreases in costs, plus applicable profits, expected to exceed the threshold for submission of certified cost or pricing data in Federal Acquisition Regulation (FAR) 15.403-4(a)(1) on the date of execution of the modification, and

(2) Be limited to such modifications.

(b) Before awarding any subcontract expected to exceed the threshold for submission of certified cost or pricing data in FAR 15.403-4(a)(1), on the date of agreement on price or the date of award, whichever is later, or before pricing any subcontract modifications involving aggregate increases and/or decreases in costs, plus applicable profits, expected to exceed the threshold for submission of certified cost or pricing data in FAR 15.403-4(a)(1), the Contractor shall require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), as part of the subcontractor's proposal in accordance with FAR 15.408, Table 15-2 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price), unless an exception under FAR 15.403-1(b) applies. If the threshold for submission of certified cost or pricing data specified in FAR 15.403-4(a)(1) is adjusted for inflation as set forth in FAR 1.108, then the changed threshold applies throughout the remaining term of the contract, unless there is a subsequent threshold adjustment.

(c) The Contractor shall require the subcontractor to certify in substantially the form prescribed in section 15.406-2 of the Federal Acquisition Regulation that, to the best of its knowledge and belief, the data submitted under paragraph (b) above were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.

(d) The Contractor shall insert the substance of this clause, including this paragraph (d), in each subcontract that, when entered into, exceeds the threshold for submission of certified cost or pricing data in FAR 15.403-4(a)(1).

(End of clause)

Alternate I (OCT 2025). As prescribed in 14.208(c)(1), substitute the following paragraph (b) in place of paragraph (b) of the basic clause:

(b) Unless an exception under FAR 15.403-1(b) applies, the Contractor shall require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), as part of the subcontractor's proposal in accordance with FAR 15.408, Table 15-2 (to include any information reasonably required to explain the subcontractor's estimating

process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price)—

(1) Before modifying any subcontract that was awarded prior to July 1, 2018, involving a pricing adjustment expected to exceed $950,000; or

(2) Before awarding any subcontract expected to exceed $2.5 million on or after July 1, 2018, or modifying any subcontract that was awarded on or after July 1, 2018, involving a pricing adjustment expected to exceed $2.5 million.

52.214-29 Order of Precedence-Sealed Bidding.

As prescribed in 14.208(d), insert the following clause:

ORDER OF PRECEDENCE-SEALED BIDDING (JAN 1986)

Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order:

(a) The Schedule (excluding the specifications);

(b) Representations and other instructions;

(c) Contract clauses;

(d) Other documents, exhibits, and attachments; and

(e) The specifications.

(End of clause)

52.214-30 [Reserved]

52.214-31 [Reserved]

(DEVIATION DATE)

52.214-32 [Reserved]

52.214-33 [Reserved]

52.214-34 Submission of Offers in the English Language.

As prescribed in 14.207(p), insert the following provision:

SUBMISSION OF OFFERS IN THE ENGLISH LANGUAGE (APR 1991)

Offers submitted in response to this solicitation shall be in the English language. Offers received in other than English shall be rejected.

(End of provision)

52.214-35 Submission of Offers in U.S. Currency.

As prescribed in 14.207(q), insert the following provision:

SUBMISSION OF OFFERS IN U.S. CURRENCY (APR 1991)

Offers submitted in response to this solicitation shall be in terms of U.S. dollars. Offers received in other than U.S. dollars shall be rejected.

(End of provision)

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52.215 [Reserved]

52.215-1 Instructions to Offerors-Competitive Acquisition.

As prescribed in 15.110(a), insert the following provision:

INSTRUCTIONS TO OFFERORS-COMPETITIVE ACQUISITION (DEVIATION DATE)

(a) *Definitions*. As used in this provision-

In writing, *writing*, or *written* means any worded or numbered expression that 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 request for proposal 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 material elements of a proposal made after the request for proposal closing date, at the request of or as allowed by a Contracting Officer, as the result 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 requests for proposals*. If this request for proposal (RFP) is amended, all terms and conditions that are not amended remain unchanged. Offerors shall acknowledge receipt of any amendment to this RFP by the date and time specified in the amendment(s).

(c) Submission, modification, revision, and withdrawal of proposals. (1) (i) Proposals and modifications to proposals shall be—

(A) Submitted using the method and the format specified in the RFP;

(B) Addressed to the office specified in the RFP; and

(C) Showing the time and date specified for receipt, the RFP number, and the name and address of the offeror.

(ii) Offerors using commercial carriers should ensure that the proposal is marked on the outermost wrapper with the information in paragraphs (c)(1)(i)(B) and (C) of this provision.

(2) The first page of the proposal must show—

(i) The RFP number;

(ii) The name, address, and telephone number of the offeror (and electronic address if available);

(iii) A statement specifying the extent of agreement with all terms, conditions, and provisions included in the RFP and agreement to furnish any or all items upon which prices are offered at the price set opposite each item;

(iv) Names, titles, and telephone number (and electronic addresses if available) of persons authorized to negotiate on the offeror's behalf with the Government in connection with this RFP; and

(v) Name, title, and signature of person authorized to sign the proposal. Proposals signed by an agent shall be accompanied by evidence of that agent's authority, unless that evidence has been previously furnished to the issuing office.

(3) (i) Offerors are responsible for submitting proposals, and any modifications or revisions, so as to reach the Government office designated in the RFP by the time specified in the RFP. If no time is specified in the RFP, the time for receipt is 4:30 p.m., local time, for the designated Government office on the date that proposal or revision is due.

(ii) (A) Any proposal, modification, or revision received at the Government office designated in the RFP after the exact time specified for receipt of offers is "late" and will not be considered unless it is received before award is made, the Contracting Officer determines that accepting the late offer would not unduly delay the acquisition; and-

(1) If it was transmitted through an electronic commerce method authorized by the RFP, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals; or

(2) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of offers and was under the Government's control prior to the time set for receipt of offers; or

(3) It is the only proposal received.

(B) However, a late modification 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.

(iii) 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.

(iv) 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 RFP, and urgent Government requirements preclude amendment of the RFP, the time specified for receipt of proposals will be deemed to be extended to the same time of day specified in the RFP on the first work day on which normal Government processes resume.

(v) Proposals may be withdrawn by written notice received at any time before award. Oral proposals in response to oral RFPs may be withdrawn orally. Proposals may be withdrawn in person by an offeror or an authorized representative, if the identity of the person requesting withdrawal is established and the person signs a receipt for the proposal before award.

(4) Unless otherwise specified in the RFP, the offeror may propose to provide any item or combination of items.

(5) Offerors shall submit proposals in response to this RFP in English, unless otherwise permitted by the RFP, and in U.S. dollars, unless the provision at FAR 52.225-17, Evaluation of Foreign Currency Offers, is included in the RFP.

(6) Offerors may submit modifications to their proposals at any time before the RFP closing date and time, and may submit modifications in response to an amendment, or to correct a mistake at any time before award.

(7) Offerors may submit revised proposals only if requested or allowed by the Contracting Officer.

(8) Proposals may be withdrawn at any time before award. Withdrawals are effective upon receipt of notice by the Contracting Officer.

(d) *Offer expiration date*. Proposals in response to this RFP will be valid for the number of days specified on the RFP cover sheet (unless a different period is proposed by the offeror).

(e) *Restriction on disclosure and use of data*. Offerors that include in their proposals data that they do not want disclosed to the public for any purpose, or used by the Government except for evaluation purposes, shall-

(1) Mark the title page with the following legend:

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 contract 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*]; and

(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.

(f) Contract award. (1) The Government intends to award a contract or contracts resulting from this RFP to the responsible offeror(s) whose proposal(s) represents the best value after evaluation in accordance with the factors and subfactors in the RFP.

(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 contract without negotiations with offerors (except clarifications as described in FAR 15.202(b)). 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 negotiations 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 evaluated proposals.

(5) The Government reserves the right to make an award on any item for a quantity less than the quantity offered, at the unit cost or prices offered, unless the offeror specifies otherwise in the proposal.

(6) The Government reserves the right to make multiple awards if, after considering the additional administrative costs, it is in the Government’s best interest to do so.

(7) The Government may determine that a proposal is unacceptable if the prices proposed are materially unbalanced between line items or subline items. Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more line items is significantly overstated or understated 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.

(8) If a cost realism analysis is performed, cost realism may be considered by the source selection authority in evaluating performance or schedule risk.

(9) A written award or acceptance of proposal mailed or otherwise furnished to the successful offeror within the time specified in the proposal shall result in a binding contract without further action by either party.

(10) If a post-award debriefing is given to requesting offerors, the Government shall disclose the following information, if applicable:

(i) The agency's evaluation of the significant weaknesses or deficiencies in the debriefed offeror's offer.

(ii) The overall evaluated cost or price and technical rating of the successful and the debriefed offeror and past performance information on the debriefed offeror.

(iii) The overall ranking of all offerors, when any ranking was developed by the agency during source selection.

(iv) A summary of the rationale for award.

(v) For acquisitions of commercial products, the make and model of the product to be delivered by the successful offeror.

(vi) Reasonable responses to relevant questions posed by the debriefed offeror as to whether source-selection procedures set forth in the RFP, applicable regulations, and other applicable authorities were followed by the agency.

(vii) For DoD contracts in excess of $10 million but not in excess of $100 million with a small business or nontraditional defense contractor (10 U.S.C. 3014), an option for the contractor to request disclosure of the agency's written source selection decision document, redacted to protect the confidential and proprietary information of other offerors for the contract award.

(viii) For award of a DoD contract in excess of $100 million, disclosure of the agency's written source selection decision document, redacted to protect the confidential and proprietary information of other offerors for the contract award.

(End of provision)

Alternate I–DEVIATION (DATE). As prescribed in 15.110(a)(1), substitute the following paragraph (f)(4) for paragraph (f)(4) of the provision:

(f)(4) The Government intends to evaluate proposals and award a contract after conducting negotiations 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.

Alternate II–DEVIATION (DATE). As prescribed in 15.110(a)(2), add a paragraph (c)(9) substantially the same as the following to the basic clause:

(c)(9) Offerors may submit proposals that depart from stated requirements. Such proposals shall clearly identify why the acceptance of the proposal would be advantageous to the Government. Any deviations from the terms and conditions of the RFP, as well as the comparative advantage to the Government, shall be clearly identified and explicitly defined. The Government reserves the right to amend the RFP to allow all offerors an opportunity to submit revised proposals based on the revised requirements.

52.215-2 Audit and Records-Negotiation.

As prescribed in 15.110(b), insert the following clause:

AUDIT AND RECORDS-NEGOTIATION (DEVIATION DATE)

(a) As used in this clause, *records* includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.

(b) *Examination of costs*. If this is a cost-reimbursement, incentive, time-and-materials, labor-hour, or price redeterminable contract, or any combination of these, the Contractor shall maintain and the Contracting Officer, or an authorized representative of the Contracting Officer, shall have the right to examine and audit all records and other evidence sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred directly or indirectly in performance of this contract. This right of examination shall include inspection at all reasonable times of the Contractor’s plants, or parts of them, engaged in performing the contract.

(c) *Certified cost or pricing data*. If the Contractor has been required to submit certified cost or pricing data in connection with any pricing action relating to this contract, the Contracting Officer, or an authorized representative of the Contracting Officer, in order to evaluate the accuracy, completeness, and currency of the certified cost or pricing data, shall have the right to examine and audit all of the Contractor's records, including computations and projections, related to-

(1) The proposal for the contract, subcontract, or modification;

(2) The discussions conducted on the proposal(s), including those related to negotiating;

(3) Pricing of the contract, subcontract, or modification; or

(4) Performance of the contract, subcontract or modification.

(d) *Comptroller General*.- (1) The Comptroller General of the United States, or an authorized representative, shall have access to and the right to examine any of the Contractor's directly pertinent records involving transactions related to this contract or a subcontract hereunder and to interview any current employee regarding such transactions.

(2) This paragraph may not be construed to require the Contractor or subcontractor to create or maintain any record that the Contractor or subcontractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(e) *Reports*. If the Contractor is required to furnish cost, funding, or performance reports, the Contracting Officer or an authorized representative of the Contracting Officer shall have the right to examine and audit the supporting records and materials, for the purpose of evaluating-

(1) The effectiveness of the Contractor's policies and procedures to produce data compatible with the objectives of these reports; and

(2) The data reported.

(f) *Availability*. The Contractor shall make available at its office at all reasonable times the records, materials, and other evidence described in paragraphs (a), (b), (c), (d), and (e) of this clause, for examination, audit, or reproduction, until 3 years after final payment under this contract or for any shorter period specified for contractor record retention in Part 4 of the Federal Acquisition Regulation (FAR), or for any longer period required by statute or by other clauses of this contract. In addition—

(1) If this contract is completely or partially terminated, the Contractor shall make available the records relating to the work terminated until 3 years after any resulting final termination settlement; and

(2) The Contractor shall make available records relating to appeals under the Disputes clause or to litigation or the settlement of claims arising under or relating to this contract until such appeals, litigation, or claims are finally resolved.

(g) (1) The Contractor shall insert a clause containing all the terms of this clause, including this paragraph (g), in all subcontracts under this contract that exceed the simplified acquisition threshold, as defined in FAR 2.101 on the date of subcontract award, and—

(i) That are cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable type or any combination of these;

(ii) For which certified cost or pricing data are required; or

(iii) That require the subcontractor to furnish reports as discussed in paragraph (e) of this clause.

(2) The clause may be altered only as necessary to identify properly the contracting parties and the Contracting Officer under the Government prime contract.

(End of clause)

Alternate I [Reserved]

Alternate II (AUG 2016). As prescribed in 15.110(b)(3), add the following paragraph (h) to the clause:

(h) The provisions of the OMB Uniform Guidance at 2 CFR part 200, subpart F apply to this contract.

Alternate III (JUN 1999). As prescribed in 15.110(b)(4), delete paragraph (d) of the clause and redesignate the remaining paragraphs accordingly, and substitute the following paragraph (e) for the redesignated paragraph (e) of the clause:

(e) *Availability*. The Contractor shall make available at its office at all reasonable times the records, materials, and other evidence described in paragraphs (a), (b), (c), and (d) of this clause, for examination, audit, or reproduction, until 3 years after final payment under this contract or for any shorter period specified for contractor record retention in Part 4 of the Federal Acquisition Regulation (FAR), or for any longer period required by statute or by other clauses of this contract. In addition—

(1) If this contract is completely or partially terminated, the Contractor shall make available the records relating to the work terminated until 3 years after any resulting final termination settlement; and

(2) The Contractor shall make available records relating to appeals under the Disputes clause or to litigation or the settlement of claims arising under or relating to this contract until such appeals, litigation, or claims are finally resolved.

52.215-3 [Reserved]

(DEVIATION DATE)

52.215-4 [Reserved]

52.215-5 [Reserved]

(DEVIATION DATE)

52.215-6 Place of Performance.

As prescribed in 15.110(f), insert the following provision:

PLACE OF PERFORMANCE (DEVIATION DATE)

(a) The offeror or respondent, in the performance of any contract resulting from this request for proposals, □ intends, □ does not intend [*check applicable block*] to use one or more plants or facilities located at a different address from the address of the offeror or respondent as indicated in this proposal or response to request for information.

(b) If the offeror or respondent checks "intends" in paragraph (a) of this provision, it shall insert in the following spaces the required information:

PLACE OF PERFORMANCE (STREET ADDRESS, CITY, STATE, COUNTY, ZIP CODE)	NAME AND ADDRESS OF OWNER AND OPERATOR OF THE PLANT OR FACILITY IF OTHER THAN OFFEROR OR RESPONDENT
_____	_____
_____	_____

(End of provision)

52.215-7 [Reserved]

52.215-8 Order of Precedence-Uniform Contract Format.

As prescribed in 15.110(h), insert the following clause:

ORDER OF PRECEDENCE-UNIFORM CONTRACT FORMAT (DEVIATION DATE)

Any inconsistency in this request for proposal or contract shall be resolved by giving precedence in the following order:

(a) The Schedule (excluding the specifications).
(b) Representations and other instructions.
(c) Contract clauses.
(d) Other documents, exhibits, and attachments.
(e) The specifications.

(End of clause)

52.215-9 Changes or Additions to Make-or-Buy Program.

As prescribed in 15.110(i), insert the following clause:

CHANGES OR ADDITIONS TO MAKE-OR-BUY PROGRAM (OCT 1997)

(a) The Contractor shall perform in accordance with the make-or-buy program incorporated in this contract. If the Contractor proposes to change the program, the Contractor shall, reasonably in advance of the proposed change, (1) notify the Contracting Officer in writing, and (2) submit justification in sufficient detail to permit evaluation. Changes in the place of performance of any "make" items in the program are subject to this requirement.

(b) For items deferred at the time of negotiation of this contract for later addition to the program, the Contractor shall, at the earliest possible time-

(1) Notify the Contracting Officer of each proposed addition; and

(2) Provide justification in sufficient detail to permit evaluation.

(c) Modification of the make-or-buy program to incorporate proposed changes or additions shall be effective upon the Contractor's receipt of the Contracting Officer's written approval.

(End of clause)

Alternate I-DEVIATION (DATE). As prescribed in 15.110(i)(1) add the following paragraph (d) to the clause:

(d) If the Contractor desires to reverse the categorization of "make" or "buy" for any item or items designated in the contract as subject to this paragraph, it shall—

(1) Support its proposal with certified cost or pricing data in accordance with FAR 15.408-2, Table 15-1, when required by FAR 15.403-3, and data other than certified cost or pricing data, to permit evaluation; and

(2) After approval is granted, promptly negotiate with the Contracting Officer an equitable reduction in the contract price in accordance with paragraph (k) of the Incentive Price Revision-Firm Target clause or paragraph (m) of the Incentive Price Revision-Successive Targets clause of this contract.

Alternate II-DEVIATION (DATE). As prescribed in 52.110(i)(2), add the following paragraph (d) to the clause:

(d) If the Contractor desires to reverse the categorization of "make" or "buy" for any item or items designated in the contract as subject to this paragraph, it shall—

(1) Support its proposal with certified cost or pricing data in accordance with FAR 15.408-2, Table 15-1, when required by FAR 15.403-3, and data other than certified cost or pricing data, to permit evaluation;

(2) Support its proposal with cost or pricing data to permit evaluation; and

(3) After approval is granted, promptly negotiate with the Contracting Officer an equitable reduction in the contract's total estimated cost and fee in accordance with paragraph (e) of the Incentive Fee clause of this contract.

52.215-10 Price Reduction for Defective Certified Cost or Pricing Data.

As prescribed in 15.110(j), insert the following clause:

PRICE REDUCTION FOR DEFECTIVE CERTIFIED COST OR PRICING DATA (AUG 2011)

(a) If any price, including profit or fee, negotiated in connection with this contract, or any cost reimbursable under this contract, was increased by any significant amount because—

(1) The Contractor or a subcontractor furnished certified cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data;

(2) A subcontractor or prospective subcontractor furnished the Contractor certified cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data; or

(3) Any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly and the contract shall be modified to reflect the reduction.

(b) Any reduction in the contract price under paragraph (a) of this clause due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (1) the actual subcontract or (2) the actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor; provided, that the actual subcontract price was not itself affected by defective certified cost or pricing data.

(c) (1) If the Contracting Officer determines under paragraph (a) of this clause that a price or cost reduction should be made, the Contractor agrees not to raise the following matters as a defense:

(i) The Contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the price of the contract would not have been modified even if accurate, complete, and current certified cost or pricing data had been submitted.

(ii) The Contracting Officer should have known that the certified cost or pricing data in issue were defective even though the Contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the Contracting Officer.

(iii) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under the contract.

(iv) The Contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data.

(2) (i) Except as prohibited by subdivision (c)(2)(ii) of this clause, an offset in an amount determined appropriate by the Contracting Officer based upon the facts shall be allowed against the amount of a contract price reduction if-

(A) The Contractor certifies to the Contracting Officer that, to the best of the Contractor's knowledge and belief, the Contractor is entitled to the offset in the amount requested; and

(B) The Contractor proves that the certified cost or pricing data were available before the "as of" date specified on its Certificate of Current Cost or Pricing Data, and that the data were not submitted before such date.

(ii) An offset shall not be allowed if—

(A) The understated data were known by the Contractor to be understated before the "as of" date specified on its Certificate of Current Cost or Pricing Data; or

(B) The Government proves that the facts demonstrate that the contract price would not have increased in the amount to be offset even if the available data had been submitted before the "as of" date specified on its Certificate of Current Cost or Pricing Data.

(d) If any reduction in the contract price under this clause reduces the price of 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 at the time such overpayment is repaid-

(1) Interest compounded daily, as required by 26 U.S.C.6622, 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 for each quarter prescribed by the Secretary of the Treasury under 26 U.S.C. 6621(a)(2); and

(2) A penalty equal to the amount of the overpayment, if the Contractor or subcontractor knowingly submitted certified cost or pricing data that were incomplete, inaccurate, or noncurrent.

(End of clause)

52.215-11 Price Reduction for Defective Certified Cost or Pricing Data-Modifications.

As prescribed in 15.110(k), insert the following clause:

PRICE REDUCTION FOR DEFECTIVE CERTIFIED COST OR PRICING DATA-MODIFICATIONS (DEVIATION DATE)

(a) This clause shall become operative only for any modification to this contract involving a pricing adjustment expected to exceed the threshold for submission of certified cost or pricing data in Federal Acquisition Regulation (FAR) 15.403-3(a) on the date of execution of the modification, except that this clause does not apply to any modification if an exception under FAR 15.403-2 applies.

(b) If any price, including profit or fee, negotiated in connection with any modification under this clause, or any cost reimbursable under this contract, was increased by any significant amount because (1) the Contractor or a subcontractor furnished certified cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data, (2) a subcontractor or prospective subcontractor furnished the Contractor certified cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data, or (3) any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly and the contract shall be modified to reflect the reduction. This right to a price reduction is limited to that resulting from defects in data relating to modifications for which this clause becomes operative under paragraph (a) of this clause.

(c) Any reduction in the contract price under paragraph (b) of this clause due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (1) the actual subcontract or (2) the actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor; provided, that the actual subcontract price was not itself affected by defective certified cost or pricing data.

(d) (1) If the Contracting Officer determines under paragraph (b) of this clause that a price or cost reduction should be made, the Contractor agrees not to raise the following matters as a defense:

(i) The Contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the price of the contract would not have been modified even if accurate, complete, and current certified cost or pricing data had been submitted.

(ii) The Contracting Officer should have known that the certified cost or pricing data in issue were defective even though the Contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the Contracting Officer.

(iii) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under the contract.

(iv) The Contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data.

(2) (i) Except as prohibited by paragraph (d)(2)(ii) of this clause, an offset in an amount determined appropriate by the Contracting Officer based upon the facts shall be allowed against the amount of a contract price reduction if-

(A) The Contractor certifies to the Contracting Officer that, to the best of the Contractor's knowledge and belief, the Contractor is entitled to the offset in the amount requested; and

(B) The Contractor proves that the certified cost or pricing data were available before the "as of" date specified on its Certificate of Current Cost or Pricing Data, and that the data were not submitted before such date.

(ii) An offset shall not be allowed if-

(A) The understated data were known by the Contractor to be understated before the "as of" date specified on its Certificate of Current Cost or Pricing Data; or

(B) The Government proves that the facts demonstrate that the contract price would not have increased in the amount to be offset even if the available data had been submitted before the "as of" date specified on its Certificate of Current Cost or Pricing Data.

(e) If any reduction in the contract price under this clause reduces the price of 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 at the time such overpayment is repaid—

(1) Interest compounded daily, as required by 26 U.S.C.6622, 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 for each quarter prescribed by the Secretary of the Treasury under 26 U.S.C. 6621(a)(2); and

(2) A penalty equal to the amount of the overpayment, if the Contractor or subcontractor knowingly submitted certified cost or pricing data that were incomplete, inaccurate, or noncurrent.

(End of clause)

52.215-12 Subcontractor Certified Cost or Pricing Data.

As prescribed in 15.110(l)(1), insert the following clause:

SUBCONTRACTOR CERTIFIED COST OR PRICING DATA (DEVIATION DATE)

(a) Before awarding any subcontract expected to exceed the threshold for submission of certified cost or pricing data in Federal Acquisition Regulation (FAR) 15.403-3(a), on the date of agreement on price or the date of award, whichever is later; or before pricing any subcontract modification involving a pricing adjustment expected to exceed the threshold for submission of certified cost or pricing data in FAR 15.403-3(a), the Contractor shall require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), in accordance with FAR 15.408-2, Table 15-1 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price), unless an exception under FAR 15.403-2 applies. If the threshold for submission of certified cost or pricing data specified in FAR 15.403-3(a) is adjusted for inflation as set forth in FAR part 1, then the changed threshold applies throughout the remaining term of the contract, unless there is a subsequent threshold adjustment.

(b) The Contractor shall require the subcontractor to certify in substantially the form prescribed in FAR 15.403-4 that, to the best of its knowledge and belief, the data submitted under paragraph (a) of this clause were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.

(c) In each subcontract that, when entered into, exceeds the threshold for submission of certified cost or pricing data in FAR 15.403-3(a), the Contractor shall insert either—

(1) The substance of this clause, including this paragraph (c), if paragraph (a) of this clause requires submission of certified cost or pricing data for the subcontract; or

(2) The substance of the clause at FAR 52.215-13, *Subcontractor Certified Cost or Pricing Data—Modifications*.

(End of clause)

Alternate I-DEVIATION (Date). As prescribed in 15.110(l)(2), substitute the following paragraph (a) in place of paragraph (a) of the clause:

(a) Unless an exception under FAR 15.403-2 applies, the Contractor shall require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), in accordance with FAR 15.408-2, Table 15-1 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price) before awarding any subcontract expected to exceed $2.5 million under any prime contract awarded on or after July 1, 2018.

52.215-13 Subcontractor Certified Cost or Pricing Data-Modifications.

As prescribed in 15.110(m)(1), insert the following clause:

SUBCONTRACTOR CERTIFIED COST OR PRICING DATA-MODIFICATIONS (DEVIATION DATE)

(a) The requirements of paragraphs (b) and (c) of this clause shall—

(1) Become operative only for any modification to this contract involving a pricing adjustment expected to exceed the threshold for submission of certified cost or pricing data in Federal Acquisition Regulation (FAR) 15.403-3(a) on the date of execution of the modification; and

(2) Be limited to such modifications.

(b) Before awarding any subcontract expected to exceed the threshold for submission of certified cost or pricing data in FAR 15.403-3(a), on the date of agreement on price or the date of award, whichever is later; or before pricing any subcontract modification involving a pricing adjustment expected to exceed the threshold for submission of certified cost or pricing data in FAR 15.403-3(a), the Contractor shall require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), in accordance with FAR 15.408-2, Table 15-1 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price), unless an exception under FAR 15.403-2 applies. If the threshold for submission of certified cost or pricing data specified in FAR 15.403-3(a) is adjusted for inflation as set forth in FAR part 1, then the changed threshold applies throughout the remaining term of the contract, unless there is a subsequent threshold adjustment.

(c) The Contractor shall require the subcontractor to certify in substantially the form prescribed in FAR 15.403-4 that, to the best of its knowledge and belief, the data submitted under paragraph (b) of this clause were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.

(d) The Contractor shall insert the substance of this clause, including this paragraph (d), in each subcontract that exceeds the threshold for submission of certified cost or pricing data in FAR 15.403-3(a) on the date of agreement on price or the date of award, whichever is later.

(End of clause)

Alternate I-DEVIATION (Date). As prescribed in 15.110(m)(2), substitute the following paragraphs (a), (b), and (d) for paragraphs (a), (b), and (d) of the clause:

(a) The requirements of paragraphs (b) and (c) of this clause shall—

(1) Become operative only for any modification to this contract involving aggregate increases and/or decreases in costs, plus applicable profits, expected to exceed the threshold for submission of certified cost or pricing data at FAR 15.403-3(a); and

(2) Be limited to such modifications.

(b) Unless an exception under FAR 15.403-2 applies, the Contractor shall require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), in accordance with FAR 15.408-2, Table 15-1 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature

and amount of any contingencies included in the price)before modifying a subcontract under a prime contract awarded on after July 1, 2018 if the modification involves a pricing adjustment expected to exceed $2.5 million.

(d) The Contractor shall insert the substance of this clause, including this paragraph (d), in each subcontract that exceeds $2.5 million.

52.215-14 Integrity of Unit Prices.

As prescribed in 15.110(n)(1), insert the following clause:

INTEGRITY OF UNIT PRICES (NOV 2021)

(a) Any proposal submitted for the negotiation of prices for items of supplies shall distribute costs within contracts on a basis that ensures that unit prices are in proportion to the items' base cost (*e.g.,* manufacturing or acquisition costs). Any method of distributing costs to line items that distorts unit prices shall not be used. For example, distributing costs equally among line items is not acceptable except when there is little or no variation in base cost. Nothing in this paragraph requires submission of certified cost or pricing data not otherwise required by law or regulation.

(b) When requested by the Contracting Officer, the Offeror/Contractor shall also identify those supplies that it will not manufacture or to which it will not contribute significant value.

(c) The Contractor shall insert the substance of this clause, less paragraph (b) of this clause, in all subcontracts for other than: acquisitions at or below the simplified acquisition threshold, as defined in Federal Acquisition Regulation (FAR) 2.101 on the date of subcontract award; construction or architect-engineer services under FAR part 36; utility services under FAR part 41; services where supplies are not required; commercial products and commercial services; and petroleum products.

(End of clause)

Alternate I (OCT 1997). As prescribed in 15.110(n)(2), substitute the following paragraph (b) for paragraph (b) of the clause:

(b) The Offeror/Contractor shall also identify those supplies that it will not manufacture or to which it will not contribute significant value.

52.215-15 Pension Adjustments and Asset Reversions.

As prescribed in 15.110(o), insert the following clause:

PENSION ADJUSTMENTS AND ASSET REVERSIONS (DEVIATION DATE)

(a) The Contractor shall promptly notify the Contracting Officer in writing when it determines that it will terminate a defined-benefit pension plan or otherwise recapture such pension fund assets.

(b) For segment closings, pension plan terminations, or curtailment of benefits, the amount of the adjustment shall be-

(1) For contracts and subcontracts that are subject to full coverage under the Cost Accounting Standards (CAS) Board rules and regulations (48 CFR Chapter 99), the amount measured, assigned, and allocated in accordance with 48 CFR 9904.413-50(c)(12) ; and

(2) For contracts and subcontracts that are not subject to full coverage under the CAS, the amount measured, assigned, and allocated in accordance with 48 CFR 9904.413-50(c)(12) , except the numerator of the fraction at 48 CFR 9904.413-50(c)(12)(vi) shall be the sum of the pension plan costs allocated to all non-CAS covered contracts and subcontracts that are subject to Federal Acquisition Regulation (FAR) subpart 31.2 or for which certified cost or pricing data were submitted.

(c) For all other situations where assets revert to the Contractor, or such assets are constructively received by it for any reason, the Contractor shall, at the Government's option, make a refund or give a credit to the Government for its equitable share of the gross amount withdrawn. The Government's equitable share shall reflect the Government's participation in pension costs through those contracts for which certified cost or pricing data were submitted or that are subject to FAR subpart 31.2.

(d) The Contractor shall include the substance of this clause in all subcontracts under this contract that meet the applicability requirement of FAR 15.110(o).

(End of clause)

52.215-16 Facilities Capital Cost of Money.

As prescribed in 15.110(p), insert the following provision:

FACILITIES CAPITAL COST OF MONEY (JUN 2003)

(a) Facilities capital cost of money will be an allowable cost under the contemplated contract, if the criteria for allowability in FAR 31.205-10(b) are met. One of the allowability criteria requires the prospective Contractor to propose facilities capital cost of money in its offer.

(b) If the prospective Contractor does not propose this cost, the resulting contract will include the clause Waiver of Facilities Capital Cost of Money.

(End of provision)

52.215-17 Waiver of Facilities Capital Cost of Money.

As prescribed in 15.110(q), insert the following clause:

WAIVER OF FACILITIES CAPITAL COST OF MONEY (OCT 1997)

The Contractor did not include facilities capital cost of money as a proposed cost of this contract. Therefore, it is an unallowable cost under this contract.

(End of clause)

52.215-18 Reversion or Adjustment of Plans for Postretirement Benefits (PRB) Other Than Pensions.

As prescribed in 15.110(r), insert the following clause:

REVERSION OR ADJUSTMENT OF PLANS FOR POSTRETIREMENT BENEFITS (PRB) OTHER THAN PENSIONS (DEVIATION DATE)

(a) The Contractor shall promptly notify the Contracting Officer in writing when the Contractor determines that it will terminate or reduce the benefits of a PRB plan.

(b) If PRB fund assets revert or inure to the Contractor, or are constructively received by it under a plan termination or otherwise, the Contractor shall make a refund or give a credit to the Government for its equitable share as required by 31.205-6(o)(5) of the Federal Acquisition Regulation (FAR). When determining or agreeing on the method for recovery of the Government's equitable share, the contracting parties should consider the following methods: cost reduction, amortizing the credit over a number of years (with appropriate interest), cash refund, or some other agreed upon method. Should the parties be unable to agree on the method for recovery of the Government's equitable share, through good faith negotiations, the Contracting Officer shall designate the method of recovery.

(c) The Contractor shall insert the substance of this clause in all subcontracts that meet the applicability requirements of FAR 15.110(r).

(End of clause)

52.215-19 Notification of Ownership Changes.

As prescribed in 15.110(s), insert the following clause:

NOTIFICATION OF OWNERSHIP CHANGES (DEVIATION DATE)

(a) The Contractor shall make the following notifications in writing:

(1) When the Contractor becomes aware that a change in its ownership has occurred, or is certain to occur, that could result in changes in the valuation of its capitalized assets in the accounting records, the Contractor shall notify the Administrative Contracting Officer (ACO) within 30 days.

(2) The Contractor shall also notify the ACO within 30 days whenever changes to asset valuations or any other cost changes have occurred or are certain to occur as a result of a change in ownership.

(b) The Contractor shall-

(1) Maintain current, accurate, and complete inventory records of assets and their costs;

(2) Provide the ACO or designated representative ready access to the records upon request;

(3) Ensure that all individual and grouped assets, their capitalized values, accumulated depreciation or amortization, and remaining useful lives are identified accurately before and after each of the Contractor's ownership changes; and

(4) Retain and continue to maintain depreciation and amortization schedules based on the asset records maintained before each Contractor ownership change.

(c) The Contractor shall include the substance of this clause in all subcontracts under this contract that meet the applicability requirement of FAR 15.110(s).

(End of clause)

52.215-20 Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data.

As prescribed in 15.110(t), insert the following provision:

REQUIREMENTS FOR CERTIFIED COST OR PRICING DATA AND DATA OTHER THAN CERTIFIED COST OR PRICING DATA (DEVIATION DATE)

(a) Exceptions from certified cost or pricing data. (1) In lieu of submitting certified cost or pricing data, offerors may submit a written request for exception by submitting the information described in the following subparagraphs. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted, and whether the price is fair and reasonable.

(i) *Identification of the law or regulation establishing the price offered*. If the price is controlled under law by periodic rulings, reviews, or similar actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office.

(ii) *Commercial product and commercial service exception*. For a commercial product and commercial service exception, the offeror shall submit, at a minimum, information on prices at which the same item or similar items have previously been sold in the commercial market that is adequate for evaluating the reasonableness of the price for this acquisition. Such information may include-

(A) For catalog items, a copy of or identification of the catalog and its date, or the appropriate pages for the offered items, or a statement that the catalog is on file in the buying office to which the proposal is being submitted. Provide a copy or describe current discount policies and price lists (published or unpublished), *e.g.,* wholesale, original equipment manufacturer, or reseller. Also explain the basis of each offered price and its relationship to the established catalog price, including how the proposed price relates to the price of recent sales in quantities similar to the proposed quantities;

(B) For market-priced items, the source and date or period of the market quotation or other basis for market price, the base amount, and applicable discounts. In addition, describe the nature of the market;

(C) For items included on an active Federal Supply Schedule contract, proof that an exception has been granted for the schedule item.

(2) The offeror grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this provision, and the reasonableness of price. For items priced using catalog or market prices, or law or regulation, access does not extend to cost or profit information or other data relevant solely to the offeror's determination of the prices to be offered in the catalog or marketplace.

(b) *Requirements for certified cost or pricing data*. If the offeror is not granted an exception from the requirement to submit certified cost or pricing data, the following applies:

(1) The offeror shall prepare and submit certified cost or pricing data, data other than certified cost or pricing data, and supporting attachments in accordance with the instructions contained in Table 15-1 of FAR 15.408-2, which is incorporated

by reference with the same force and effect as though it were inserted here in full text. The instructions in Table 15-1 are incorporated as a mandatory format to be used in this contract, unless the Contracting Officer and the Contractor agree to a different format and change this clause to use Alternate I.

(2) As soon as practicable after agreement on price, but before contract award (except for unpriced actions such as letter contracts), the offeror shall submit a Certificate of Current Cost or Pricing Data, as prescribed by FAR 15.403-4.

(End of provision)

Alternate I-DEVIATION (DATE). As prescribed in 15.110(t)(1), substitute the following paragraph (b)(1) for paragraph (b)(1) of the provision:

(b)(1) The offeror shall submit certified cost or pricing data, data other than certified cost or pricing data, and supporting attachments in the following format: *[Insert description of the data and format that are required, and include access to records necessary to permit an adequate evaluation of the proposed price in accordance with 15.408-2, Table 15-1, Note 2. The description may be inserted at the time of issuing the request for proposals, or the Contracting Officer may specify that the offeror's format will be acceptable, or the description may be inserted as the result of negotiations.]*

Alternate II (OCT 1997). As prescribed in 15.110(t)(2), add the following paragraph (c) to the provision:

(c) When the proposal is submitted, also submit one copy each to: (1) the Administrative Contracting Officer, and (2) the Contract Auditor.

Alternate III (OCT 1997). As prescribed in 15.110(t)(3), add the following paragraph (c) to the basic provision (if Alternate II is also used, redesignate the following paragraph as paragraph (d)).

(c) Submit the cost portion of the proposal via the following electronic media: *[Insert media format, e.g.,electronic spreadsheet format, electronic mail, etc.]*

Alternate IV-DEVIATION (DATE). As prescribed in 15.110(t)(4), replace the text of the provision with the following:

(a) Submission of certified cost or pricing data is not required.

(b) Provide data described below: *[Insert description of the data and the format that are required, including the access to records necessary to permit an adequate evaluation of the proposed price in accordance with 15.4.]*

52.215-21 Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data-Modifications.

As prescribed in 15.110(u), insert the following clause:

REQUIREMENTS FOR CERTIFIED COST OR PRICING DATA AND DATA OTHER THAN CERTIFIED COST OR PRICING DATA-MODIFICATIONS (DEVIATION DATE)

(a) Exceptions from certified cost or pricing data. (1) In lieu of submitting certified cost or pricing data for modifications under this contract, for price adjustments expected to exceed the threshold set forth in Federal Acquisition Regulation (FAR) 15.403-3(a) on the date of the agreement on price or the date of the award, whichever is later, the Contractor may submit a written request for exception by submitting the information described in paragraphs (a)(1)(i) and (ii) of this clause. If the threshold for submission of certified cost or pricing data specified in FAR 15.403-3(a) is adjusted for inflation as set forth in FAR part 1, the changed threshold applies throughout the remaining term of the contract, unless there is a subsequent threshold adjustment. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted, and whether the price is fair and reasonable—

(i) *Identification of the law or regulation establishing the price offered*. If the price is controlled under law by periodic rulings, reviews, or similar actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office.

(ii) *Information on modifications of contracts or subcontracts for commercial products or commercial services.* (A) If—

(1) The original contract or subcontract was granted an exception from certified cost or pricing data requirements because the price agreed upon was based on adequate price competition or prices set by law or regulation, or was a contract or subcontract for the acquisition of a commercial product or commercial service; and

(2) The modification (to the contract or subcontract) is not exempted based on one of these exceptions, then the Contractor may provide information to establish that the modification would not change the contract or subcontract from

a contract or subcontract for the acquisition of a commercial product or commercial service, to a contract or subcontract for the acquisition of other than a commercial product or commercial service.

(B) For a commercial product and commercial service exception, the Contractor shall provide, at a minimum, information on prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price of the modification. Such information may include-

(1) For catalog items, a copy of or identification of the catalog and its date, or the appropriate pages for the offered items, or a statement that the catalog is on file in the buying office to which the proposal is being submitted. Provide a copy or describe current discount policies and price lists (published or unpublished), *e.g.,* wholesale, original equipment manufacturer, or reseller. Also explain the basis of each offered price and its relationship to the established catalog price, including how the proposed price relates to the price of recent sales in quantities similar to the proposed quantities.

(2) For market-priced items, the source and date or period of the market quotation or other basis for market price, the base amount, and applicable discounts. In addition, describe the nature of the market.

(3) For items included on an active Federal Supply Schedule contract, proof that an exception has been granted for the schedule item.

(2) The Contractor grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this clause, and the reasonableness of price. For items priced using catalog or market prices, or law or regulation, access does not extend to cost or profit information or other data relevant solely to the Contractor's determination of the prices to be offered in the catalog or marketplace.

(b) *Requirements for certified cost or pricing data*. If the Contractor is not granted an exception from the requirement to submit certified cost or pricing data, the following applies:

(1) The Contractor shall submit certified cost or pricing data, data other than certified cost or pricing data, and supporting attachments in accordance with the instructions contained in Table 15-1 of FAR 15.408-2, which is incorporated by reference with the same force and effect as though it were inserted here in full text. The instructions in Table 15-1 are incorporated as a mandatory format to be used in this contract, unless the Contracting Officer and the Contractor agree to a different format and change this clause to use Alternate I.

(2) As soon as practicable after agreement on price, but before award (except for unpriced actions), the Contractor shall submit a Certificate of Current Cost or Pricing Data, as prescribed by FAR 15.403-4.

(End of clause)

Alternate I-DEVIATION (DATE). As prescribed in 15.110(u)(1), substitute the following paragraph (b)(1) for paragraph (b)(1) of the basic clause.

(b)(1) The Contractor shall submit certified cost or pricing data, data other than certified cost or pricing data, and supporting attachments prepared in the following format: *[Insert description of the data and format that are required and include access to records necessary to permit an adequate evaluation of the proposed price in accordance with 15.408-2, Table 15-1, Note 2. The description may be inserted at the time of issuing the request for proposals, or the Contracting Officer may specify that the offeror's format will be acceptable, or the description may be inserted as the result of negotiations.]*

Alternate II (OCT 1997). As prescribed in 15.110(u)(2), add the following paragraph (c) to the basic clause:

(c) When the proposal is submitted, also submit one copy each to: (1) the Administrative Contracting Officer, and (2) the Contract Auditor.

Alternate III (OCT 1997). As prescribed in 15.110(u)(3), add the following paragraph (c) to the basic clause (if Alternate II is also used, redesignate the following paragraph as paragraph (d)):

(c) Submit the cost portion of the proposal via the following electronic media: *[Insert media format]*

Alternate IV-DEVIATION (DATE). As prescribed in 15.110(u)(4), replace the text of the basic clause with the following:

(a) Submission of certified cost or pricing data is not required.

(b) Provide data described below: *[Insert description of the data and the format that are required, including the access to records necessary to permit an adequate evaluation of the proposed price in accordance with 15.4 .]*

52.215-22 Limitations on Pass-Through Charges-Identification of Subcontract Effort.

As prescribed in 15.110(v)(1), use the following provision:

LIMITATIONS ON PASS-THROUGH CHARGES-IDENTIFICATION OF SUBCONTRACT EFFORT (DEVIATION DATE)

(a) *Definitions*. Added value, excessive pass-through charge, subcontract, and subcontractor, as used in this provision, are defined in the clause of this request for proposals entitled "Limitations on Pass-Through Charges" (FAR 52.215-23).

(b) *General*. The offeror's proposal shall exclude excessive pass-through charges.

(c) Performance of work by the Contractor or a subcontractor. (1) The offeror shall identify in its proposal the total cost of the work to be performed by the offeror, and the total cost of the work to be performed by each subcontractor, under the contract, task order, or delivery order.

(2) If the offeror intends to subcontract more than 70 percent of the total cost of work to be performed under the contract, task order, or delivery order, the offeror shall identify in its proposal-

(i) The amount of the offeror's indirect costs and profit/fee applicable to the work to be performed by the subcontractor(s); and

(ii) A description of the added value provided by the offeror as related to the work to be performed by the subcontractor(s).

(3) If any subcontractor proposed under the contract, task order, or delivery order intends to subcontract to a lower-tier subcontractor more than 70 percent of the total cost of work to be performed under its subcontract, the offeror shall identify in its proposal-

(i) The amount of the subcontractor's indirect costs and profit/fee applicable to the work to be performed by the lower-tier subcontractor(s); and

(ii) A description of the added value provided by the subcontractor as related to the work to be performed by the lower-tier subcontractor(s).

(End of provision)

52.215-23 Limitations on Pass-Through Charges.

As prescribed in 15.110(v)(2), use the following clause:

LIMITATIONS ON PASS-THROUGH CHARGES (DEVIATION DATE)

(a) *Definitions*. As used in this clause-

Added value means that the Contractor performs subcontract management functions that the Contracting Officer determines are a benefit to the Government (*e.g.*, processing orders of parts or services, maintaining inventory, reducing delivery lead times, managing multiple sources for contract requirements, coordinating deliveries, performing quality assurance functions).

Excessive pass-through charge, with respect to a Contractor or subcontractor that adds no or negligible value to a contract or subcontract, means a charge to the Government by the Contractor or subcontractor that is for indirect costs or profit/fee on work performed by a subcontractor (other than charges for the costs of managing subcontracts and any applicable indirect costs and associated profit/fee based on such costs).

No or negligible value means the Contractor or subcontractor cannot demonstrate to the Contracting Officer that its effort added value to the contract or subcontract in accomplishing the work performed under the contract (including task or delivery orders).

Subcontract means any contract, as defined in Federal Acquisition Regulation (FAR)2.101, entered into by a subcontractor to furnish supplies or services for performance of the contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

Subcontractor, as defined in FAR part 44, means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime Contractor or another subcontractor.

(b) *General*. The Government will not pay excessive pass-through charges. The Contracting Officer shall determine if excessive pass-through charges exist.

(c) *Reporting*. Required reporting of performance of work by the Contractor or a subcontractor. The Contractor shall notify the Contracting Officer in writing if-

(1) The Contractor changes the amount of subcontract effort after award such that it exceeds 70 percent of the total cost of work to be performed under the contract, task order, or delivery order. The notification shall identify the revised cost of the subcontract effort and shall include verification that the Contractor will provide added value; or

(2) Any subcontractor changes the amount of lower-tier subcontractor effort after award such that it exceeds 70 percent of the total cost of the work to be performed under its subcontract. The notification shall identify the revised cost of the subcontract effort and shall include verification that the subcontractor will provide added value as related to the work to be performed by the lower-tier subcontractor(s).

(d) *Recovery of excessive pass-through charges*. If the Contracting Officer determines that excessive pass-through charges exist;

(1) For other than fixed-price contracts, the excessive pass-through charges are unallowable in accordance with the provisions in FAR 31; and

(2) For applicable DoD fixed-price contracts, as identified in 15.110(v)(2)(i)(B), the Government shall be entitled to a price reduction for the amount of excessive pass-through charges included in the contract price.

(e) *Access to records*. (1) The Contracting Officer, or authorized representative, shall have the right to examine and audit all the Contractor's records (as defined at FAR 52.215-2(a)) necessary to determine whether the Contractor proposed, billed, or claimed excessive pass-through charges.

(2) For those subcontracts to which paragraph (f) of this clause applies, the Contracting Officer, or authorized representative, shall have the right to examine and audit all the subcontractor's records (as defined at FAR 52.215-2(a)) necessary to determine whether the subcontractor proposed, billed, or claimed excessive pass-through charges.

(f) *Subcontracts.*The Contractor shall insert the substance of this clause, including this paragraph (f), in all cost-reimbursement subcontracts under this contract that exceed the simplified acquisition threshold, as defined in FAR 2.101 on the date of subcontract award, except if the contract is with DoD, then insert in all cost-reimbursement subcontracts and fixed-price subcontracts, except those identified in FAR 15.110(v)(2)(i)(B)(2), that exceed the threshold for obtaining cost or pricing data in FAR 15.403-3(a) on the date of subcontract award.

(End of clause)

Alternate I (OCT 2009). As prescribed in 15.110(v)(2)(iii), substitute the following paragraph (b) for paragraph (b) of the clause:

(b) *General*. The Government will not pay excessive pass-through charges. The Contracting Officer has determined that there will be no excessive pass-through charges, provided the Contractor performs the disclosed value-added functions.

52.216 [Reserved]

52.216-1 Type of Contract.

As prescribed in 16.105 , complete and insert the following provision:

TYPE OF CONTRACT (DEVIATION DATE)

The Government contemplates award of a _____ *[Contracting Officer insert specific type of contract]* contract resulting from this solicitation.

(End of provision)

Alternate I (DEVIATION DATE). As prescribed in 16.105, Include the following as paragraph (a) of the basic provision:

Offerors may propose an alternative contract type.

52.216-2 Economic Price Adjustment-Standard Supplies.

As prescribed in 16.203-4(a), insert the following clause:

ECONOMIC PRICE ADJUSTMENT-STANDARD SUPPLIES (NOV 2021)

(a) The Contractor warrants that the unit price stated in the Schedule for _____ [*offeror insert Schedule line item number*] is not in excess of the Contractor's applicable established price in effect on the contract date for like quantities of the same item. The term "unit price" excludes any part of the price directly resulting from requirements for preservation, packaging, or packing beyond standard commercial practice. The term "established price" means a price that-

(1) Is an established catalog or market price for a commercial product sold in substantial quantities to the general public; and

(2) Is the net price after applying any standard trade discounts offered by the Contractor.

(b) The Contractor shall promptly notify the Contracting Officer of the amount and effective date of each decrease in any applicable established price. Each corresponding contract unit price shall be decreased by the same percentage that the established price is decreased. The decrease shall apply to those items delivered on and after the effective date of the decrease in the Contractor's established price, and this contract shall be modified accordingly.

(c) If the Contractor's applicable established price is increased after the contract date, the corresponding contract unit price shall be increased, upon the Contractor's written request to the Contracting Officer, by the same percentage that the established price is increased, and the contract shall be modified accordingly, subject to the following limitations:

(1) The aggregate of the increases in any contract unit price under this clause shall not exceed 10 percent of the original contract unit price.

(2) The increased contract unit price shall be effective-

(i) On the effective date of the increase in the applicable established price if the Contracting Officer receives the Contractor's written request within 10 days thereafter; or

(ii) If the written request is received later, on the date the Contracting Officer receives the request.

(3) The increased contract unit price shall not apply to quantities scheduled under the contract for delivery before the effective date of the increased contract unit price, unless failure to deliver before that date results from causes beyond the control and without the fault or negligence of the Contractor, within the meaning of the Default clause.

(4) No modification increasing a contract unit price shall be executed under this paragraph (c) until the Contracting Officer verifies the increase in the applicable established price.

(5) Within 30 days after receipt of the Contractor's written request, the Contracting Officer may cancel, without liability to either party, any undelivered portion of the contract items affected by the requested increase.

(d) During the time allowed for the cancellation provided for in paragraph (c)(5) of this clause, and thereafter if there is no cancellation, the Contractor shall continue deliveries according to the contract delivery schedule, and the Government shall pay for such deliveries at the contract unit price, increased to the extent provided by paragraph (c) of this clause.

(End of clause)

52.216-3 Economic Price Adjustment-Semistandard Supplies.

As prescribed in 16.203-4(b), insert the following clause:

ECONOMIC PRICE ADJUSTMENT-SEMISTANDARD SUPPLIES (NOV 2021)

(a) The Contractor warrants that the supplies identified as line items _____ [*offeror insert Schedule line item number*] in the Schedule are, except for modifications required by the contract specifications, supplies for which it has an established price. The term "established price" means a price that (1)is an established catalog or market price for a commercial product sold in substantial quantities to the general public, and (2)is the net price after applying any standard trade discounts offered by the Contractor. The Contractor further warrants that, as of the date of this contract, any difference between the unit prices stated in the contract for these line items and the Contractor's established prices for like quantities of the nearest commercial equivalents are due to compliance with contract specifications and with any contract requirements for preservation, packaging, and packing beyond standard commercial practice.

(b) The Contractor shall promptly notify the Contracting Officer of the amount and effective date of each decrease in any applicable established price. Each corresponding contract unit price (exclusive of any part of the unit price that reflects modifications resulting from compliance with specifications or with requirements for preservation, packaging, and packing beyond standard commercial practice) shall be decreased by the same percentage that the established price is decreased. The decrease shall apply to those items delivered on and after the effective date of the decrease in the Contractor's established price, and this contract shall be modified accordingly.

(c) If the Contractor's applicable established price is increased after the contract date, the corresponding contract unit price (exclusive of any part of the unit price resulting from compliance with specifications or with requirements for preservation, packaging, and packing beyond standard commercial practice) shall be increased, upon the Contractor's written request to the Contracting Officer, by the same percentage that the established price is increased, and the contract shall be modified accordingly, subject to the following limitations:

(1) The aggregate of the increases in any contract unit price under this clause shall not exceed 10 percent of the original contract unit price.

(2) The increased contract unit price shall be effective-

(i) On the effective date of the increase in the applicable established price if the Contracting Officer receives the Contractor's written request within 10 days thereafter; or

(ii) If the written request is received later, on the date the Contracting Officer receives the request.

(3) The increased contract unit price shall not apply to quantities scheduled under the contract for delivery before the effective date of the increased contract unit price, unless failure to deliver before that date results from causes beyond the control and without the fault or negligence of the Contractor, within the meaning of the Default clause.

(4) No modification increasing a contract unit price shall be executed under this paragraph (c) until the Contracting Officer verifies the increase in the applicable established price.

(5) Within 30 days after receipt of the Contractor's written request, the Contracting Officer may cancel, without liability to either party, any undelivered portion of the contract items affected by the requested increase.

(d) During the time allowed for the cancellation provided for in paragraph (c)(5) of this clause, and thereafter if there is no cancellation, the Contractor shall continue deliveries according to the contract delivery schedule, and the Government shall pay for such deliveries at the contract unit price, increased to the extent provided by paragraph (c) of this clause.

(End of clause)

52.216-4 Economic Price Adjustment-Labor and Material.

As prescribed in 16.203-4(c), insert the following clause:

ECONOMIC PRICE ADJUSTMENT-LABOR AND MATERIAL (JAN 2017)

(a) The Contractor shall notify the Contracting Officer if, at any time during contract performance, the rates of pay for labor (including fringe benefits) or the unit prices for material shown in the Schedule either increase or decrease. The Contractor shall furnish this notice within 60 days after the increase or decrease, or within any additional period that the Contracting Officer may approve in writing, but not later than the date of final payment under this contract. The notice shall include the Contractor's proposal for an adjustment in the contract unit prices to be negotiated under paragraph (b) of this

clause, and shall include, in the form required by the Contracting Officer, supporting data explaining the cause, effective date, and amount of the increase or decrease and the amount of the Contractor's adjustment proposal.

(b) Promptly after the Contracting Officer receives the notice and data under paragraph (a) of this clause, the Contracting Officer and the Contractor shall negotiate a price adjustment in the contract unit prices and its effective date. However, the Contracting Officer may postpone the negotiations until an accumulation of increases and decreases in the labor rates (including fringe benefits) and unit prices of material shown in the Schedule results in an adjustment allowable under paragraph (c)(3) of this clause. The Contracting Officer shall modify this contract (1)to include the price adjustment and its effective date and (2)to revise the labor rates (including fringe benefits) or unit prices of material as shown in the Schedule to reflect the increases or decreases resulting from the adjustment. The Contractor shall continue performance pending agreement on, or determination of, any adjustment and its effective date.

(c) Any price adjustment under this clause is subject to the following limitations:

(1) Any adjustment shall be limited to the effect on unit prices of the increases or decreases in the rates of pay for labor (including fringe benefits) or unit prices for material shown in the Schedule. There shall be no adjustment for-

(i) Supplies or services for which the production cost is not affected by such changes;

(ii) Changes in rates or unit prices other than those shown in the Schedule; or

(iii) Changes in the quantities of labor or material used from those shown in the Schedule for each item.

(2) No upward adjustment shall apply to supplies or services that are required to be delivered or performed before the effective date of the adjustment, unless the Contractor's failure to deliver or perform according to the delivery schedule results from causes beyond the Contractor's control and without its fault or negligence, within the meaning of the Default clause.

(3) There shall be no adjustment for any change in rates of pay for labor (including fringe benefits) or unit prices for material which would not result in a net change of at least 3 percent of the then-current total contract price. This limitation shall not apply, however, if, after final delivery of all line items, either party requests an adjustment under paragraph (b) of this clause.

(4) The aggregate of the increases in any contract unit price made under this clause shall not exceed 10 percent of the original unit price. There is no percentage limitation on the amount of decreases that may be made under this clause.

(d) The Contracting Officer may examine the Contractor's books, records, and other supporting data relevant to the cost of labor (including fringe benefits) and material during all reasonable times until the end of 3 years after the date of final payment under this contract or the time periods specified in subpart 4.7 of the Federal Acquisition Regulation (FAR), whichever is earlier.

(End of clause)

52.216-5 Price Redetermination-Prospective.

As prescribed in 16.204-4 , insert the following clause:

PRICE REDETERMINATION-PROSPECTIVE (DEVIATION DATE)

(a) *General*. The unit prices and the total price stated in this contract shall be periodically redetermined in accordance with this clause, except that-

(1) The prices for supplies delivered and services performed before the first effective date of price redetermination (see paragraph (c) of this clause) shall remain fixed; and

(2) In no event shall the total amount paid under this contract exceed any ceiling price included in the contract.

(b) *Definition*. "Costs," as used in this clause, means allowable costs in accordance with part 31 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract.

(c) *Price redetermination periods*. For the purpose of price redetermination, performance of this contract is divided into successive periods. The first period shall extend from the date of the contract to _____, [*see Note (1)*] and the second and each succeeding period shall extend for _____ *[insert appropriate number]* months from the end of the last preceding period, except that the parties may agree to vary the length of the final period. The first day of the second and each succeeding period shall be the effective date of price redetermination for that period.

(d) Data submission. (1) Not more than _____ nor less than _____ [*see Note (2)*] days before the end of each redetermination period, except the last, the Contractor shall submit-

(i) Proposed prices for supplies that may be delivered or services that may be performed in the next succeeding period, and-

(A) An estimate and breakdown of the costs of these supplies or services in the format of Table 15-1, FAR 15.408, or in any other form on which the parties may agree;

(B) Sufficient data to support the accuracy and reliability of this estimate; and

(C) An explanation of the differences between this estimate and the original (or last preceding) estimate for the same supplies or services; and

(ii) A statement of all costs incurred in performing this contract through the end of the _____ month (see Note (3)) before the submission of proposed prices in the format of Table 15-1, FAR 15.408 (or in any other form on which the parties may agree), with sufficient supporting data to disclose unit costs and cost trends for-

(A) Supplies delivered and services performed; and

(B) Inventories of work in process and undelivered contract supplies on hand (estimated to the extent necessary).

(2) The Contractor shall also submit, to the extent that it becomes available before negotiations on redetermined prices are concluded-

(i) Supplemental statements of costs incurred after the date stated in subdivision (d)(1)(ii) of this section for-

(A) Supplies delivered and services performed; and

(B) Inventories of work in process and undelivered contract supplies on hand (estimated to the extent necessary); and

(ii) Any other relevant data that the Contracting Officer may reasonably require.

(3) If the Contractor fails to submit the data required by paragraphs (d)(1) and (2) of this section, within the time specified, the Contracting Officer may suspend payments under this contract until the data are furnished. If it is later determined that the Government has overpaid the Contractor, the Contractor shall repay the excess to the Government immediately. Unless repaid within 30 days after the end of the data submittal period, the amount of the excess shall bear interest, computed from the date the data were due to the date of repayment, at the rate established in accordance with the Interest clause.

(e) *Price redetermination*. Upon the Contracting Officer's receipt of the data required by paragraph (d) of this section, the Contracting Officer and the Contractor shall promptly negotiate to redetermine fair and reasonable prices for supplies that may be delivered or services that may be performed in the period following the effective date of price redetermination.

(f) *Contract modifications*. Each negotiated redetermination of prices shall be evidenced by a modification to this contract, signed by the Contractor and the Contracting Officer, stating the redetermined prices that apply during the redetermination period.

(g) *Adjusting billing prices*. Pending execution of the contract modification (see paragraph (f) of this section), the Contractor shall submit invoices or vouchers in accordance with the billing prices stated in this contract. If at any time it appears that the then-current billing prices will be substantially greater than the estimated final prices, or if the Contractor submits data showing that the redetermined price will be substantially greater than the current billing prices, the parties shall negotiate an appropriate decrease or increase in billing prices. Any billing price adjustment shall be reflected in a contract modification and shall not affect the redetermination of prices under this clause. After the contract modification for price redetermination is executed, the total amount paid or to be paid on all invoices or vouchers shall be adjusted to reflect the agreed-upon prices, and any requested additional payments, refunds, or credits shall be made promptly.

(h) *Quarterly limitation on payments statement*. This paragraph (h) applies only during periods for which firm prices have not been established.

(1) Within 45 days after the end of the quarter of the Contractor's fiscal year in which a delivery is first made (or services are first performed) and accepted by the Government under this contract, and for each quarter thereafter, the Contractor shall submit to the contract administration office (with a copy to the contracting office and the cognizant contract auditor) a statement, cumulative from the beginning of the contract, showing-

(i) The total contract price of all supplies delivered (or services performed) and accepted by the Government and for which final prices have been established;

(ii) The total costs (estimated to the extent necessary) reasonably incurred for, and properly allocable solely to, the supplies delivered (or services performed) and accepted by the Government and for which final prices have not been established;

(iii) The portion of the total interim profit (used in establishing the initial contract price or agreed to for the purpose of this paragraph (h)) that is in direct proportion to the supplies delivered (or services performed) and accepted by the Government and for which final prices have not been established; and

(iv) The total amount of all invoices or vouchers for supplies delivered (or services performed) and accepted by the Government (including amounts applied or to be applied to liquidate progress payments).

(2) The statement required by paragraph (h)(1) of this section need not be submitted for any quarter for which either no costs are to be reported under subdivision (h)(1)(ii) of this section, or revised billing prices have been established in accordance with paragraph (g) of this section, and do not exceed the existing contract price, the Contractor's price-redetermination proposal, or a price based on the most recent quarterly statement, whichever is least.

(3) Notwithstanding any provision of this contract authorizing greater payments, if on any quarterly statement the amount under subdivision (h)(1)(iv) of this section exceeds the sum due the Contractor, as computed in accordance with subdivisions (h)(1)(i), (ii), and (iii) of this section, the Contractor shall immediately refund or credit to the Government the amount of this excess. The Contractor may, when appropriate, reduce this refund or credit by the amount of previous refunds or credits effected under this clause. If any portion of the excess has been applied to the liquidation of progress payments, then that portion may, instead of being refunded, be added to the unliquidated progress payment account, consistent with the Progress Payments clause. The Contractor shall provide complete details to support any claimed reductions in refunds.

(4) If the Contractor fails to submit the quarterly statement within 45 days after the end of each quarter and it is later determined that the Government has overpaid the Contractor, the Contractor shall repay the excess to the Government immediately. Unless repaid within 30 days after the end of the statement submittal period, the amount of the excess shall bear interest, computed from the date the quarterly statement was due to the date of repayment, at the rate established in accordance with the Interest clause.

(i) *Subcontracts*. No subcontract placed under this contract may provide for payment on a cost-plus-a-percentage-of-cost-basis.

(j) *Disagreements*. If the Contractor and the Contracting Officer fail to agree upon redetermined prices for any price redetermination period within 60 days (or within such other period as the parties agree) after the date on which the data required by paragraph (d) of this section are to be submitted, the Contracting Officer shall promptly issue a decision in accordance with the Disputes clause. For the purpose of paragraphs (f), (g), and (h) of this section, and pending final settlement of the disagreement on appeal, by failure to appeal, or by agreement, this decision shall be treated as an executed contract modification. Pending final settlement, price redetermination for subsequent periods, if any, shall continue to be negotiated as provided in this clause.

(k) *Termination*. If this contract is terminated, prices shall continue to be established in accordance with this clause for (1) completed supplies and services accepted by the Government and (2) those supplies and services not terminated under a partial termination. All other elements of the termination shall be resolved in accordance with other applicable clauses of this contract.

Notes:

(1) Express in terms of units delivered, or as a date; but in either case the period should end on the last day of a month.

(2) Insert the number of days chosen so that the Contractor's submission will be late enough to reflect recent cost experience (taking into account the Contractor's accounting system), but early enough to permit review, audit (if necessary), and negotiation before the start of the prospective period.

(3) Insert "first," except that "second" may be inserted if necessary to achieve compatibility with the Contractor's accounting system.

(End of clause)

52.216-6 Price Redetermination-Retroactive.

As prescribed in 16.205-4 , insert the following clause:

PRICE REDETERMINATION-RETROACTIVE (DEVIATION DATE)

(a) *General*. The unit price and the total price stated in this contract shall be redetermined in accordance with this clause, but in no event shall the total amount paid under this contract exceed _____ *[insert dollar amount of ceiling price]*.

(b) *Definition*. "Costs," as used in this clause, means allowable costs in accordance with part 31 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract.

(c) Data submission. (1) Within_____ *[Contracting Officer insert number of days]* days after delivery of all supplies to be delivered and completion of all services to be performed under this contract, the Contractor shall submit-

(i) Proposed prices;

(ii) A statement in the format of Table 15-1, FAR 15.408, or in any other form on which the parties may agree, of all costs incurred in performing the contract; and

(iii) Any other relevant data that the Contracting Officer may reasonably require.

(2) If the Contractor fails to submit the data required by paragraph (c)(1) of this section within the time specified, the Contracting Officer may suspend payments under this contract until the data are furnished. If it is later determined that the Government has overpaid the Contractor, the excess shall be repaid to the Government immediately. Unless repaid within 30 days after the end of the data submittal period, the amount of the excess shall bear interest, computed from the date the data were due to the date of repayment, at the rate established in accordance with the Interest clause.

(d) *Price determination*. Upon the Contracting Officer's receipt of the data required by paragraph (c) of this section, the Contracting Officer and the Contractor shall promptly negotiate to redetermine fair and reasonable prices for supplies delivered and services performed by the Contractor under this contract.

(e) *Contract modification*. The negotiated redetermination of price shall be evidenced by a modification to this contract, signed by the Contractor and the Contracting Officer.

(f) *Adjusting billing prices*. Pending execution of the contract modification (see paragraph (e) of this section), the Contractor shall submit invoices or vouchers in accordance with billing prices stated in this contract. If at any time it appears that the then-current billing prices will be substantially greater than the estimated final prices, or if the Contractor submits data showing that the redetermined prices will be substantially greater than the current billing prices, the parties shall negotiate an appropriate decrease or increase in billing prices. Any billing price adjustment shall be reflected in a contract modification and shall not affect the redetermination of prices under this clause. After the contract modification for price redetermination is executed, the total amount paid or to be paid on all invoices or vouchers shall be adjusted to reflect the agreed-upon prices, and any resulting additional payments, refunds, or credits shall be made promptly.

(g) *Quarterly limitation on payments statement*. This paragraph (g) shall apply until final price redetermination under this contract has been completed.

(1) Within 45 days after the end of the quarter of the Contractor's fiscal year in which a delivery is first made (or services are first performed) and accepted by the Government under this contract, and for each quarter thereafter, the Contractor shall submit to the contract administration office (with a copy to the contracting office and the cognizant contract auditor), a statement, cumulative from the beginning of the contract, showing-

(i) The total contract price of all supplies delivered (or services performed) and accepted by the Government and for which final prices have been established;

(ii) The total costs (estimated to the extent necessary) reasonably incurred for, and properly allocable solely to, the supplies delivered (or services performed) and accepted by the Government and for which final prices have not been established;

(iii) The portion of the total interim profit (used in establishing the initial contract price or agreed to for the purpose of this paragraph (g)) that is in direct proportion to the supplies delivered (or services performed) and accepted by the Government and for which final prices have not been established; and

(iv) The total amount of all invoices or vouchers for supplies delivered (or services performed) and accepted by the Government (including amounts applied or to be applied to liquidate progress payments).

(2) Notwithstanding any provision of this contract authorizing greater payments, if on any quarterly statement the amount under subdivision (g)(1)(iv) of this section exceeds the sum due the Contractor, as computed in accordance with subdivisions (g)(1)(i), (ii), and (iii) of this section, the Contractor shall immediately refund or credit to the Government the amount of this excess. The Contractor may, when appropriate, reduce this refund or credit by the amount of previous refunds or credits effected under this clause. If any portion of the excess has been applied to the liquidation of progress payments, then that portion may, instead of being refunded, be added to the unliquidated progress payment account, consistent with the Progress Payments clause. The Contractor shall provide complete details to support any claimed reduction in refunds.

(3) If the Contractor fails to submit the quarterly statement within 45 days after the end of each quarter and it is later determined that the Government has overpaid the Contractor, the Contractor shall repay the excess to the Government immediately. Unless repaid within 30 days after the end of the statement submittal period, the amount of the excess shall bear interest, computed from the date the quarterly statement was due to the date of repayment, at the rate established in accordance with the Interest clause.

(h) *Subcontracts*. No subcontract placed under this contract may provide for payment on a cost-plus-a-percentage-of-cost basis.

(i) *Disagreements*. If the Contractor and the Contracting Officer fail to agree upon redetermined prices within 60 days (or within such other period as the parties agree) after the date on which the data required by paragraph (c) of this section are to

be submitted, the Contracting Officer shall promptly issue a decision in accordance with the Disputes clause. For the purpose of paragraphs (e), (f), and (g) of this section, and pending final settlement of the disagreement on appeal, by failure to appeal, or by agreement, this decision shall be treated as an executed contract modification.

(j) *Termination*. If this contract is terminated before price redetermination, prices shall be established in accordance with this clause for completed supplies and services not terminated. All other elements of the termination shall be resolved in accordance with other applicable clauses of this contract.

(End of clause)

52.216-7 Allowable Cost and Payment.

As prescribed in 16.305(a), insert the following clause:

ALLOWABLE COST AND PAYMENT (DEVIATION DATE)

(a) Invoicing. (1) The Government will make payments to the Contractor when requested as work progresses, but (except for small business concerns) not more often than once every 2 weeks, in amounts determined to be allowable by the Contracting Officer in accordance with Federal Acquisition Regulation (FAR) subpart 31.2 in effect on the date of this contract and the terms of this contract. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract.

(2) Contract financing payments are not subject to the interest penalty provisions of the Prompt Payment Act. Interim payments made prior to the final payment under the contract are contract financing payments, except interim payments if this contract contains Alternate I to the clause at 52.232-25.

(3) The designated payment office will make interim payments for contract financing on the _____ *[Contracting Officer insert day as prescribed by agency head; if not prescribed, insert "30t"h]* day after the designated billing office receives a proper payment request. In the event that the Government requires an audit or other review of a specific payment request to ensure compliance with the terms and conditions of the contract, the designated payment office is not compelled to make payment by the specified due date.

(b) Reimbursing costs. (1) For the purpose of reimbursing allowable costs (except as provided in paragraph (b)(2) of this clause, with respect to pension, deferred profit sharing, and employee stock ownership plan contributions), the term "costs" includes only—

(i) Those recorded costs that, at the time of the request for reimbursement, the Contractor has paid by cash, check, or other form of actual payment for items or services purchased directly for the contract;

(ii) When the Contractor is not delinquent in paying costs of contract performance in the ordinary course of business, costs incurred, but not necessarily paid, for-

(A) Supplies and services purchased directly for the contract and associated financing payments to subcontractors, provided payments determined due will be made–

(1) In accordance with the terms and conditions of a subcontract or invoice; and

(2) Ordinarily within 30 days of the submission of the Contractor's payment request to the Government;

(B) Materials issued from the Contractor's inventory and placed in the production process for use on the contract;

(C) Direct labor;

(D) Direct travel;

(E) Other direct in-house costs; and

(F) Properly allocable and allowable indirect costs, as shown in the records maintained by the Contractor for purposes of obtaining reimbursement under Government contracts; and

(iii) The amount of financing payments that have been paid by cash, check, or other forms of payment to subcontractors.

(2) Accrued costs of Contractor contributions under employee pension plans shall be excluded until actually paid unless-

(i) The Contractor's practice is to make contributions to the retirement fund quarterly or more frequently; and

(ii) The contribution does not remain unpaid 30 days after the end of the applicable quarter or shorter payment period (any contribution remaining unpaid shall be excluded from the Contractor's indirect costs for payment purposes).

(3) Notwithstanding the audit and adjustment of invoices or vouchers under paragraph (g) of this clause, allowable indirect costs under this contract shall be obtained by applying indirect cost rates established in accordance with paragraph (d) of this clause.

(4) Any statements in specifications or other documents incorporated in this contract by reference designating performance of services or furnishing of materials at the Contractor's expense or at no cost to the Government shall be disregarded for purposes of cost-reimbursement under this clause.

(c) *Small business concerns*. A small business concern may receive more frequent payments than every 2 weeks.

(d) Final indirect cost rates. (1) Final annual indirect cost rates and the appropriate bases shall be established in accordance with subpart 42.7 of the Federal Acquisition Regulation (FAR) in effect for the period covered by the indirect cost rate proposal.

(2) (i) The Contractor shall submit an adequate final indirect cost rate proposal to the Contracting Officer (or cognizant Federal agency official) and auditor within the 6-month period following the expiration of each of its fiscal years. Reasonable extensions, for exceptional circumstances only, may be requested in writing by the Contractor and granted in writing by the Contracting Officer. The Contractor shall support its proposal with adequate supporting data.

(ii) The proposed rates shall be based on the Contractor's actual cost experience for that period. The appropriate Government representative and the Contractor shall establish the final indirect cost rates as promptly as practical after receipt of the Contractor's proposal.

(iii) An adequate indirect cost rate proposal shall include the following data unless otherwise specified by the cognizant Federal agency official:

(A) Summary of all claimed indirect expense rates, including pool, base, and calculated indirect rate.

(B) *General and Administrative expenses (final indirect cost pool)*. Schedule of claimed expenses by element of cost as identified in accounting records (Chart of Accounts).

(C) *Overhead expenses (final indirect cost pool)*. Schedule of claimed expenses by element of cost as identified in accounting records (Chart of Accounts) for each final indirect cost pool.

(D) *Occupancy expenses (intermediate indirect cost pool)*. Schedule of claimed expenses by element of cost as identified in accounting records (Chart of Accounts) and expense reallocation to final indirect cost pools.

(E) Claimed allocation bases, by element of cost, used to distribute indirect costs.

(F) Facilities capital cost of money factors computation.

(G) Reconciliation of books of account (*i.e.*, General Ledger) and claimed direct costs by major cost element.

(H) Schedule of direct costs by contract and subcontract and indirect expense applied at claimed rates, as well as a subsidiary schedule of Government participation percentages in each of the allocation base amounts.

(I) Schedule of cumulative direct and indirect costs claimed and billed by contract and subcontract.

(J) *Subcontract information*. Listing of subcontracts awarded to companies for which the contractor is the prime or upper-tier contractor (include prime and subcontract numbers; subcontract value and award type; amount claimed during the fiscal year; and the subcontractor name, address, and point of contact information).

(K) Summary of each time-and-materials and labor-hour contract information, including labor categories, labor rates, hours, and amounts; direct materials; other direct costs; and, indirect expense applied at claimed rates.

(L) Reconciliation of total payroll per IRS form 941 to total labor costs distribution.

(M) Listing of decisions/agreements/approvals and description of accounting/organizational changes.

(N) Certificate of final indirect costs (see 52.242-4, Certification of Final Indirect Costs).

(O) Contract closing information for contracts physically completed in this fiscal year (include contract number, period of performance, contract ceiling amounts, contract fee computations, level of effort, and indicate if the contract is ready to close).

(iv) The following supplemental information is not required to determine if a proposal is adequate, but may be required during the audit process:

(A) Comparative analysis of indirect expense pools detailed by account to prior fiscal year and budgetary data.

(B) General organizational information and limitation on allowability of compensation for certain contractor personnel. See 31.205-6(p).

(C) Identification of prime contracts under which the contractor performs as a subcontractor.

(D) Description of accounting system (excludes contractors required to submit a CAS Disclosure Statement or contractors where the description of the accounting system has not changed from the previous year's submission).

(E) Procedures for identifying and excluding unallowable costs from the costs claimed and billed (excludes contractors where the procedures have not changed from the previous year's submission).

(F) Certified financial statements and other financial data (*e.g.*, trial balance, compilation, review, *etc.*).

(G) Management letter from outside CPAs concerning any internal control weaknesses.

(H) Actions that have been and/or will be implemented to correct the weaknesses described in the management letter from subparagraph (G) of this section.

(I) List of all internal audit reports issued since the last disclosure of internal audit reports to the Government.

(J) Annual internal audit plan of scheduled audits to be performed in the fiscal year when the final indirect cost rate submission is made.

(K) Federal and State income tax returns.

(L) Securities and Exchange Commission 10-K annual report.

(M) Minutes from board of directors meetings.

(N) Listing of delay claims and termination claims submitted which contain costs relating to the subject fiscal year.

(O) Contract briefings, which generally include a synopsis of all pertinent contract provisions, such as: contract type, contract amount, product or service(s) to be provided, contract performance period, rate ceilings, advance approval requirements, pre-contract cost allowability limitations, and billing limitations.

(v) The Contractor shall update the billings on all contracts to reflect the final settled rates and update the schedule of cumulative direct and indirect costs claimed and billed, as required in paragraph (d)(2)(iii)(I) of this section, within 60 days after settlement of final indirect cost rates.

(3) The Contractor and the appropriate Government representative shall execute a written understanding setting forth the final indirect cost rates. The understanding shall specify (i) the agreed-upon final annual indirect cost rates, (ii) the bases to which the rates apply, (iii) the periods for which the rates apply, (iv) any specific indirect cost items treated as direct costs in the settlement, and (v) the affected contract and/or subcontract, identifying any with advance agreements or special terms and the applicable rates. The understanding shall not change any monetary ceiling, contract obligation, or specific cost allowance or disallowance provided for in this contract. The understanding is incorporated into this contract upon execution.

(4) Failure by the parties to agree on a final annual indirect cost rate shall be a dispute within the meaning of the Disputes clause.

(5) Within 120 days (or longer period if approved in writing by the Contracting Officer) after settlement of the final annual indirect cost rates for all years of a physically complete contract, the Contractor shall submit a completion invoice or voucher to reflect the settled amounts and rates. The completion invoice or voucher shall include settled subcontract amounts and rates. The prime contractor is responsible for settling subcontractor amounts and rates included in the completion invoice or voucher and providing status of subcontractor audits to the contracting officer upon request.

(6) (i) If the Contractor fails to submit a completion invoice or voucher within the time specified in paragraph (d)(5) of this clause, the Contracting Officer may-

(A) Determine the amounts due to the Contractor under the contract; and

(B) Record this determination in a unilateral modification to the contract.

(ii) This determination constitutes the final decision of the Contracting Officer in accordance with the Disputes clause.

(e) *Billing rates*. Until final annual indirect cost rates are established for any period, the Government shall reimburse the Contractor at billing rates established by the Contracting Officer or by an authorized representative (the cognizant auditor), subject to adjustment when the final rates are established. These billing rates-

(1) Shall be the anticipated final rates; and

(2) May be prospectively or retroactively revised by mutual agreement, at either party's request, to prevent substantial overpayment or underpayment.

(f) *Quick-closeout procedures*. Quick-closeout procedures are applicable when the conditions in FAR 42.708(a) are satisfied.

(g) *Audit*. At any time or times before final payment, the Contracting Officer may have the Contractor's invoices or vouchers and statements of cost audited. Any payment may be-

(1) Reduced by amounts found by the Contracting Officer not to constitute allowable costs; or

(2) Adjusted for prior overpayments or underpayments.

(h) Final payment. (1) Upon approval of a completion invoice or voucher submitted by the Contractor in accordance with paragraph (d)(5) of this clause, and upon the Contractor's compliance with all terms of this contract, the Government shall promptly pay any balance of allowable costs and that part of the fee (if any) not previously paid.

(2) The Contractor shall pay to the Government any refunds, rebates, credits, or other amounts (including interest, if any) accruing to or received by the Contractor or any assignee under this contract, to the extent that those amounts are properly allocable to costs for which the Contractor has been reimbursed by the Government. Reasonable expenses incurred by the Contractor for securing refunds, rebates, credits, or other amounts shall be allowable costs if approved by the Contracting Officer. Before final payment under this contract, the Contractor and each assignee whose assignment is in effect at the time of final payment shall execute and deliver-

(i) An assignment to the Government, in form and substance satisfactory to the Contracting Officer, of refunds, rebates, credits, or other amounts (including interest, if any) properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract; and

(ii) A release discharging the Government, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract, except-

(A) Specified claims stated in exact amounts, or in estimated amounts when the exact amounts are not known;

(B) Claims (including reasonable incidental expenses) based upon liabilities of the Contractor to third parties arising out of the performance of this contract; provided, that the claims are not known to the Contractor on the date of the execution of the release, and that the Contractor gives notice of the claims in writing to the Contracting Officer within 6 years following the release date or notice of final payment date, whichever is earlier; and

(C) Claims for reimbursement of costs, including reasonable incidental expenses, incurred by the Contractor under the patent clauses of this contract, excluding, however, any expenses arising from the Contractor's indemnification of the Government against patent liability.

(End of clause)

Alternate I (FEB 1997). As prescribed in 16.305(a)(2), substitute the following paragraph (b)(1)(iii) for paragraph (b)(1)(iii) of the basic clause:

(iii) The amount of progress and other payments to the Contractor's subcontractors that either have been paid, or that the Contractor is required to pay pursuant to the clause of this contract entitled "Prompt Payment for Construction Contracts." Payments shall be made by cash, check, or other form of payment to the Contractor's subcontractors under similar cost standards.

Alternate II (AUG 2012). As prescribed in 16.305(a)(3), substitute the following paragraph (a)(1) for paragraph (a)(1) of the basic clause:

(a)(1) The Government will make payments to the Contractor when requested as work progresses, but not more often than once every two weeks, in amounts determined to be allowable by the Contracting Officer in accordance with FAR subpart 31.3 in effect on the date of this contract and the terms of this contract. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract.

Alternate III (AUG 2012). As prescribed in 16.305(a)(4), substitute the following paragraph (a)(1) for paragraph (a)(1) of the basic clause:

(a)(1) The Government will make payments to the Contractor when requested as work progresses, but not more often than once every two weeks, in amounts determined to be allowable by the Contracting Officer in accordance with FAR subpart 31.6 in effect on the date of this contract and the terms of this contract. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract.

Alternate IV (AUG 2012). As prescribed in 16.305(a)(5), substitute the following paragraph (a)(1) for paragraph (a)(1) of the basic clause:

(a)(1) The Government will make payments to the Contractor when requested as work progresses, but not more often than once every two weeks, in amounts determined to be allowable by the Contracting Officer in accordance with FAR subpart 31.7 in effect on the date of this contract and the terms of this contract. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract.

52.216-8 Fixed Fee.

As prescribed in 16.305(b), insert the following clause:

FIXED FEE (JUN 2011)

(a) The Government shall pay the Contractor for performing this contract the fixed fee specified in the Schedule.

(b) Payment of the fixed fee shall be made as specified in the Schedule; provided that the Contracting Officer withholds a reserve not to exceed 15 percent of the total fixed fee or $100,000, whichever is less, to protect the Government's interest. The Contracting Officer shall release 75 percent of all fee withholds under this contract after receipt of an adequate certified final indirect cost rate proposal covering the year of physical completion of this contract, provided the Contractor has satisfied all other contract terms and conditions, including the submission of the final patent and royalty reports, and is not delinquent in submitting final vouchers on prior years' settlements. The Contracting Officer may release up to 90 percent of the fee withholds under this contract based on the Contractor's past performance related to the submission and settlement of final indirect cost rate proposals.

(End of clause)

52.216-9 Fixed Fee-Construction.

As prescribed in 16.305(c), insert the following clause:

FIXED FEE-CONSTRUCTION (JUN 2011)

(a) The Government shall pay to the Contractor for performing this contract the fixed fee specified in the Schedule.

(b) Payment of the fixed fee shall be made in installments based upon the percentage of completion of the work as determined from estimates submitted to and approved by the Contracting Officer, but subject to the withholding provisions of paragraph (c) of this section.

(c) The Contracting Officer shall withhold a reserve not to exceed 15 percent of the total fixed fee or $100,000, whichever is less, to protect the Government's interest. The Contracting Officer shall release 75 percent of all fee withholds under this contract after receipt of an adequate certified final indirect cost rate proposal covering the year of physical completion of this contract, provided the Contractor has satisfied all other contract terms and conditions, including the submission of the final patent and royalty reports, and is not delinquent in submitting final vouchers on prior years' settlements. The Contracting Officer may release up to 90 percent of the fee withholds under this contract based on the Contractor's past performance related to the submission and settlement of final indirect cost rate proposals.

(End of clause)

52.216-10 Incentive Fee.

As prescribed in 16.305(d), insert the following clause:

INCENTIVE FEE (JUN 2011)

(a) *General*. The Government shall pay the Contractor for performing this contract a fee determined as provided in this contract.

(b) *Target cost and target fee*. The target cost and target fee specified in the Schedule are subject to adjustment if the contract is modified in accordance with paragraph (d) of this clause.

(1) "Target cost," as used in this contract, means the estimated cost of this contract as initially negotiated, adjusted in accordance with paragraph (d) of this clause.

(2) "Target fee," as used in this contract, means the fee initially negotiated on the assumption that this contract would be performed for a cost equal to the estimated cost initially negotiated, adjusted in accordance with paragraph (d) of this clause.

(c) Withholding of payment. (1) Normally, the Government shall pay the fee to the Contractor as specified in the Schedule. However, when the Contracting Officer considers that performance or cost indicates that the Contractor will not achieve target, the Government shall pay on the basis of an appropriate lesser fee. When the Contractor demonstrates that performance or cost clearly indicates that the Contractor will earn a fee significantly above the target fee, the Government may, at the sole discretion of the Contracting Officer, pay on the basis of an appropriate higher fee.

(2) Payment of the incentive fee shall be made as specified in the Schedule; provided that the Contracting Officer withholds a reserve not to exceed 15 percent of the total incentive fee or $100,000, whichever is less, to protect the

Government's interest. The Contracting Officer shall release 75 percent of all fee withholds under this contract after receipt of an adequate certified final indirect cost rate proposal covering the year of physical completion of this contract, provided the Contractor has satisfied all other contract terms and conditions, including the submission of the final patent and royalty reports, and is not delinquent in submitting final vouchers on prior years' settlements. The Contracting Officer may release up to 90 percent of the fee withholds under this contract based on the Contractor's past performance related to the submission and settlement of final indirect cost rate proposals.

(d) *Equitable adjustments*. When the work under this contract is increased or decreased by a modification to this contract or when any equitable adjustment in the target cost is authorized under any other clause, equitable adjustments in the target cost, target fee, minimum fee, and maximum fee, as appropriate, shall be stated in a supplemental agreement to this contract.

(e) Fee payable. (1) The fee payable under this contract shall be the target fee increased by _____ *[Contracting Officer insert Contractor's participation]* cents for every dollar that the total allowable cost is less than the target cost or decreased by _____ *[Contracting Officer insert Contractor's participation]* cents for every dollar that the total allowable cost exceeds the target cost. In no event shall the fee be greater than _____ *[Contracting Officer insert percentage]* percent or less than _____ *[Contracting Officer insert percentage]* percent of the target cost.

(2) The fee shall be subject to adjustment, to the extent provided in paragraph (d) of this clause, and within the minimum and maximum fee limitations in paragraph (e)(1) of this clause, when the total allowable cost is increased or decreased as a consequence of-

(i) Payments made under assignments; or

(ii) Claims excepted from the release as required by paragraph (h)(2) of the Allowable Cost and Payment clause.

(3) If this contract is terminated in its entirety, the portion of the target fee payable shall not be subject to an increase or decrease as provided in this paragraph. The termination shall be accomplished in accordance with other applicable clauses of this contract.

(4) For the purpose of fee adjustment, "total allowable cost" shall not include allowable costs arising out of-

(i) Any of the causes covered by the Excusable Delays clause to the extent that they are beyond the control and without the fault or negligence of the Contractor or any subcontractor;

(ii) The taking effect, after negotiating the target cost, of a statute, court decision, written ruling, or regulation that results in the Contractor's being required to pay or bear the burden of any tax or duty or rate increase in a tax or duty;

(iii) Any direct cost attributed to the Contractor's involvement in litigation as required by the Contracting Officer pursuant to a clause of this contract, including furnishing evidence and information requested pursuant to the Notice and Assistance Regarding Patent and Copyright Infringement clause;

(iv) The purchase and maintenance of additional insurance not in the target cost and required by the Contracting Officer, or claims for reimbursement for liabilities to third persons pursuant to the Insurance Liability to Third Persons clause;

(v) Any claim, loss, or damage resulting from a risk for which the Contractor has been relieved of liability by the Government Property clause; or

(vi) Any claim, loss, or damage resulting from a risk defined in the contract as unusually hazardous or as a nuclear risk and against which the Government has expressly agreed to indemnify the Contractor.

(5) All other allowable costs are included in "total allowable cost" for fee adjustment in accordance with this paragraph (e), unless otherwise specifically provided in this contract.

(f) *Contract modification*. The total allowable cost and the adjusted fee determined as provided in this clause shall be evidenced by a modification to this contract signed by the Contractor and Contracting Officer.

(g) *Inconsistencies*. In the event of any language inconsistencies between this clause and provisioning documents or Government options under this contract, compensation for spare parts or other supplies and services ordered under such documents shall be determined in accordance with this clause.

(End of clause)

52.216-11 Cost Contract-No Fee.

As prescribed in 16.305(e), insert the following clause.

COST CONTRACT-NO FEE (APR 1984)

(a) The Government shall not pay the Contractor a fee for performing this contract.

(b) After payment of 80 percent of the total estimated cost shown in the Schedule, the Contracting Officer may withhold further payment of allowable cost until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government's interest. This reserve shall not exceed one percent of the total estimated cost shown in the Schedule or $100,000, whichever is less.

(End of clause)

Alternate I (DEVIATION DATE). As prescribed in 16.305(e)(2), delete paragraph (b) of the basic clause.

52.216-12 Cost-Sharing Contract-No Fee.

As prescribed in 16.307(f), insert the following clause:

COST SHARING CONTRACT-NO FEE (APR 1984)

(a) The Government shall not pay to the Contractor a fee for performing this contract.

(b) After paying 80 percent of the Government's share of the total estimated cost of performance shown in the Schedule, the Contracting Officer may withhold further payment of allowable cost until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government's interest. This reserve shall not exceed one percent of the Government's share of the total estimated cost shown in the Schedule or $100,000, whichever is less.

(End of clause)

Alternate I (DEVIATION DATE). As prescribed in 16.305(f)(2), delete paragraph (b) of the basic clause.

52.216-13 [Reserved]

52.216-14 [Reserved]

52.216-15 Predetermined Indirect Cost Rates.

As prescribed in 16.305(g), insert the following clause:

PREDETERMINED INDIRECT COST RATES (APR 1998)

(a) Notwithstanding the Allowable Cost and Payment clause of this contract, the allowable indirect costs under this contract shall be obtained by applying predetermined indirect cost rates to bases agreed upon by the parties, as specified below.

(b) (1) The Contractor shall submit an adequate final indirect cost rate proposal to the Contracting Officer (or cognizant Federal agency official) and auditor within the 6-month period following the expiration of each of its fiscal years. Reasonable extensions, for exceptional circumstances only, may be requested in writing by the Contractor and granted in writing by the Contracting Officer. The Contractor shall support its proposal with adequate supporting data.

(2) The proposed rates shall be based on the Contractor's actual cost experience for that period. The appropriate Government representative and the Contractor shall establish the final indirect cost rates as promptly as practical after receipt of the Contractor's proposal.

(c) Allowability of costs and acceptability of cost allocation methods shall be determined in accordance with FAR subpart 31.3 in effect on the date of this contract.

(d) Predetermined rate agreements in effect on the date of this contract shall be incorporated into the contract Schedule. The Contracting Officer (or cognizant Federal agency official) and Contractor shall negotiate rates for subsequent periods and execute a written indirect cost rate agreement setting forth the results. The agreement shall specify (1) the agreed-upon predetermined indirect cost rates, (2) the bases to which the rates apply, (3) the period for which the rates apply, and (4) the specific items treated as direct costs or any changes in the items previously agreed to be direct costs. The indirect cost rate agreement shall not change any monetary ceiling, contract obligation, or specific cost allowance or disallowance provided for in this contract. The agreement is incorporated into this contract upon execution.

(e) Pending establishment of predetermined indirect cost rates for any fiscal year (or other period agreed to by the parties), the Contractor shall be reimbursed either at the rates fixed for the previous fiscal year (or other period) or at billing rates acceptable to the Contracting Officer (or cognizant Federal agency official), subject to appropriate adjustment when the final rates for that period are established.

(f) Any failure by the parties to agree on any predetermined indirect cost rates under this clause shall not be considered a dispute within the meaning of the Disputes clause. If for any fiscal year (or other period specified in the Schedule) the parties fail to agree to predetermined indirect cost rates, the allowable indirect costs shall be obtained by applying final indirect cost rates established in accordance with the Allowable Cost and Payment clause.

(g) Allowable indirect costs for the period from the beginning of performance until the end of the Contractor's fiscal year (or other period specified in the Schedule) shall be obtained using the predetermined indirect cost rates and the bases shown in the Schedule.

(End of clause)

52.216-16 Incentive Price Revision-Firm Target.

As prescribed in 16.406(a), insert the following clause:

INCENTIVE PRICE REVISION-FIRM TARGET (DEVIATION DATE)

(a) *General*. The supplies or services identified in the Schedule as Items _____ *[Contracting Officer insert Schedule line item numbers]* are subject to price revision in accordance with this clause; provided, that in no event shall the total final price of these items exceed the ceiling price of _____ dollars ($_____). Any supplies or services that are to be (1) ordered separately under, or otherwise added to, this contract and (2) subject to price revision in accordance with the terms of this clause shall be identified as such in a modification to this contract.

(b) *Definition*. "Costs," as used in this clause, means allowable costs in accordance with part 31 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract.

(c) Data submission. (1) Within _____ *[Contracting Officer insert number of days]* days after the end of the month in which the Contractor has delivered the last unit of supplies and completed the services specified by item number in paragraph (a) of this clause, the Contractor shall submit in the format of Table 15-1, FAR 15.408, or in any other form on which the parties agree-

(i) A detailed statement of all costs incurred up to the end of that month in performing all work under the items;

(ii) An estimate of costs of further performance, if any, that may be necessary to complete performance of all work under the items;

(iii) A list of all residual inventory and an estimate of its value; and

(iv) Any other relevant data that the Contracting Officer may reasonably require.

(2) If the Contractor fails to submit the data required by paragraph (c)(1) of this clause within the time specified and it is later determined that the Government has overpaid the Contractor, the Contractor shall repay the excess to the Government immediately. Unless repaid within 30 days after the end of the data submittal period, the amount of the excess shall bear interest, computed from the date the data were due to the date of repayment, at the rate established in accordance with the Interest clause.

(d) *Price revision*. Upon the Contracting Officer's receipt of the data required by paragraph (c) of this clause, the Contracting Officer and the Contractor shall promptly establish the total final price of the items specified in (a) of this clause by applying to final negotiated cost an adjustment for profit or loss, as follows:

(1) On the basis of the information required by paragraph (c) of this clause, together with any other pertinent information, the parties shall negotiate the total final cost incurred or to be incurred for supplies delivered (or services performed) and accepted by the Government and which are subject to price revision under this clause.

(2) The total final price shall be established by applying to the total final negotiated cost an adjustment for profit or loss, as follows:

(i) If the total final negotiated cost is equal to the total target cost, the adjustment is the total target profit.

(ii) If the total final negotiated cost is greater than the total target cost, the adjustment is the total target profit, less _____ *[Contracting Officer insert percent]* percent of the amount by which the total final negotiated cost exceeds the total target cost.

(iii) If the final negotiated cost is less than the total target cost, the adjustment is the total target profit plus _____ *[Contracting Officer insert percent]* percent of the amount by which the total final negotiated cost is less than the total target cost.

(e) *Contract modification*. The total final price of the items specified in paragraph (a) of this clause shall be evidenced by a modification to this contract, signed by the Contractor and the Contracting Officer. This price shall not be subject to revision, notwithstanding any changes in the cost of performing the contract, except to the extent that-

(1) The parties may agree in writing, before the determination of total final price, to exclude specific elements of cost from this price and to a procedure for subsequent disposition of those elements; and

(2) Adjustments or credits are explicitly permitted or required by this or any other clause in this contract.

(f) Adjusting billing prices. (1) Pending execution of the contract modification (see paragraph (e) of this clause), the Contractor shall submit invoices or vouchers in accordance with billing prices as provided in this paragraph. The billing prices shall be the target prices shown in this contract.

(2) If at any time it appears from information provided by the contractor under paragraph (g)(2) of this clause that the then-current billing prices will be substantially greater than the estimated final prices, the parties shall negotiate a reduction in the billing prices. Similarly, the parties may negotiate an increase in billing prices by any or all of the difference between the target prices and the ceiling price, upon the Contractor's submission of factual data showing that final cost under this contract will be substantially greater than the target cost.

(3) Any billing price adjustment shall be reflected in a contract modification and shall not affect the determination of the total final price under paragraph (d) of this clause. After the contract modification establishing the total final price is executed, the total amount paid or to be paid on all invoices or vouchers shall be adjusted to reflect the total final price, and any resulting additional payments, refunds, or credits shall be made promptly.

(g) *Quarterly limitation on payments statement*. This paragraph (g) shall apply until final price revision under this contract has been completed.

(1) Within 45 days after the end of each quarter of the Contractor's fiscal year in which a delivery is first made (or services are first performed) and accepted by the Government under this contract, and for each quarter thereafter, the Contractor shall submit to the contract administration office (with a copy to the contracting office and the cognizant contract auditor) a statement, cumulative from the beginning of the contract, showing-

(i) The total contract price of all supplies delivered (or services performed) and accepted by the Government and for which final prices have been established;

(ii) The total costs (estimated to the extent necessary) reasonably incurred for, and properly allocable solely to, the supplies delivered (or services performed) and accepted by the Government and for which final prices have not been established;

(iii) The portion of the total target profit (used in establishing the initial contract price or agreed to for the purpose of this paragraph (g)) that is in direct proportion to the supplies delivered (or services performed) and accepted by the Government and for which final prices have not been established-increased or decreased in accordance with paragraph (d)(2) of this clause, when the amount stated under subdivision (g)(1)(ii) of this clause differs from the aggregate target costs of the supplies or services; and

(iv) The total amount of all invoices or vouchers for supplies delivered (or services performed) and accepted by the Government (including amounts applied or to be applied to liquidate progress payments).

(2) Notwithstanding any provision of this contract authorizing greater payments, if on any quarterly statement the amount under subdivision (g)(1)(iv) of this clause exceeds the sum due the Contractor, as computed in accordance with subdivisions (g)(1)(i), (ii), and (iii) of this clause, the Contractor shall immediately refund or credit to the Government the amount of this excess. The Contractor may, when appropriate, reduce this refund or credit by the amount of previous refunds or credits effected under this clause. If any portion of the excess has been applied to the liquidation of progress payments, then that portion may, instead of being refunded, be added to the unliquidated progress payment account consistent with the Progress Payments clause. The Contractor shall provide complete details to support any claimed reductions in refunds.

(3) If the Contractor fails to submit the quarterly statement within 45 days after the end of each quarter and it is later determined that the Government has overpaid the Contractor, the Contractor shall repay the excess to the Government immediately. Unless repaid within 30 days after the end of the statement submittal period, the amount of the excess shall bear interest, computed from the date the quarterly statement was due to the date of repayment, at the rate established in accordance with the Interest clause.

(h) *Subcontracts*. No subcontract placed under this contract may provide for payment on a cost-plus-a-percentage-of-cost basis.

(i) *Disagreements*. If the Contractor and the Contracting Officer fail to agree upon the total final price within 60 days (or within such other period as the Contracting Officer may specify) after the date on which the data required by paragraph (c) of this clause are to be submitted, the Contracting Officer shall promptly issue a decision in accordance with the Disputes clause.

(j) *Termination*. If this contract is terminated before the total final price is established, prices of supplies or services subject to price revision shall be established in accordance with this clause for (1) completed supplies and services accepted by the Government and (2) those supplies and services not terminated under a partial termination. All other elements of the termination shall be resolved in accordance with other applicable clauses of this contract.

(k) *Equitable adjustment under other clauses*. If an equitable adjustment in the contract price is made under any other clause of this contract before the total final price is established, the adjustment shall be made in the total target cost and may be made in the maximum dollar limit on the total final price, the total target profit, or both. If the adjustment is made after the total final price is established, only the total final price shall be adjusted.

(l) *Exclusion from target price and total final price*. If any clause of this contract provides that the contract price does not or will not include an amount for a specific purpose, then neither any target price nor the total final price includes or will include any amount for that purpose.

(m) *Separate reimbursement*. If any clause of this contract expressly provides that the cost of performance of an obligation shall be at Government expense, that expense shall not be included in any target price or in the total final price, but shall be reimbursed separately.

(n) *Taxes*. As used in the Federal, State, and Local Taxes clause or in any other clause that provides for certain taxes or duties to be included in, or excluded from, the contract price, the term "contract price" includes the total target price or, if it has been established, the total final price. When any of these clauses requires that the contract price be increased or decreased as a result of changes in the obligation of the Contractor to pay or bear the burden of certain taxes or duties, the increase or decrease shall be made in the total target price or, if it has been established, in the total final price, so that it will not affect the Contractor's profit or loss on this contract.

(End of clause)

Alternate I (APR 1984). As prescribed in 16.406 (a), add the following paragraph (o) to the basic clause:

(o) *Provisioning and options*. Parts, other supplies, or services that are to be furnished under this contract on the basis of a provisioning document or Government option shall be subject to price revision in accordance with this clause. Any prices established for these parts, other supplies, or services under a provisioning document or Government option shall be treated as target prices. Target cost and profit covering these parts, other supplies, or services may be established separately, in the aggregate, or in any combination, as the parties may agree.

52.216-17 Incentive Price Revision-Successive Targets.

As prescribed in 16.406(b), insert the following clause:

INCENTIVE PRICE REVISION-SUCCESSIVE TARGETS (DEVIATION DATE)

(a) *General*. The supplies or services identified in the Schedule as Items _____ *[Contracting Officer insert line item numbers]* are subject to price revision in accordance with this clause; provided, that in no event shall the total final price of these items exceed the ceiling *price of ___ dollars ($___)*. The prices of these items shown in the Schedule are the initial target prices, which include an initial target profit of _____ *[Contracting Officer insert percent]* percent of the initial target cost. Any supplies or services that are to be-

(1) Ordered separately under, or otherwise added to, this contract; and

(2) Subject to price revision in accordance with this clause shall be identified as such in a modification to this contract.

(b) *Definition*. "Costs," as used in this clause, means allowable costs in accordance with part 31 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract.

(c) Submitting data for establishing the firm fixed price or a final profit adjustment formula. (1) Within _____ *[Contracting Officer insert number of days]* days after the end of the month in which the Contractor has completed _____ *[see Note 1]*, the Contractor shall submit the following data:

(i) A proposed firm fixed price or total firm target price for supplies delivered and to be delivered and services performed and to be performed.

(ii) A detailed statement of all costs incurred in the performance of this contract through the end of the month specified above, in the format of Table 15-1, FAR 15.408 (or in any other form on which the parties may agree), with sufficient supporting data to disclose unit costs and cost trends for-

(A) Supplies delivered and services performed; and

(B) Inventories of work in process and undelivered contract supplies on hand (estimated to the extent necessary).

(iii) An estimate of costs of all supplies delivered and to be delivered and all services performed and to be performed under this contract, using the statement of costs incurred plus an estimate of costs to complete performance, in the format of Table 15-1, FAR 15.408 (or in any other form on which the parties may agree), together with-

(A) Sufficient data to support the accuracy and reliability of the estimate; and

(B) An explanation of the differences between this estimate and the original estimate used to establish the initial target prices.

(2) The Contractor shall also submit, to the extent that it becomes available before negotiations establishing the total firm price are concluded-

(i) Supplemental statements of costs incurred after the end of the month specified in paragraph (1) of this section for-

(A) Supplies delivered and services performed; and

(B) Inventories of work in process and undelivered contract supplies on hand (estimated to the extent necessary); and

(ii) Any other relevant data that the Contracting Officer may reasonably require.

(3) If the Contractor fails to submit the data required by paragraphs (c)(1) and (2) of this section within the time specified and it is later determined that the Government has overpaid the Contractor, the Contractor shall repay the excess to the Government immediately. Unless repaid within 30 days after the end of the data submittal period, the amount of the excess shall bear interest, computed from the date the data were due to the date of repayment, at the rate established in accordance with the Interest clause.

(d) *Establishing firm fixed price or final profit adjustment formula*. Upon the Contracting Officer's receipt of the data required by paragraph (c) of this section, the Contracting Officer and the Contractor shall promptly establish either a firm fixed price or a profit adjustment formula for determining final profit, as follows:

(1) The parties shall negotiate a total firm target cost, based upon the data submitted under paragraph (c) of this section.

(2) If the total firm target cost is more than the total initial target cost, the total initial target profit shall be decreased. If the total firm target cost is less than the total initial target cost, the total initial target profit shall be increased. The initial target profit shall be increased or decreased by _____ percent *[see Note 2]* of the difference between the total initial target cost and the total firm target cost. The resulting amount shall be the total firm target profit; *provided*, that in no event shall the total firm target profit be less than _____ percent or more than _____ percent [*Contracting Officer insert percents*] of the total initial target cost.

(3) If the total firm target cost plus the total firm target profit represent a reasonable price for performing that part of the contract subject to price revision under this clause, the parties may agree on a firm fixed price, which shall be evidenced by a contract modification signed by the Contractor and the Contracting Officer.

(4) Failure of the parties to agree to a firm fixed price shall not constitute a dispute under the Disputes clause. If agreement is not reached, or if establishment of a firm fixed price is inappropriate, the Contractor and the Contracting Officer shall establish a profit adjustment formula under which the total final price shall be established by applying to the total final negotiated cost an adjustment for profit or loss, determined as follows:

(i) If the total final negotiated cost is equal to the total firm target cost, the adjustment is the total firm target profit.

(ii) If the total final negotiated cost is greater than the total firm target cost, the adjustment is the total firm target profit, less _____ percent of the amount by which the total final negotiated cost exceeds the total firm target cost.

(iii) If the total final negotiated cost is less than the total firm target cost, the adjustment is the total firm target profit, plus _____ percent of the amount by which the total final negotiated cost is less than the total firm target cost.

(iv) The total firm target cost, total firm target profit, and the profit adjustment formula for determining final profit shall be evidenced by a modification to this contract signed by the Contractor and the Contracting Officer.

(e) *Submitting data for final price revision*. Unless a firm fixed price has been established in accordance with paragraph (d) of this section within _____ *[Contracting Officer insert number of days]* days after the end of the month in which the Contractor has delivered the last unit of supplies and completed the services specified by item number in paragraph (a) of this section, the Contractor shall submit in the format of Table 15-1, FAR 15.408 (or in any other form on which the parties agree)-

(1) A detailed statement of all costs incurred up to the end of that month in performing all work under the items;

(2) An estimate of costs of further performance, if any, that may be necessary to complete performance of all work under the items;

(3) A list of all residual inventory and an estimate of its value; and

(4) Any other relevant data that the Contracting Officer may reasonably require.

(f) *Final price revision*. Unless a firm fixed price has been agreed to in accordance with paragraph (d) of this section, the Contractor and the Contracting Officer shall, promptly after submission of the data required by paragraph (e) of this section, establish the total final price, as follows:

(1) On the basis of the information required by paragraph (e) of this section, together with any other pertinent information, the parties shall negotiate the total final cost incurred or to be incurred for the supplies delivered (or services performed) and accepted by the Government and which are subject to price revision under this clause.

(2) The total final price shall be established by applying to the total final negotiated cost an adjustment for final profit or loss determined as agreed upon under paragraph (d)(4) of this section.

(g) *Contract modification*. The total final price of the items specified in paragraph (a) of this section shall be evidenced by a modification to this contract, signed by the Contractor and the Contracting Officer. This price shall not be subject to revision, notwithstanding any changes in the cost of performing the contract, except to the extent that-

(1) The parties may agree in writing, before the determination of total final price, to exclude specific elements of cost from this price and to a procedure for subsequent disposition of these elements; and

(2) Adjustments or credits are explicitly permitted or required by this or any other clause in this contract.

(h) Adjustment of billing prices. (1) Pending execution of the contract modification (see paragraph (e) of this section), the Contractor shall submit invoices or vouchers in accordance with billing prices as provided in this paragraph. The billing prices shall be the initial target prices shown in this contract until firm target prices are established under paragraph (d) of this section. When established, the firm target prices shall be used as the billing prices.

(2) If at any time it appears from information provided by the contractor under paragraph (i)(1) of this section that the then-current billing prices will be substantially greater than the estimated final prices, the parties shall negotiate a reduction in the billing prices. Similarly, the parties may negotiate an increase in billing prices by any or all of the difference between the target prices and the ceiling price, upon the Contractor's submission of factual data showing that the final cost under this contract will be substantially greater than the target cost.

(3) Any adjustment of billing prices shall be reflected in a contract modification and shall not affect the determination of any price under paragraph (d) or (f) of this section. After the contract modification establishing the total final price is executed, the total amount paid or to be paid on all invoices or vouchers shall be adjusted to reflect the total final price, and any resulting additional payments, refunds, or credits shall be made promptly.

(i) *Quarterly limitation on payments statement*. This paragraph (i) shall apply until a firm fixed price or a total final price is established under paragraph (d)(3) or (f)(2).

(1) Within 45 days after the end of each quarter of the Contractor's fiscal year in which a delivery is first made (or services are first performed) and accepted by the Government under this contract, and for each quarter thereafter, the Contractor shall submit to the contract administration office (with a copy to the contracting office and the cognizant contract auditor) a statement, cumulative from the beginning of the contract, showing-

(i) The total contract price of all supplies delivered (or services performed) and accepted by the Government and for which final prices have been established;

(ii) The total cost (estimated to the extent necessary) reasonably incurred for, and properly allocable solely to, the supplies delivered (or services performed) and accepted by the Government and for which final prices have not been established;

(iii) The portion of the total interim profit (used in establishing the initial contract price or agreed to for the purpose of this paragraph (i)) that is in direct proportion to the supplies delivered (or services performed) and accepted by the Government and for which final prices have not been established-increased or decreased in accordance with paragraph (d)(4) of this section when the amount stated under subdivision (ii) of this section, differs from the aggregate firm target costs of the supplies or services; and

(iv) The total amount of all invoices or vouchers for supplies delivered (or services performed) and accepted by the Government (including amounts applied or to be applied to liquidate progress payments).

(2) Notwithstanding any provision of this contract authorizing greater payments, if on any quarterly statement the amount under subdivision (i)(1)(iv) of this section exceeds the sum due the Contractor, as computed in accordance with subdivisions (i)(1)(i), (ii), and (iii) of this section, the Contractor shall immediately refund or credit to the Government the

amount of this excess. The Contractor may, when appropriate, reduce this refund or credit by the amount of previous refunds or credits effected under this clause. If any portion of the excess has been applied to the liquidation of progress payments, then that portion may, instead of being refunded, be added to the unliquidated progress payment account consistent with the Progress Payments clause. The Contractor shall provide complete details to support any claimed reductions in refunds.

(3) If the Contractor fails to submit the quarterly statement within 45 days after the end of each quarter and it is later determined that the Government has overpaid the Contractor, the Contractor shall repay the excess to the Government immediately. Unless repaid within 30 days after the end of the statement submittal period, the amount of the excess shall bear interest, computed from the date the quarterly statement was due to the date of repayment, at the rate established in accordance with the Interest clause.

(j) *Subcontracts*. No subcontract placed under this contract may provide for payment on a cost-plus-a-percentage-of-cost basis.

(k) *Disagreements*. If the Contractor and the Contracting Officer fail to agree upon (1)a total firm target cost and a final profit adjustment formula or (2)a total final price, within 60 days (or within such other period as the Contracting Officer may specify) after the date on which the data required in paragraphs (c) and (e) of this section are to be submitted, the Contracting Officer shall promptly issue a decision in accordance with the Disputes clause.

(l) *Termination*. If this contract is terminated before the total final price is established, prices of supplies or services subject to price revision shall be established in accordance with this clause for (1) completed supplies and services accepted by the Government and (2) those supplies or services not terminated under a partial termination. All other elements of the termination shall be resolved in accordance with other applicable clauses of this contract.

(m) *Equitable adjustments under other clauses*. If an equitable adjustment in the contract price is made under any other clause of this contract before the total final price is established, the adjustment shall be made in the total target cost and may be made in the maximum dollar limit on the total final price, the total target profit, or both. If the adjustment is made after the total final price is established, only the total final price shall be adjusted.

(n) *Exclusion from target price and total final price.* If any clause of this contract provides that the contract price does not or will not include an amount for a specific purpose, then neither any target price nor the total final price includes or will include any amount for that purpose.

(o) *Separate reimbursement*. If any clause of this contract expressly provides that the cost of performance of an obligation shall be at Government expense, that expense shall not be included in any target price or in the total final price, but shall be reimbursed separately.

(p) *Taxes*. As used in the Federal, State, and Local Taxes clause or in any other clause that provides for certain taxes or duties to be included in, or excluded from, the contract price, the term "contract price" includes the total target price or, if it has been established, the total final price. When any of these clauses requires that the contract price be increased or decreased as a result of changes in the obligation of the Contractor to pay or bear the burden of certain taxes or duties, the increase or decrease shall be made in the total target price or, if it has been established, in the total final price, so that it will not affect the Contractor’s profit or loss on this contract.

Notes:

(1) The degree of completion may be based on a percentage of contract performance or any other reasonable basis.

(2) The language may be changed to describe a negotiated adjustment pattern under which the extent of adjustment is not the same for all levels of cost variation.

(End of clause)

Alternate I (APR 1984). As prescribed in 16.406 (b), add the following paragraph (q) to the basic clause:

(q) *Provisioning and options*. Parts, other supplies, or services that are to be furnished under this contract on the basis of a provisioning document or Government option shall be subject to price revision in accordance with this clause. Any prices established for these parts, other supplies, or services under a provisioning document or Government option shall be treated as initial target prices, or target prices as agreed upon and stipulated in the pricing document supporting the provisioning or added items. Initial or firm target costs and profits and final prices covering these parts, other supplies, or services may be established separately, in the aggregate, or in any combination, as the parties may agree.

52.216-18 Ordering.

As prescribed in 16.505(a), insert the following clause:

ORDERING (AUG 2020)

(a) Any supplies and services to be furnished under this contract shall be ordered by issuance of delivery orders or task orders by the individuals or activities designated in the Schedule. Such orders may be issued from _____ through _____ *[insert dates]*.

(b) All delivery orders or task orders are subject to the terms and conditions of this contract. In the event of conflict between a delivery order or task order and this contract, the contract shall control.

(c) A delivery order or task order is considered "issued" when—

(1) If sent by mail (includes transmittal by U.S. mail or private delivery service), the Government deposits the order in the mail;

(2) If sent by fax, the Government transmits the order to the Contractor's fax number; or

(3) If sent electronically, the Government either—

(i) Posts a copy of the delivery order or task order to a Government document access system, and notice is sent to the Contractor; or

(ii) Distributes the delivery order or task order via email to the Contractor's email address.

(d) Orders may be issued by methods other than those enumerated in this clause only if authorized in the contract.

(End of clause)

52.216-19 Order Limitations.

As prescribed in 16.505(b), insert a clause substantially the same as follows:

ORDER LIMITATIONS (OCT 1995)

(a) *Minimum order*. When the Government requires supplies or services covered by this contract in an amount of less than _____ *[insert dollar figure or quantity]*, the Government is not obligated to purchase, nor is the Contractor obligated to furnish, those supplies or services under the contract.

(b) *Maximum order*. The Contractor is not obligated to honor-

(1) Any order for a single item in excess of _____ *[insert dollar figure or quantity]*;

(2) Any order for a combination of items in excess of _____ *[insert dollar figure or quantity]*; or

(3) A series of orders from the same ordering office within _____ days that together call for quantities exceeding the limitation in paragraph (b)(1) or (2) of this section.

(c) If this is a requirements contract (*i.e.,* includes the Requirements clause at subsection 52.216-21 of the Federal Acquisition Regulation (FAR)), the Government is not required to order a part of any one requirement from the Contractor if that requirement exceeds the maximum-order limitations in paragraph (b) of this section.

(d) Notwithstanding paragraphs (b) and (c) of this section, the Contractor shall honor any order exceeding the maximum order limitations in paragraph (b), unless that order (or orders) is returned to the ordering office within _____ days after issuance, with written notice stating the Contractor’s intent not to ship the item (or items) called for and the reasons. Upon receiving this notice, the Government may acquire the supplies or services from another source.

(End of clause)

52.216-20 Definite Quantity.

As prescribed in 16.505(c), insert the following clause:

DEFINITE QUANTITY (OCT 1995)

(a) This is a definite-quantity, indefinite-delivery contract for the supplies or services specified, and effective for the period stated, in the Schedule.

(b) The Government shall order the quantity of supplies or services specified in the Schedule, and the Contractor shall furnish them when ordered. Delivery or performance shall be at locations designated in orders issued in accordance with the Ordering clause and the Schedule.

(c) Except for any limitations on quantities in the Order Limitations clause or in the Schedule, there is no limit on the number of orders that may be issued. The Government may issue orders requiring delivery to multiple destinations or performance at multiple locations.

(d) Any order issued during the ordering period of this contract and not completed within that time shall be completed by the Contractor within the time specified in the order. The contract shall govern the Contractor's and Government's rights and obligations with respect to that order to the same extent as if the order were completed during the contract's effective period; provided, that the Contractor shall not be required to make any deliveries under this contract after _____ *[insert date]*.

(End of clause)

52.216-21 Requirements.

As prescribed in 16.505(d), insert the following clause:

REQUIREMENTS (DEVIATION DATE)

(a) This is a requirements contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies or services specified in the Schedule are estimates only and are not purchased by this contract. Except as this contract may otherwise provide, if the Government's requirements do not result in orders in the quantities described as "estimated" or "maximum" in the Schedule, that fact shall not constitute the basis for an equitable price adjustment.

(b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. Subject to any limitations in the Order Limitations clause or elsewhere in this contract, the Contractor shall furnish to the Government all supplies or services specified in the Schedule and called for by orders issued in accordance with the Ordering clause. The Government may issue orders requiring delivery to multiple destinations or performance at multiple locations.

(c) Except as this contract otherwise provides, the Government shall order from the Contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule.

(d) The Government is not required to purchase from the Contractor requirements in excess of any limit on total orders under this contract.

(e) If the Government urgently requires delivery of any quantity of an item before the earliest date that delivery may be specified under this contract, and if the Contractor will not accept an order providing for the accelerated delivery, the Government may acquire the urgently required goods or services from another source.

(f) Any order issued during the ordering period of this contract and not completed within that period shall be completed by the Contractor within the time specified in the order. The contract shall govern the Contractor's and Government's rights and obligations with respect to that order to the same extent as if the order were completed during the contract's ordering period; *provided*, that the Contractor shall not be required to make any deliveries under this contract after _____ *[insert date]*.

Alternate I (Apr1984). As prescribed in 16.505(d)(2), substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) The estimated quantities are not the total requirements of the Government activity specified in the Schedule, but are estimates of requirements in excess of the quantities that the activity may itself furnish within its own capabilities. Except as this contract otherwise provides, the Government shall order from the Contractor all of that activity's requirements for supplies and services specified in the Schedule that exceed the quantities that the activity may itself furnish within its own capabilities.

Alternate II (APR 1984). As prescribed in 16.505(d)(3), add the following paragraph (g) to the basic clause:

(g) The requirements referred to in this contract are for items to be manufactured according to Government specifications. Notwithstanding anything to the contrary stated in the contract, the Government may acquire similar products by brand name from other sources for resale.

Alternate III (OCT 1995). As prescribed in 16.505(d)(4), substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) The Government's requirements for each item or subitem of supplies or services described in the Schedule are being purchased through one non-set-aside contract and one set-aside contract. Therefore, the Government shall order from each

Contractor approximately one-half of the total supplies or services specified in the Schedule that are required to be purchased by the specified Government activity or activities. The Government may choose between the set-aside Contractor and the non-set-aside Contractor in placing any particular order. However, the Government shall allocate successive orders, in accordance with its delivery requirements, to maintain as close a ratio as is reasonably practicable between the total quantities ordered from the two Contractors.

Alternate IV (OCT 1995). As prescribed in 16.505(d)(5), substitute the following paragraph (c) for paragraph (c) of the basic clause and add the following paragraph (g) to the basic clause:

(c) The Government's requirements for each item or subitem of supplies or services described in the Schedule are being purchased through one non-set-aside contract and one set-aside contract. Therefore, the Government shall order from each Contractor approximately one-half of the total supplies or services specified in the Schedule that are required to be purchased by the specified Government activity or activities. The Government may choose between the set-aside Contractor and the non-set-aside Contractor in placing any particular order. However, the Government shall allocate successive orders, in accordance with its delivery requirements, to maintain as close a ratio as is reasonably practicable between the total quantities ordered from the two Contractors.

(g) The requirements referred to in this contract are for items to be manufactured according to the Government specifications. Notwithstanding anything to the contrary stated in the contract, the Government may acquire similar products by brand name from other sources for resale.

52.216-22 Indefinite Quantity.

As prescribed in 16.505(e), insert the following clause:

INDEFINITE QUANTITY (DEVIATION DATE)

(a) This is an indefinite-quantity contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract.

(b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. The Contractor shall furnish to the Government, when and if ordered, the supplies or services specified in the Schedule up to and including the quantity designated in the Schedule as the "maximum." The Government shall order at least the quantity of supplies or services designated in the Schedule as the "minimum."

(c) Except for any limitations on quantities in the Order Limitations clause or in the Schedule, there is no limit on the number of orders that may be issued. The Government may issue orders requiring delivery to multiple destinations or performance at multiple locations.

(d) Any order issued during the ordering period of this contract and not completed within that period shall be completed by the Contractor within the time specified in the order, which may include order options to be exercised after the ordering period of this contract but before the end of the period of performance of the order. The contract shall govern the Contractor's and Government's rights and obligations with respect to that order, including options exercised, to the same extent as if the order were completed during the contract's ordering period; provided, that the Contractor shall not be required to make any deliveries under this contract after _____ *[insert date]*.

(End of clause)

Alternate I (DEVIATION DATE). As prescribed in 16.505(e)(1), add a paragraph (e) substantially the same as the following to the basic clause:

(e) 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 either party makes such notification, no further orders may be issued against the contract, but orders already awarded will be completed unless a termination action is taken against the order. If the Contractor elects to cancel this contract, the Government will not reimburse the minimum guarantee.

Alternate II (DEVIATION DATE). As prescribed in 16.505(e)(2), add paragraphs (e) and (f) substantially the same as the following to the basic clause:

(e) The Government may cancel this contract in whole or in part by providing written notice. The cancellation will take effect 30 calendar days after the contractor receives the notice of cancellation. No further orders may be issued against the contract, but orders already awarded will be completed unless a termination action is taken against the order.

(f) The Contractor may request to cancel this contract by submitting a written cancellation request to the contracting officer. The cancellation will take effect 30 calendar days after the Government receives the cancellation request, unless the contracting officer informs the contractor, before cancellation is effective, that cancellation is not approved. A contractor who requests cancellation is not eligible for the minimum guarantee. If cancelled, no further orders may be issued against the contract, but orders already awarded will be completed unless a termination action is taken against the order.

52.216-23 Execution and Commencement of Work.

As prescribed in 16.603-4(b)(1), insert the following clause:

EXECUTION AND COMMENCEMENT OF WORK (APR 1984)

The Contractor shall indicate acceptance of this letter contract by signing three copies of the contract and returning them to the Contracting Officer not later than _____ *[insert date]*. Upon acceptance by both parties, the Contractor shall proceed with performance of the work, including purchase of necessary materials.

(End of clause)

52.216-24 Limitation of Government Liability.

As prescribed in 16.603-4(b)(2), insert the following clause:

LIMITATION OF GOVERNMENT LIABILITY (APR 1984)

(a) In performing this contract, the Contractor is not authorized to make expenditures or incur obligations exceeding _____ dollars.

(b) The maximum amount for which the Government shall be liable if this contract is terminated is _____ dollars.

(End of clause)

52.216-25 Contract Definitization.

As prescribed in 16.603-4(b)(3), insert the following clause:

CONTRACT DEFINITIZATION (DEVIATION DATE)

(a) A _____ *[insert specific type of contract]* definitive contract is contemplated. The Contractor agrees to begin promptly negotiating with the Contracting Officer the terms of a definitive contract that will include (1) all clauses required by the Federal Acquisition Regulation (FAR) on the date of execution of the letter contract, (2) all clauses required by law on the date of execution of the definitive contract, and (3) any other mutually agreeable clauses, terms, and conditions. The Contractor agrees to submit a _____ *[insert specific type of proposal (e.g., fixed-price or cost-and-fee)]* proposal, including data other than certified cost or pricing data, and certified cost or pricing data, in accordance with FAR 15.408, Table 15-1, supporting its proposal.

(b) The schedule for definitizing this contract is *[insert target date for definitization of the contract and dates for submission of proposal, beginning of negotiations, and, if appropriate, submission of make-or-buy and subcontracting plans and certified cost or pricing data]:*

_____

_____

(c) If agreement on a definitive contract to supersede this letter contract is not reached by the target date in paragraph (b) of this section, or within any extension of it granted by the Contracting Officer, the Contracting Officer may, with the approval of the head of the contracting activity, determine a reasonable price or fee in accordance with subpart 15.4 and part 31 of the FAR, subject to Contractor appeal as provided in the Disputes clause. In any event, the Contractor shall proceed with completion of the contract, subject only to the Limitation of Government Liability clause.

(1) After the Contracting Officer's determination of price or fee, the contract shall be governed by-

(i) All clauses required by the FAR on the date of execution of this letter contract for either fixed-price or cost-reimbursement contracts, as determined by the Contracting Officer under this paragraph (c);

(ii) All clauses required by law as of the date of the Contracting Officer's determination; and

(iii) Any other clauses, terms, and conditions mutually agreed upon.

(2) To the extent consistent with paragraph (c)(1) of this section, all clauses, terms, and conditions included in this letter contract shall continue in effect, except those that by their nature apply only to a letter contract.

(End of clause)

Alternate I (APR 1984). As prescribed in 16.603-4(b)(3), add the following paragraph (d) to the basic clause:

(d) The definitive contract resulting from this letter contract will include a negotiated _____ *[insert "price ceilin"g or "firm fixed pric"e]* in no event to exceed _____ *[insert the proposed price upon which the award was based]*.

52.216-26 Payments of Allowable Costs Before Definitization.

As prescribed in 16.603-4(c), insert the following clause:

PAYMENTS OF ALLOWABLE COSTS BEFORE DEFINITIZATION (DEC 2002)

(a) *Reimbursement rate*. Pending the placing of the definitive contract referred to in this letter contract, the Government will promptly reimburse the Contractor for all allowable costs under this contract at the following rates:

(1) One hundred percent of approved costs representing financing payments to subcontractors under fixed-price subcontracts, provided that the Government's payments to the Contractor will not exceed 80 percent of the allowable costs of those subcontractors.

(2) One hundred percent of approved costs representing cost-reimbursement subcontracts; *provided*, that the Government's payments to the Contractor shall not exceed 85 percent of the allowable costs of those subcontractors.

(3) Eighty-five percent of all other approved costs.

(b) *Limitation of reimbursement*. To determine the amounts payable to the Contractor under this letter contract, the Contracting Officer shall determine allowable costs in accordance with the applicable cost principles in part 31 of the Federal Acquisition Regulation (FAR). The total reimbursement made under this paragraph shall not exceed 85 percent of the maximum amount of the Government's liability, as stated in this contract.

(c) *Invoicing*. Payments shall be made promptly to the Contractor when requested as work progresses, but (except for small business concerns) not more often than every 2 weeks, in amounts approved by the Contracting Officer. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost incurred by the Contractor in the performance of this contract.

(d) *Allowable costs*. For the purpose of determining allowable costs, the term "costs" includes-

(1) Those recorded costs that result, at the time of the request for reimbursement, from payment by cash, check, or other form of actual payment for items or services purchased directly for the contract;

(2) When the Contractor is not delinquent in payment of costs of contract performance in the ordinary course of business, costs incurred, but not necessarily paid, for-

(i) Supplies and services purchased directly for the contract and associated financing payments to subcontractors, provided payments determined due will be made-

(A) In accordance with the terms and conditions of a subcontract or invoice; and

(B) Ordinarily within 30 days of the submission of the Contractor's payment request to the Government;

(ii) Materials issued from the Contractor's stores inventory and placed in the production process for use on the contract;

(iii) Direct labor;

(iv) Direct travel;

(v) Other direct in-house costs; and

(vi) Properly allocable and allowable indirect costs as shown on the records maintained by the Contractor for purposes of obtaining reimbursement under Government contracts; and

(3) The amount of financing payments that the Contractor has paid by cash, check, or other forms of payment to subcontractors.

(e) *Small business concerns*. A small business concern may receive more frequent payments than every 2 weeks.

(f) *Audit*. At any time before final payment, the Contracting Officer may have the Contractor's invoices or vouchers and statements of costs audited. Any payment may be-

(1) Reduced by any amounts found by the Contracting Officer not to constitute allowable costs; or

(2) Adjusted for overpayments or underpayments made on preceding invoices or vouchers.

(End of clause)

52.216-27 Single or Multiple Awards.

As prescribed in 16.505(f), insert the following provision:

SINGLE OR MULTIPLE AWARDS (OCT 1995)

The Government may elect to award a single delivery order contract or task order contract or to award multiple delivery order contracts or task order contracts for the same or similar supplies or services to two or more sources under this solicitation.

(End of provision)

52.216-28 Multiple Awards for Advisory and Assistance Services.

As prescribed in 16.505(g), insert the following provision:

MULTIPLE AWARDS FOR ADVISORY AND ASSISTANCE SERVICES (OCT 1995)

The Government intends to award multiple contracts for the same or similar advisory and assistance services to two or more sources under this solicitation unless the Government determines, after evaluation of offers, that only one offeror is capable of providing the services at the level of quality required.

(End of provision)

52.216-29 Time-and-Materials/Labor-Hour Proposal Requirements—Other Than Commercial Acquisition With Adequate Price Competition.

As prescribed in 16.601-4(a), insert the following provision:

TIME-AND-MATERIALS/LABOR-HOUR PROPOSAL REQUIREMENTS—OTHER THAN COMMERCIAL ACQUISITION WITH ADEQUATE PRICE COMPETITION (NOV 2021)

(a) The Government contemplates award of a Time-and-Materials or Labor-Hour type of contract resulting from this solicitation.

(b) The offeror must specify fixed hourly rates in its offer that include wages, overhead, general and administrative expenses, and profit. The offeror must specify whether the fixed hourly rate for each labor category applies to labor performed by-

(1) The offeror;

(2) Subcontractors; and/or

(3) Divisions, subsidiaries, or affiliates of the offeror under a common control;

(c) The offeror must establish fixed hourly rates using-

(1) Separate rates for each category of labor to be performed by each subcontractor and for each category of labor to be performed by the offeror, and for each category of labor to be transferred between divisions, subsidiaries, or affiliates of the offeror under a common control;

(2) Blended rates for each category of labor to be performed by the offeror, including labor transferred between divisions, subsidiaries, or affiliates of the offeror under a common control, and all subcontractors; or

(3) Any combination of separate and blended rates for each category of labor to be performed by the offeror, affiliates of the offeror under a common control, and subcontractors.

(End of provision)

52.216-30 Time-and-Materials/Labor-Hour Proposal Requirements—Other Than Commercial Acquisition Without Adequate Price Competition.

As prescribed in 16.601-4(b), insert the following provision:

TIME-AND-MATERIALS/LABOR-HOUR PROPOSAL REQUIREMENTS—OTHER THAN COMMERCIAL ACQUISITION WITHOUT ADEQUATE PRICE COMPETITION (NOV 2021)

(a) The Government contemplates award of a Time-and-Materials or Labor-Hour type of contract resulting from this solicitation.

(b) The offeror must specify separate fixed hourly rates in its offer that include wages, overhead, general and administrative expenses, and profit for each category of labor to be performed by-

(1) The offeror;

(2) Each subcontractor; and

(3) Each division, subsidiary, or affiliate of the offeror under a common control.

(c) Unless exempt under paragraph (d) of this provision, the fixed hourly rates for services transferred between divisions, subsidiaries, or affiliates of the offeror under a common control-

(1) Shall not include profit for the transferring organization; but

(2) May include profit for the prime Contractor.

(d) The fixed hourly rates for services that meet the definition of "commercial service" at Federal Acquisition Regulation 2.101 that are transferred between divisions, subsidiaries, or affiliates of the offeror under a common control may be the established catalog or market rate when it is the established practice of the transferring organization to price interorganizational transfers at other than cost for commercial work of the offeror or any division, subsidiary or affiliate of the offeror under a common control.

(End of provision)

52.216-31 Time-and-Materials/Labor-Hour Proposal Requirements—Commercial Acquisition.

As prescribed in 16.601-4(c), insert the following provision:

TIME-AND-MATERIALS/LABOR-HOUR PROPOSAL REQUIREMENTS—COMMERCIAL ACQUISITION (NOV 2021)

(a) The Government contemplates award of a Time-and-Materials or Labor-Hour type of contract resulting from this solicitation.

(b) The offeror must specify fixed hourly rates in its offer that include wages, overhead, general and administrative expenses, and profit. The offeror must specify whether the fixed hourly rate for each labor category applies to labor performed by-

(1) The offeror;

(2) Subcontractors; and/or

(3) Divisions, subsidiaries, or affiliates of the offeror under a common control.

(End of provision)

52.216-32 Task-Order and Delivery-Order Ombudsman.

As prescribed in 16.505(j), insert the following clause:

TASK-ORDER AND DELIVERY-ORDER OMBUDSMAN (SEPT 2019)

(a) In accordance with 41 U.S.C. 4106(g), the Agency has designated the following task-order and delivery-order Ombudsman for this contract. The Ombudsman must review complaints from the Contractor concerning all task-order and delivery-order actions for this contract and ensure the Contractor is afforded a fair opportunity for consideration in the award of orders, consistent with the procedures in the contract. _____ *[Contracting Officer to insert name, address, telephone number, and email address for the Agency Ombudsman or provide the URL address where this information may be found.]*

(b) Consulting an ombudsman does not alter or postpone the timeline for any other process (e.g., protests).

(c) Before consulting with the Ombudsman, the Contractor is encouraged to first address complaints with the Contracting Officer for resolution. When requested by the Contractor, the Ombudsman may keep the identity of the concerned party or entity confidential, unless prohibited by law or agency procedure.

(End of clause)

Alternate I (SEPT 2019). As prescribed in 16.505 (j), add the following paragraph (d) to the basic clause.

(d) Contracts used by multiple agencies.

(1) This is a contract that is used by multiple agencies. Complaints from Contractors concerning orders placed under contracts used by multiple agencies are primarily reviewed by the task-order and delivery-order Ombudsman for the ordering activity.

(2) The ordering activity has designated the following task-order and delivery-order Ombudsman for this order: _____ *[The ordering activity's contracting officer to insert the name, address, telephone number, and email address for the ordering activity's Ombudsman or provide the URL address where this information may be found.]*

(3) Before consulting with the task-order and delivery-order Ombudsman for the ordering activity, the Contractor is encouraged to first address complaints with the ordering activity's Contracting Officer for resolution. When requested by the Contractor, the task-order and delivery-order Ombudsman for the ordering activity may keep the identity of the concerned party or entity confidential, unless prohibited by law or agency procedure.

(End of clause)

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52.217 [Reserved]

52.217-1 [Reserved]

52.217-2 Cancellation Under Multiyear Contracts.

As prescribed in 17.106(a), insert the following clause:

CANCELLATION UNDER MULTIYEAR CONTRACTS (OCT 1997)

(a) "Cancellation," as used in this clause, means that the Government is canceling its requirements for all supplies or services in program years subsequent to that in which notice of cancellation is provided. Cancellation shall occur by the date or within the time period specified in the Schedule, unless a later date is agreed to, if the Contracting Officer-

(1) Notifies the Contractor that funds are not available for contract performance for any subsequent program year; or

(2) Fails to notify the Contractor that funds are available for performance of the succeeding program year requirement.

(b) Except for cancellation under this clause or termination under the Default clause, any reduction by the Contracting Officer in the requirements of this contract shall be considered a termination under the Termination for Convenience of the Government clause.

(c) If cancellation under this clause occurs, the Contractor will be paid a cancellation charge not over the cancellation ceiling specified in the Schedule as applicable at the time of cancellation.

(d) The cancellation charge will cover only-

(1) Costs-

(i) Incurred by the Contractor and/or subcontractor;

(ii) Reasonably necessary for performance of the contract; and

(iii) That would have been equitably amortized over the entire multiyear contract period but, because of the cancellation, are not so amortized; and

(2) A reasonable profit or fee on the costs.

(e) The cancellation charge shall be computed and the claim made for it as if the claim were being made under the Termination for Convenience of the Government clause of this contract. The Contractor shall submit the claim promptly but no later than 1 year from the date-

(1) Of notification of the nonavailability of funds; or

(2) Specified in the Schedule by which notification of the availability of additional funds for the next succeeding program year is required to be issued, whichever is earlier, unless extensions in writing are granted by the Contracting Officer.

(f) The Contractor's claim may include-

(1) Reasonable nonrecurring costs (see part 15 of the Federal Acquisition Regulation) which are applicable to and normally would have been amortized in all supplies or services which are multiyear requirements;

(2) Allocable portions of the costs of facilities acquired or established for the conduct of the work, to the extent that it is impracticable for the Contractor to use the facilities in its commercial work, and if the costs are not charged to the contract through overhead or otherwise depreciated;

(3) Costs incurred for the assembly, training, and transportation to and from the job site of a specialized work force; and

(4) Costs not amortized solely because the cancellation had precluded anticipated benefits of Contractor or subcontractor learning.

(g) The claim shall not include-

(1) Labor, material, or other expenses incurred by the Contractor or subcontractors for performance of the canceled work;

(2) Any cost already paid to the Contractor;

(3) Anticipated profit or unearned fee on the canceled work; or

(4) For service contracts, the remaining useful commercial life of facilities. "Useful commercial life" means the commercial utility of the facilities rather than their physical life with due consideration given to such factors as location of facilities, their specialized nature, and obsolescence.

(h) This contract may include an Option clause with the period for exercising the option limited to the date in the contract for notification that funds are available for the next succeeding program year. If so, the Contractor agrees not to include in option quantities any costs of a startup or nonrecurring nature that have been fully set forth in the contract. The Contractor

further agrees that the option quantities will reflect only those recurring costs and a reasonable profit or fee necessary to furnish the additional option quantities.

(i) Quantities added to the original contract through the Option clause of this contract shall be included in the quantity canceled for the purpose of computing allowable cancellation charges.

(End of clause)

52.217-3 Evaluation Exclusive of Options.

As prescribed in 17.203(a), insert a provision substantially the same as the following:

EVALUATION EXCLUSIVE OF OPTIONS (APR 1984)

The Government will evaluate offers for award purposes by including only the price for the basic requirement; *i.e.*, options will not be included in the evaluation for award purposes.

(End of provision)

52.217-4 Evaluation of Options Exercised at Time of Contract Award.

As prescribed in 17.203(b), insert a provision substantially the same as the following:

EVALUATION OF OPTIONS EXERCISED AT TIME OF CONTRACT AWARD (DEVIATION DATE)

Except when it is determined in accordance with FAR 17.202(b) not to be in the Government's best interests, the Government will evaluate the total price for the basic requirement together with any option(s) exercised at the time of award.

(End of provision)

52.217-5 Evaluation of Options.

As prescribed in 17.203(c), insert a provision substantially the same as the following:

EVALUATION OF OPTIONS (DEVIATION DATE)

Except when it is determined in accordance with FAR 17.202(b) not to be in the Government's best interests, the Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. Evaluation of options will not obligate the Government to exercise the option(s).

(End of provision)

52.217-6 Option for Increased Quantity.

As prescribed in 17.203(d), insert a clause substantially the same as the following:

OPTION FOR INCREASED QUANTITY (MAR 1989)

The Government may increase the quantity of supplies called for in the Schedule at the unit price specified. The Contracting Officer may exercise the option by written notice to the Contractor within _____ *[insert in the clause the period of time in which the Contracting Officer has to exercise the option]*. Delivery of the added items shall continue at the same rate as the like items called for under the contract, unless the parties otherwise agree.

(End of clause)

52.217-7 Option for Increased Quantity-Separately Priced Line Item.

As prescribed in 17.203(e), insert a clause substantially the same as the following:

OPTION FOR INCREASED QUANTITY-SEPARATELY PRICED LINE ITEM (MAR 1989)

The Government may require the delivery of the numbered line item, identified in the Schedule as an option item, in the quantity and at the price stated in the Schedule. The Contracting Officer may exercise the option by written notice to the Contractor within _____ *[insert in the clause the period of time in which the Contracting Officer has to exercise the option]*. Delivery of added items shall continue at the same rate that like items are called for under the contract, unless the parties otherwise agree.

(End of clause)

52.217-8 Option to Extend Services.

As prescribed in 17.203(f), insert a clause substantially the same as the following:

OPTION TO EXTEND SERVICES (NOV 1999)

The Government may require continued performance of any services within the limits and at the rates specified in the contract. These rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed 6 months. The Contracting Officer may exercise the option by written notice to the Contractor within _____ *[insert the period of time within which the Contracting Officer may exercise the option]*.

(End of clause)

52.217-9 Option to Extend the Term of the Contract.

As prescribed in 17.203(g), insert a clause substantially the same as the following:

OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 2000)

(a) The Government may extend the term of this contract by written notice to the Contractor within _____ *[insert the period of time within which the Contracting Officer may exercise the option]*; provided that the Government gives the Contractor a preliminary written notice of its intent to extend at least _____ days[*60days unless a different number of days is inserted*] before the contract expires. The preliminary notice does not commit the Government to an extension.

(b) If the Government exercises this option, the extended contract shall be considered to include this option clause.

(c) The total duration of this contract, including the exercise of any options under this clause, shall not exceed _____ *(months) (years)*.

(End of clause)

52.217-10 Reverse Auction

As prescribed in 17.804(a), insert the following provision:

REVERSE AUCTION (AUG 2024)

(a) *Definitions.* As used in this provision—

Reverse auction means the process for obtaining pricing, usually supported by an electronic tool, in which offerors see competing offerors' price(s), without disclosure of the competing offerors' identity, and have the opportunity to submit lower priced offers until the close of the auction.

Reverse auction service provider means a commercial or Government entity that provides a means for conducting reverse auctions when acquiring supplies or services to be used by the Government.

(b) *Reverse auction.* The Government intends to conduct a reverse auction under this solicitation to award a contract or blanket purchase agreement.

(c) *Offeror agreement.* By submission of a quote or proposal in response to the solicitation, the Offeror agrees to participate in the reverse auction and agrees that the Government may reveal to all Offerors the offered price(s) in the auction,

without revealing any Offeror's identity, except for the awardee's identity subsequent to an award resulting from the auction. The Offeror may withdraw its agreement to further participate in the process by withdrawing its offer before the close of the auction by notifying the Contracting Officer via the contact method identified in the solicitation.

(d) *Only one offer.* If the reverse auction produces only one offer, the Government reserves the right to cancel the auction.

(e) *Release of information.* The Government may use a reverse auction service provider to conduct the reverse auction. Any price or proposal information or source selection information received by the reverse auction service provider in relation to the reverse auction shall not be released, outside of the Government, unless otherwise required by law. However, this does not prevent the Government from revealing to all Offerors the offered price(s) in the auction, without revealing any Offeror's identity. Price or proposal information includes, but is not limited to—

(1) Contractor bid or proposal information, as defined at Federal Acquisition Regulation 3.104-1; and

(2) Information identified by the Offeror as restricted from duplication, use, or disclosure—in whole or in part—for any purpose other than to evaluate the Offeror's price or proposal.

(End of provision)

52.217-11 Reverse Auction—Orders.

As prescribed in 17.804(b), insert the following clause:

REVERSE AUCTION—ORDERS (AUG 2024)

(a) *Definitions.* As used in this clause—

Reverse auction means the process for obtaining pricing, usually supported by an electronic tool, in which offerors see competing offerors' price(s), without disclosure of the competing offerors' identity, and have the opportunity to submit lower priced offers until the close of the auction.

Reverse auction service provider means a commercial or Government entity that provides a means for conducting reverse auctions when acquiring supplies or services to be used by the Government.

(b) *Reverse auction.* The Contracting Officer may conduct a reverse auction to award an order under this contract or blanket purchase agreement.

(c) *Contractor agreement.* When a reverse auction is conducted under this contract or blanket purchase agreement, the following applies:

(1) The Contractor's or blanket purchase agreement holder's submission of a quote or proposal in response to the solicitation for an order constitutes agreement to participate in the auction.

(2) The Contractor agrees that the Government may reveal to all Offerors the offered price(s) in the auction, without revealing any Offerors' identity, except for the awardee's identity subsequent to an award resulting from the auction.

(3) The Contractor or blanket purchase agreement holder may withdraw its agreement to further participate in the reverse auction by withdrawing its offer. To withdraw an offer made in response to a reverse auction solicitation issued under this contract or blanket purchase agreement, the Contractor or blanket purchase agreement holder shall notify the Contracting Officer of the request before the close of the auction via the contact method identified in the solicitation.

(4) If the reverse auction produces only one offer, the Government reserves the right to cancel the auction.

(d) *Release of information.* The Government may use a reverse auction service provider to conduct the reverse auction. Any price or proposal information or source selection information received by the reverse auction service provider in relation to the reverse auction shall not be released, outside of the Government, unless otherwise required by law. However, this does not prevent the Government from revealing to all Contractors or blanket purchase agreement holders the offered price(s) in the auction, without revealing any Contractor or blanket purchase agreement holder's identity. Price or proposal information includes, but is not limited to—

(1) Contractor bid or proposal information, as defined at Federal Acquisition Regulation 3.104-1;

(2) Price or proposal information similarly generated for a task order or delivery order or an order under a blanket purchase agreement; and

(3) Information identified by the Contractor or blanket purchase agreement holder as restricted from duplication, use, or disclosure—in whole or in part—for any purpose other than to evaluate the Contractor or blanket purchase agreement holder's price or proposal.

(End of clause)

52.217-12 Reverse Auction Services.

As prescribed in 17.804(c), insert the following clause:

REVERSE AUCTION SERVICES (AUG 2024)

(a) *Definitions*.

Government data means any information, document, media, or machine-readable material regardless of physical form or characteristics, that is created or obtained by the Government, in the course of official Government business.

Government-related data means any information, document, media, or machine-readable material regardless of physical form or characteristics that is created or obtained by a contractor through the storage, processing, or communication of Government data. This does not include a contractor's business records (*e.g.,* financial records, legal records, etc.) or data such as operating procedures, software coding, or algorithms that are not uniquely applied to the Government data.

Reverse auction means the process for obtaining pricing, usually supported by an electronic tool, in which offerors see competing offerors' price(s), without disclosure of the competing offeror's identity, and have the opportunity to submit lower priced offers until the close of the auction.

(b) *Duties of the reverse auction service provider.* When providing reverse auction services to the Government, the Contractor shall—

(1) Not assert or imply that it can or will obtain a Government contract for the participants of a reverse auction;

(2) Allow entities to register, at no cost, as potential offerors for any reverse auction conducted on behalf of the Government on the provider's reverse auction platform. As part of the registration process, the Contractor shall allow each entity the opportunity to execute a proprietary data protection agreement with the Contractor; however, the Contractor shall not negotiate terms in the agreement that affect the terms and conditions of a Government solicitation or contract;

(3) Limit access to, use of, and disclosure of Government data and Government-related data.

(i) The Contractor shall not access, use, or disclose Government data unless specifically authorized by the terms of this contract or a task order or delivery order issued hereunder.

(ii) If authorized by the terms of this contract or a task order or delivery order issued hereunder, any access to, or use or disclosure of, Government data shall only be for purposes specified in this contract or task order or delivery order.

(iii) The Contractor shall ensure that its employees are subject to all such access, use, and disclosure prohibitions and obligations.

(iv) These access, use, and disclosure prohibitions and obligations shall survive the expiration or termination of this contract.

(v) The Contractor shall notify the Contracting Officer promptly of any requests from a third party for access to Government data or Government-related data, including any warrants, seizures, or subpoenas it receives, including those from another Federal, State, or local agency. The Contractor shall cooperate with the Contracting Officer to take all measures to protect Government data and Government-related data from any unauthorized disclosure.

(4) Assert no right or license in the data gathered or generated during a reverse auction. Use Government-related data only to manage the operational environment that supports the Government data and for no other purpose unless otherwise permitted with the prior written approval of the Contracting Officer.

(5) Protect from unauthorized use or disclosure and not release outside of the Government any price or proposal information or any source selection information (see Federal Acquisition Regulation (FAR) 2.101) received by the Contractor in relation to a reverse auction. Price or proposal information shall include, but is not limited to—

(i) Contractor bid or proposal information, as defined at FAR 3.104-1;

(ii) Price or proposal information similarly generated for a task order or delivery order or an order under a blanket purchase agreement; and

(iii) Information identified by the reverse auction participant as restricted from duplication, use, or disclosure—in whole or in part—for any purpose other than to evaluate the reverse auction participant's price or proposal;

(6) Allow offerors to see the successive lowest price(s) offered in the auction without revealing an offeror's identity;

(7) Not participate as an offeror in any reverse auction, which the Contractor is hosting on behalf of the Government. This prohibition includes participation in a reverse auction by any entity with which the Contractor has a relationship that raises an actual or potential conflict of interest;

(8) At the close of each auction—

(i) Provide the Contracting Officer with the successful offer, along with information that separately identifies the offeror's price and the price for each provider fee or charge included in the total price; and

(ii) Provide the Contracting Officer with all information and documentation received from reverse auction participants in response to the reverse auction.

(End of clause)

52.218 [Reserved]

52.219 [Reserved]

52.219-1 Small Business Program Representations.

As prescribed in 19.101(a)(2)(ii)(A), insert the following provision:

SMALL BUSINESS PROGRAM REPRESENTATIONS (DEVIATION DATE)

(a) *Definitions*. As used in this provision-

Economically disadvantaged women-owned small business (EDWOSB) concern means a small business concern that is at least 51 percent directly and unconditionally owned by, and the management and daily business operations of which are controlled by, one or more women who are citizens of the United States and who are economically disadvantaged in accordance with 13 CFR part 127, and the concern is certified by SBA or an approved third-party certifier in accordance with 13 CFR 127.300. It automatically qualifies as a women-owned small business concern eligible under the WOSB Program.

HUBZone small business concern means a small business concern that meets the requirements described in 13 CFR 126.200, is certified by the Small Business Administration (SBA) and designated by SBA as a HUBZone small business concern in the Small Business Search (SBS) (13 CFR 126.103).

Service-disabled veteran-owned small business (SDVOSB) concern eligible under the SDVOSB Program means an SDVOSB concern that is designated in the System for Award Management (SAM) as certified by the Small Business Administration (SBA) in accordance with 13 CFR 128.300.

Small business concern—

(1) Means a concern, including its affiliates, that is independently owned and operated, not dominant in its field of operation, and qualified as a small business under the criteria in 13 CFR part 121 and the size standard in paragraph (b) of this provision.

(2) *Affiliates*, as used in this definition, means business concerns, one of whom directly or indirectly controls or has the power to control the others, or a third party or parties control or have the power to control the others. In determining whether affiliation exists, consideration is given to all appropriate factors including common ownership, common management, and contractual relationships. SBA determines affiliation based on the factors set forth at 13 CFR 121.103.

Small disadvantaged business concern means a small business concern that-

(1) Is at least 51 percent unconditionally and directly owned (as defined at 13 CFR 124.105) by one or more socially disadvantaged (as defined at 13 CFR 124.103) and economically disadvantaged (as defined at 13 CFR 124.104) individuals who are citizens of the United States, and

(2) The management and daily business operations of which are controlled (as defined at 13 CFR 124.106) by individuals who meet the criteria in paragraph (1) of this definition.

Women-owned small business (WOSB) concern eligible under the WOSB Program (in accordance with 13 CFR part 127) means a small business concern that is at least 51 percent directly and unconditionally owned by, and the management and daily business operations of which are controlled by, one or more women who are citizens of the United States, and the concern is certified by SBA or an approved third-party certifier in accordance with 13 CFR 127.300.

(b) (1) The North American Industry Classification System (NAICS) code for this acquisition is _____ *[insert NAICS code]*.

(2) The small business size standard is _____ *[insert size standard]*.

(3) The small business size standard for a concern that submits an offer, other than on a construction or service acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce (*i.e.*, nonmanufacturer), is 500 employees, or 150 employees for information technology value-added resellers under NAICS code 541519, if the acquisition—

(i) Is set aside for small business and has a value above the simplified acquisition threshold;

(ii) Uses the HUBZone price evaluation preference regardless of dollar value, unless the offeror waives the price evaluation preference; or

(iii) Is an 8(a), HUBZone, service-disabled veteran-owned, economically disadvantaged women-owned, or women-owned small business set-aside or sole-source award regardless of dollar value.

(c) *Representations.* (1) The offeror represents as part of its offer that—

(i) it □ is, □ is not a small business concern; or

(ii) It □ is, □ is not a small business joint venture that complies with the requirements of 13 CFR 121.103(h) and 13 CFR 125.8(a) and (b). [*The offeror shall enter the name and unique entity identifier of each party to the joint venture:* __.]

(2) [*Complete only if the offeror represented itself as a small business concern in paragraph (c)(1) of this provision.]* The offeror represents that it □ is, □ is not a women-owned small disadvantage business concern.

(3) *Women-owned small business (WOSB) joint venture eligible under the WOSB Program.* The offeror represents as part of its offer that it □ is, □ is not a joint venture that complies with the requirements of 13 CFR 127.506(a) through (c). [*The offeror shall enter the name and unique entity identifier of each party to the joint venture: __.*]

(4) *Economically disadvantaged women-owned small business (EDWOSB) joint venture.* The offeror represents as part of its offer that it □ is, □ is not a joint venture that complies with the requirements of 13 CFR 127.506(a) through (c). [*The offeror shall enter the name and unique entity identifier of each party to the joint venture: __.*]

(5) *SDVOSB joint venture eligible under the SDVOSB Program*. [*Complete only if the offeror is certified as a SDVOSB concern*]. The offeror represents as part of its offer that it □ is, □ is not a SDVOSB joint venture eligible under the SDVOSB Program that complies with the requirements of 13 CFR 128.402. [*The offeror shall enter the name and unique entity identifier of each party to the joint venture:__.*]

(6) *HUBZone joint venture eligible under the HUBZone Program.* [*Complete only if the offeror is a HUBZone small business concern.*] The offeror represents, as part of its offer, that it □ is, □ is not a HUBZone joint venture that complies with the requirements of 13 CFR 126.616(a) through (c). [*The offeror shall enter the name and unique entity identifier of each party to the joint venture: __.*] Each HUBZone small business concern participating in the HUBZone joint venture must be certified as a HUBZone concern.

(d) *Notice.* Under 15 U.S.C. 645(d), any person who misrepresents a firm's status as a business concern that is small, HUBZone small, small disadvantaged, service-disabled veteran-owned small, economically disadvantaged women-owned small, or women-owned small eligible under the WOSB Program in order to obtain a contract to be awarded under the preference programs established pursuant to section 8, 9, 15, 31, and 36 of the Small Business Act or any other provision of Federal law that specifically references section 8(d) for a definition of program eligibility, will be—

(1) Punished by imposition of fine, imprisonment, or both;

(2) Subject to administrative remedies, including suspension and debarment; and

(3) Ineligible for participation in programs conducted under the authority of the Act.

(End of provision)

Alternate I [Reserved]

Alternate II (MAR 2023). As prescribed in 19.101(a)(2)(ii)(B), substitute the following paragraphs (b) and (c)(1) for paragraphs (b) and (c)(1) of the basic provision:

(b)(1) The North American Industry Classification System (NAICS) codes and corresponding size standards for this acquisition are as follows; the categories or portions these NAICS codes are assigned to are specified elsewhere in the solicitation:

NAICS Code	**Size standard**
_____	_____
_____	_____
_____	_____

[Contracting Officer to insert NAICS codes and size standards].

(2) The small business size standard for a concern that submits an offer, other than on a construction or service acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce (*i.e.*, nonmanufacturer), is 500 employees, or 150 employees for information technology value-added resellers under NAICS code 541519, if the acquisition—

(i) Is set aside for small business and has a value above the simplified acquisition threshold;

(ii) Uses the HUBZone price evaluation preference regardless of dollar value, unless the offeror waives the price evaluation preference; or

(iii) Is an 8(a), HUBZone, service-disabled veteran-owned, economically disadvantaged women-owned, or women-owned small business set-aside or sole-source award regardless of dollar value.

(c) *Representations.* (1) The Offeror shall represent its small business size status for each one of the NAICS codes assigned to this acquisition under which it is submitting an offer.

NAICS Code	Small business concern (yes/no)

[*Contracting Officer to insert NAICS codes.*]

52.219-2 Equal Low Bids.

As prescribed in 19.203(b), insert the following provision:

EQUAL LOW BIDS (DEVIATION DATE)

(a) This provision applies to small business concerns only.

(b) The bidder's status as a labor surplus area (LSA) concern may affect entitlement to award in case of tie bids. If the bidder wishes to be considered for this priority, the bidder must identify, in the following space, the LSA in which the costs to be incurred on account of manufacturing or production (by the bidder or the first-tier subcontractors) amount to more than 50 percent of the contract price.

_____ _____

(c) Failure to identify the labor surplus areas as specified in paragraph (b) of this provision will preclude the bidder from receiving priority consideration. If the bidder is awarded a contract as a result of receiving priority consideration under this provision and would not have otherwise received award, the bidder shall perform the contract or cause the contract to be performed in accordance with the obligations of an LSA concern.

(End of provision)

52.219-3 Notice of HUBZone Set-Aside or Sole-Source Award.

As prescribed in 19.105-4(a), insert the following clause:

NOTICE OF HUBZONE SET-ASIDE OR SOLE-SOURCE AWARD (DEVIATION DATE)

(a) *Definition*. *HUBZone small business concern*, as used in this clause, means a small business concern, certified by the Small Business Administration (SBA), that appears on the List of Qualified HUBZone Small Business Concerns maintained by the SBA (13 CFR 126.103).

(b) *Applicability*. This clause applies only to-

(1) Contracts that have been set aside or awarded on a sole-source basis to, HUBZone small business concerns;

(2) Part or parts of a multiple-award contract that have been set aside for HUBZone small business concerns; and

(3) Orders set aside for HUBZone small business concerns under multiple-award contracts as described in 8.4 and 16.5

(c) *General*. (1) Offers are solicited only from HUBZone small business concerns. Offers received from concerns that are not HUBZone small business concerns will not be considered.

(2) Any award resulting from this solicitation will be made to a HUBZone small business concern.

(d) *Joint venture.* A joint venture may be considered a HUBZone concern if—

(1) At least one party to the joint venture is a HUBZone small business concern and complies with 13 CFR 126.616(c); and

(2) Each party to the joint venture qualifies as small under the size standard for the solicitation, or the protégé is small under the size standard for the solicitation in a joint venture comprised of a mentor and protégé with an approved mentor-protégé agreement under the SBA mentor-protégé program.

(e) A HUBZone joint venture agrees that, in the performance of the contract, at least 40 percent of the aggregate work performed by the joint venture shall be completed by the HUBZone small business parties to the joint venture. Work performed by the HUBZone small business party or parties to the joint venture must be more than administrative functions.

(End of clause)

52.219-4 Notice of Price Evaluation Preference for HUBZone Small Business Concerns.

As prescribed in 19.110(b), insert the following provision:

NOTICE OF PRICE EVALUATION PREFERENCE FOR HUBZONE SMALL BUSINESS CONCERNS (DEVIATION DATE)

(a) Evaluation preference. (1) Offers will be evaluated by adding a factor of 10 percent to the price of all offers, except-

(i) Offers from HUBZone small business concerns that have not waived the evaluation preference; and

(ii) Otherwise successful offers from small business concerns.

(b) *Waiver of evaluation preference*. A HUBZone small business concern may choose to waive the evaluation preference. If the concern waives the preference, the factor will be added to its offer for evaluation purposes.

□ Offeror chooses to waive the evaluation preference.

(c) *Joint venture.* A HUBZone joint venture agrees that, in the performance of the contract, at least 40 percent of the aggregate work performed by the joint venture shall be completed by the HUBZone small business parties to the joint venture. Work performed by the HUBZone small business parties to the joint venture must be more than administrative functions.

(End of provision)

52.219-5 [Reserved]

52.219-6 Notice of Total Small Business Set-Aside.

As prescribed in 19.104-3(a), insert the following clause:

NOTICE OF TOTAL SMALL BUSINESS SET-ASIDE (DEVIATION DATE)

(a) *Definition*. *Small business concern*, as used in this clause—

(1) Means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the size standards in this solicitation.

(2) *Affiliates*, as used in paragraph (a)(1) of this clause, means business concerns, one of whom directly or indirectly controls or has the power to control the others, or a third party or parties control or have the power to control the others. In determining whether affiliation exists, consideration is given to all appropriate factors including common ownership, common management, and contractual relationships. SBA determines affiliation based on the factors set forth at 13 CFR 121.103.

(b) *Applicability*. This clause applies only to-

(1) Contracts that have been set aside for small business concerns; and

(2) Orders set aside for small business concerns under multiple-award contracts as described in 8.4 and 16.5.

(c) *General*. (1) Offers are solicited only from small business concerns. Offers received from concerns that are not small business concerns shall be considered nonresponsive and will be rejected.

(2) Any award resulting from this solicitation will be made to a small business concern.

(End of clause)

Alternate I (MAR 2020) . As prescribed in 19.104-3(a), substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) *General.*(1) Offers are solicited only from small business concerns and Federal Prison Industries, Inc. (FPI). Offers received from concerns that are not small business concerns or FPI shall be considered nonresponsive and will be rejected.

(2) Any award resulting from this solicitation will be made to either a small business concern or FPI.

52.219-7 Notice of Partial Small Business Set-Aside.

As prescribed in 19.104-3(b), insert the following clause:

NOTICE OF PARTIAL SMALL BUSINESS SET-ASIDE (NOV 2020)

(a) *Definition*. *Small business concern*, as used in this clause—

(1) Means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the size standards in this solicitation.

(2) *Affiliates*, as used in paragraph (a)(1) of this clause, means business concerns, one of whom directly or indirectly controls or has the power to control the others, or a third party or parties control or have the power to control the others. In determining whether affiliation exists, consideration is given to all appropriate factors including common ownership, common management, and contractual relationships. SBA determines affiliation based on the factors set forth at 13 CFR 121.103.

(b) *Applicability.* This clause applies only to contracts that have been partially set aside for small business concerns.

(c) General. (1) A portion of this requirement, identified elsewhere in this solicitation, has been set aside for award to one or more small business concerns identified in 19.000(a)(3). Offers received from concerns that do not qualify as small business concerns shall be considered nonresponsive and shall be rejected on the set-aside portion of the requirement.

(2) Small business concerns may submit offers and compete for the non-set-aside portion and the set-aside portion.

(d) The Offeror shall—

[*Contracting Officer check as appropriate.*]

□ Submit a separate offer for each portion of the solicitation for which it wants to compete (i.e. set-aside portion, non-set-aside portion, or both); or

□ Submit one offer to include all portions for which it wants to compete.

(e) *Partial set-asides of multiple-award contracts.* (1) Small business concerns will not compete against other than small business concerns for any order issued under the part or parts of the multiple-award contract that are set aside.

(2) Small business concerns may compete for orders issued under the part or parts of the multiple-award contract that are not set aside, if the small business concern received a contract award for the non-set-aside portion.

(End of clause)

Alternate I (MAR 2020) . As prescribed in 19.104-3(b), add the following paragraph (f) to the basic clause:

(f) Notwithstanding paragraph (c) of this clause, offers from Federal Prison Industries, Inc., will be solicited and considered for both the set-aside and non-set-aside portion of this requirement.

52.219-8 Utilization of Small Business Concerns.

As prescribed in 19.109(e), insert the following clause:

UTILIZATION OF SMALL BUSINESS CONCERNS (DEVIATION DATE)

(a) *Definitions*. As used in this contract—

HUBZone small business concern means a small business concern that meets the requirements described in 13 CFR 126.200, certified by the Small Business Administration (SBA) and designated by SBA as a HUBZone small business concern in the Small Business Search (SBS) and the System for Award Management (SAM).

Service-disabled veteran-owned small business (SDVOSB) concern means an SDVOSB concern that meets the requirements described in 13 CFR 128.300, is certified by SBA, and is designated by SBA as an SDVOSB concern in SBS and SAM.

Small business concern means a concern, including its affiliates, that is independently owned and operated, not dominant in its field of operation and qualified as a small business under the criteria and size standards in 13 CFR part 121, including the size standard that corresponds to the NAICS code assigned to the contract or subcontract.

Small disadvantaged business (SDB) concern means a small business concern under the size standard applicable to the acquisition, that-

(1) Is at least 51 percent unconditionally and directly owned (as defined at 13 CFR 124.105) by-

(i) One or more socially disadvantaged (as defined at 13 CFR 124.103) and economically disadvantaged (as defined at 13 CFR 124.104) individuals who are citizens of the United States; and

(ii) Each individual claiming economic disadvantage has a net worth not exceeding the threshold at 13 CFR 124.104(c)(2) after taking into account the applicable exclusions set forth at 13 CFR 124.104(c)(2); and

(2) The management and daily business operations of which are controlled (as defined at 13.CFR 124.106) by individuals, who meet the criteria in paragraphs (1)(i) and (ii) of this definition.

Veteran-owned small business (VOSB) concern means a small business concern-

(1) Not less than 51 percent of which is owned and controlled by one or more veterans (as defined at 38 U.S.C.101(2)) or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more veterans; and

(2) The management and daily business operations of which are controlled by one or more veterans.

Women-owned small business (WOSB) concern means a small business concern-

(1) That is at least 51 percent owned by one or more women, or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women;

(2) Whose management and daily business operations are controlled by one or more women; and

(3) That is certified by SBA or an approved third- party certifier in accordance with 13 CFR 127.300 and is designated by SBA as a WOSB concern in SBS and SAM.

(b) It is the policy of the United States that small business concerns, VOSB concerns, SDVOSB concerns, HUBZone small business concerns, SDB concerns, and WOSB concerns shall have the maximum practicable opportunity to participate in performing contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns, VOSB concerns, SDVOSB concerns, HUBZone small business concerns, SDB concerns, and WOSB concerns.

(c) (1) A joint venture qualifies as a small business concern if—

(i) Each party to the joint venture qualifies as small under the size standard for the solicitation; or

(ii) The protégé is small under the size standard for the solicitation in a joint venture comprised of a mentor and protégé with an approved mentor-protégé agreement under a SBA mentor-protégé program. (See 13 CFR 125.9(d).)

(2) A joint venture qualifies as a HUBZone small business concern if it complies with the requirements in 13 CFR 126.616(a) through (c).

(d) The Contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with efficient contract performance. The Contractor further agrees to cooperate in any studies or surveys as may be conducted by the Small Business Administration or the awarding agency of the as may be necessary to determine the extent of the Contractor's compliance with this clause.

(e) (1) Unless the Contractor has reason to question the representation, it may accept a subcontractor's written representations of its size and socioeconomic status as a small business or SDB, if the subcontractor represents that the size and socioeconomic status representations with its offer are current, accurate, and complete as of the date of the offer for the subcontract.

(2) Unless the Contractor has reason to question the representation, it may accept a subcontractor's representations of its size and socioeconomic status as a small business or SDB in the System for Award Management (SAM) if the subcontractor —

(i) Is registered in SAM; and

(ii) Represents that the size and socioeconomic status representations made in SAM are current, accurate and complete as of the date of the offer for the subcontract.

(3) The Contractor may not require that the subcontractor register in SAM for the purposes of representing size or socioeconomic status in connection with a subcontract.

(4) A contractor acting in good faith is not liable for misrepresentations made by its subcontractors regarding the subcontractor's size or socioeconomic status.

(5) The Contractor shall confirm that a subcontractor representing itself as a HUBZone small business concern, VOSB, SDVOSB, or WOSB concern is certified by SBA by checking SAM or SBS at https://search.certifications.sba.gov/.

(End of clause)

52.219-9 Small Business Subcontracting Plan.

As prescribed in 19.109(e)(2)(i), insert the following clause:

SMALL BUSINESS SUBCONTRACTING PLAN (DEVIATION DATE)

(a) This clause does not apply to small business concerns.

(b) *Definitions*. As used in this clause—

Alaska Native Corporation (ANC) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act (43 U.S.C. 1601, *et seq.*) and which is considered a minority and economically disadvantaged concern under the criteria at 43 U.S.C. 1626(e)(1). This definition also includes ANC direct and indirect subsidiary corporations, joint ventures, and partnerships that meet the requirements of 43 U.S.C. 1626(e)(2).

Commercial plan means a subcontracting plan (including goals) that covers the offeror's fiscal year and that applies to the entire production of commercial products and commercial services sold by either the entire company or a portion thereof (*e.g.,* division, plant, or product line).

Commercial product means a product that satisfies the definition of "commercial product" in Federal Acquisition Regulation (FAR) 2.101.

Commercial service means a service that satisfies the definition of "commercial service" in FAR 2.101.

Indian tribe means any Indian tribe, band, group, pueblo, or community, including native villages and native groups (including corporations organized by Kenai, Juneau, Sitka, and Kodiak) as defined in the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), that is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs in accordance with 25 U.S.C. 1452(c). This definition also includes Indian-owned economic enterprises that meet the requirements of 25 U.S.C. 1452(e).

Individual subcontracting plan means a subcontracting plan that covers the entire contract period (including option periods), applies to a specific contract, and has goals that are based on the offeror's planned subcontracting in support of the specific contract, except that indirect costs incurred for common or joint purposes may be allocated on a prorated basis to the contract.

Master subcontracting plan means a subcontracting plan that contains all the required elements of an individual subcontracting plan, except goals, and may be incorporated into individual subcontracting plans, provided the master subcontracting plan has been approved.

Reduced payment means a payment for less than the amount agreed upon in a subcontract in accordance with its terms and conditions, for supplies and services for which the Government has paid the prime contractor.

Subcontract means any agreement (other than one involving an employer-employee relationship) entered into by a Federal Government prime contractor or subcontractor calling for supplies or services required for performance of the contract or subcontract.

Subcontracting Plan Reporting (SPR) means the electronic subcontracting reporting system at SAM.gov for small business subcontracting program reporting.

Total contract dollars means the final anticipated dollar value, including the dollar value of all options.

Untimely payment means a payment to a subcontractor that is more than 90 days past due under the terms and conditions of a subcontract for supplies and services for which the Government has paid the prime contractor.

(c) (1) The Offeror, upon request by the Contracting Officer, shall submit and negotiate a subcontracting plan, where applicable, that separately addresses subcontracting with small business, veteran-owned small business (VOSB), service-disabled veteran-owned small business (SDVOSB), HUBZone small business, small disadvantaged business (SDB), and women-owned small business (WOSB) concerns. If the Offeror is submitting an individual subcontracting plan, the plan must separately address subcontracting with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, with a separate part for the basic contract and separate parts for each option (if any). The Contracting Officer will include the subcontracting plan in and make it a part of the resultant contract. The Offeror shall negotiate the subcontracting plan within the timeframe specified by the Contracting Officer. If the Offeror fails to submit and negotiate the subcontracting plan, then the Offeror will not be eligible for award of a contract.

(2) (i) Unless the Contractor has reason to question the representations, it may accept a subcontractor's written representations of its size and socioeconomic status as a small business or SDB, if the subcontractor represents that the size

and socioeconomic status representations with its offer are current, accurate, and complete as of the date of the offer for the subcontract.

(ii) Unless the Contractor has reason to question the representations, it may accept a subcontractor's representations of its size and socioeconomic status as a small business or SDB in the System for Award Management (SAM) if—

(A) The subcontractor is registered in SAM; and

(B) The subcontractor represents that the size and socioeconomic status representations made in SAM are current, accurate and complete as of the date of the offer for the subcontract.

(iii) The Contractor may not require that the subcontractor register in SAM for the purposes of representing size or socioeconomic status in connection with a subcontract.

(iv) A contractor acting in good faith is not liable for misrepresentations made by its subcontractors regarding the subcontractor's size or SDB status.

(v) In order to be eligible as a VOSB, SDVOSB, HUBZone small business, or WOSB concern, subcontractor under a subcontracting plan, the small business must be certified by the Small Business Administration (SBA) as that socioeconomic status. SBA certifications are in the Small Business Search (SBS) website at https://search.certifications.sba.gov/.

(d) The Offeror’s subcontracting plan shall include the following:

(1) Separate goals, expressed in terms of total dollars subcontracted, and as a percentage of total planned subcontracting dollars, for the use of small business, VOSB, SDVOSB, HUBZone small business, SDB, and WOSB concerns as subcontractors. For individual subcontracting plans, and if required by the Contracting Officer, goals shall also be expressed in terms of percentage of total contract dollars, in addition to the goals expressed as a percentage of total subcontract dollars. The Offeror shall include all subcontracts that contribute to contract performance and may include a proportionate share of products and services that are normally allocated as indirect costs. In accordance with 15 U.S.C. 657r(a), an Offeror that is a mentor with an SBA-approved mentor-protégé agreement (see 13 CFR 125.9) and awards a subcontract to its protégé may apply the costs incurred for training it provides to its protégé toward its subcontracting plan goals, if the protégé is a covered territory business or the protégé’s principal office is located in the Commonwealth of Puerto Rico. In accordance with 43 U.S.C. 1626—

(i) Count subcontracts awarded to an ANC or Indian tribe toward the subcontracting goals for small business and small disadvantaged business concerns, regardless of the size or SBA certification status of the ANC or Indian tribe; and

(ii) If one or more subcontractors are in the subcontract tier between the prime Contractor and the ANC or Indian tribe, then the ANC or Indian tribe shall designate the appropriate Contractor(s) to count the subcontract towards its small business and small disadvantaged business subcontracting goals.

(A) In most cases, the appropriate Contractor is the Contractor that awarded the subcontract to the ANC or Indian tribe.

(B) If the ANC or Indian tribe designates more than one Contractor to count the subcontract toward its goals, the ANC or Indian tribe shall designate only a portion of the total subcontract award to each Contractor. The sum of the amounts designated to various Contractors cannot exceed the total value of the subcontract.

(C) The ANC or Indian tribe shall give a copy of the written designation to the Contracting Officer, the prime Contractor, and the subcontractors between the prime Contractor and the ANC or Indian tribe within 30 days of the date of the subcontract award.

(D) If the Contracting Officer does not receive a copy of the ANC's or the Indian tribe's written designation within 30 days of the subcontract award, the Contracting Officer will consider the Contractor that awarded the subcontract to the ANC or Indian tribe the designated Contractor.

(2) A statement of–

(i) Total dollars planned to be subcontracted for an individual subcontracting plan; or the Offeror's total projected sales, expressed in dollars, and the total value of projected subcontracts, including all indirect costs except as described in paragraph (g) of this clause, to support the sales for a commercial plan;

(ii) Total dollars planned to be subcontracted to small business concerns (including ANC and Indian tribes);

(iii) Total dollars planned to be subcontracted to veteran-owned small business concerns;

(iv) Total dollars planned to be subcontracted to service-disabled veteran-owned small business;

(v) Total dollars planned to be subcontracted to HUBZone small business concerns;

(vi) Total dollars planned to be subcontracted to small disadvantaged business concerns (including ANCs and Indian tribes); and

(vii) Total dollars planned to be subcontracted to women-owned small business concerns.

(3) A description of the principal types of supplies and services to be subcontracted, and an identification of the types planned for subcontracting to-

(i) Small business concerns;

(ii) Veteran-owned small business concerns;

(iii) Service-disabled veteran-owned small business concerns;

(iv) HUBZone small business concerns;

(v) Small disadvantaged business concerns; and

(vi) Women-owned small business concerns.

(4) A description of the method used to develop the subcontracting goals in paragraph (d)(1) of this clause.

(5) A description of the method used to identify potential sources for solicitation purposes (*e.g.*, existing company source lists, SAM, veterans service organizations, the National Minority Purchasing Council Vendor Information Service, the Research and Information Division of the Minority Business Development Agency in the Department of Commerce, or small, HUBZone, small disadvantaged, and women-owned small business trade associations). A firm may rely on the information contained in SAM as an accurate representation of a concern's size and ownership characteristics for the purposes of maintaining a small, veteran-owned small, service-disabled veteran-owned small, HUBZone small, small disadvantaged, and women-owned small business source list. Use of SAM as its source list does not relieve a firm of its responsibilities (*e.g.*, outreach, assistance, counseling, or publicizing subcontracting opportunities) in this clause.

(6) A statement as to whether or not the Offeror included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with–

(i) Small business concerns (including ANC and Indian tribes);

(ii) Veteran-owned small business concerns;

(iii) Service-disabled veteran-owned small business concerns;

(iv) HUBZone small business concerns;

(v) Small disadvantaged business concerns (including ANC and Indian tribes); and

(vi) Women-owned small business concerns.

(7) The name of the individual employed by the Offeror who will administer the Offeror's subcontracting program, and a description of the duties of the individual.

(8) A description of the efforts the Offeror will make to assure that small business, VOSB, SDVOSB, HUBZone small business, SDB, and WOSB concerns have an equitable opportunity to compete for subcontracts.

(9) Assurances that the Offeror will include the clause of this contract entitled “Utilization of Small Business Concerns” in all subcontracts that offer further subcontracting opportunities, and that the Offeror will require all subcontractors (except small business concerns, including entities that are treated as small business concerns by statute for certain purposes (*e.g.,* ANCs, see 13 CFR 125.3(b)(2))) that receive subcontracts in excess of the applicable threshold specified in FAR 19.109(a) on the date of subcontract award, with further subcontracting possibilities to adopt a subcontracting plan that complies with the requirements of this clause.

(10) Assurances that the Offeror will–

(i) Cooperate in any studies or surveys as may be required;

(ii) Submit periodic reports so the Government can determine the extent of compliance by the Contractor with the subcontracting plan;

(iii) Include subcontracting data for each order when reporting subcontracting achievements for indefinite-delivery, indefinite-quantity contracts with individual subcontracting plans where the contract is intended for use by multiple agencies;

(iv) Submit the Individual Subcontract Report (ISR) and/or the Summary Subcontract Report (SSR), in accordance with paragraph (l) of this clause using the SPR. The reports shall provide information on subcontract awards to small business concerns (including ANCs and Indian tribes that are not small businesses), veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns (including ANCs and Indian tribes that have not been certified by SBA as small disadvantaged businesses), women-owned small business concerns, and for NASA only, Historically Black Colleges and Universities and Minority Institutions. Reporting shall be in accordance with this clause, or as provided in agency regulations;

(v) Ensure that its subcontractors with subcontracting plans agree to submit the ISR and/or the SSR using SPR;

(vi) Provide its prime contract number, its unique entity identifier, and the e-mail address of the Offeror’s official responsible for acknowledging receipt of or rejecting the ISRs, to all first-tier subcontractors with subcontracting plans so they can enter this information into the SPR when submitting their ISRs; and

(vii) Require that each subcontractor with a subcontracting plan provide the prime contract number, its own unique entity identifier, and the e-mail address of the subcontractor's official responsible for acknowledging receipt of or rejecting the ISRs, to its subcontractors with subcontracting plans.

(11) A description of the types of records that will be maintained concerning procedures that have been adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of the Offeror's efforts to locate small business, VOSB, SDVOSB, HUBZone small business, SDB, and WOSB concerns and award subcontracts to them. The records shall include at least the following (on a plant-wide or company-wide basis, unless otherwise indicated):

(i) Source lists (*e.g.,* SAM), guides, and other data that identify small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns.

(ii) Organizations contacted in an attempt to locate sources that are small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business concerns.

(iii) Records on each subcontract solicitation resulting in an award of more than the simplified acquisition threshold, as defined in FAR 2.101 on the date of subcontract award, indicating-

(A) Whether small business concerns were solicited and, if not, why not;

(B) Whether veteran-owned small business concerns were solicited and, if not, why not;

(C) Whether service-disabled veteran-owned small business concerns were solicited and, if not, why not;

(D) Whether HUBZone small business concerns were solicited and, if not, why not;

(E) Whether small disadvantaged business concerns were solicited and, if not, why not;

(F) Whether women-owned small business concerns were solicited and, if not, why not; and

(G) If applicable, the reason award was not made to a small business concern.

(iv) Records of any outreach efforts to contact-

(A) Trade associations;

(B) Business development organizations;

(C) Conferences and trade fairs to locate small, HUBZone small, small disadvantaged, service-disabled veteran-owned, and women-owned small business sources; and

(D) Veterans service organizations.

(v) Records of internal guidance and encouragement provided to buyers through-

(A) Workshops, seminars, training, etc.; and

(B) Monitoring performance to evaluate compliance with the program's requirements.

(vi) On a contract-by-contract basis, records to support award data submitted by the offeror to the Government, including the name, address, and business size of each subcontractor. Contractors having commercial plans need not comply with this requirement.

(12) Assurances that the Offeror will make a good faith effort to acquire articles, equipment, supplies, services, or materials, or obtain the performance of construction work from the small business concerns that it used in preparing the bid or proposal, in the same or greater scope, amount, and quality used in preparing and submitting the bid or proposal. Responding to a request for a quote does not constitute use in preparing a bid or proposal. The Offeror used a small business concern in preparing the bid or proposal if–

(i) The Offeror identifies the small business concern as a subcontractor in the bid or proposal or associated small business subcontracting plan, to furnish certain supplies or perform a portion of the subcontract; or

(ii) The Offeror used the small business concern's pricing or cost information or technical expertise in preparing the bid or proposal, where there is written evidence of an intent or understanding that the small business concern will be awarded a subcontract for the related work if the Offeror is awarded the contract.

(13) Assurances that the Contractor will provide the Contracting Officer with a written explanation if the Contractor fails to acquire articles, equipment, supplies, services, or materials or obtain the performance of construction work as described in paragraph (d)(12) of this clause. The Contractor shall submit the written explanation to the Contracting Officer within 30 days of contract completion.

(14) Assurances that the Contractor will not prohibit a subcontractor from discussing with the Contracting Officer any material matter pertaining to payment to or utilization of a subcontractor.

(15) Assurances that the Contractor will pay its small business subcontractors on time and in accordance with the terms and conditions of the underlying subcontract, and notify the Contracting Officer when the prime contractor makes either a reduced or an untimely payment to a small business subcontractor (see 52.242-5).

(e) In order to effectively implement this plan to the extent consistent with efficient contract performance, the Contractor shall perform the following functions:

(1) Assist small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns by arranging solicitations, time for the preparation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation by such concerns. Where the Contractor's lists of potential small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business subcontractors are excessively long, reasonable effort shall be made to give all such small business concerns an opportunity to compete over a period of time.

(2) Provide adequate and timely consideration of the potentialities of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns in all "make-or-buy" decisions.

(3) Counsel and discuss subcontracting opportunities with representatives of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business firms.

(4) Confirm that a subcontractor representing itself as a HUBZone small business concern is certified by SBA as a HUBZone small business concern by accessing SAM or by accessing the Small Business Search (SBS) at https://search.certifications.sba.gov/.

(5) Provide notice to subcontractors concerning penalties and remedies for misrepresentations of business status as small, veteran-owned small business, HUBZone small, small disadvantaged, or women-owned small business for the purpose of obtaining a subcontract that is to be included as part or all of a goal contained in the Contractor's subcontracting plan.

(6) For all competitive subcontracts over the simplified acquisition threshold, as defined in FAR 2.101 on the date of subcontract award, in which a small business concern received a small business preference, upon determination of the successful subcontract offeror, prior to award of the subcontract the Contractor must inform each unsuccessful small business subcontract offeror in writing of the name and location of the apparent successful offeror and if the successful subcontract offeror is a small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business concern.

(7) Assign each subcontract the NAICS code and corresponding size standard that best describes the principal purpose of the subcontract.

(f) A master subcontracting plan on a plant or division-wide basis that contains all the elements required by paragraph (d) of this clause, except goals, may be incorporated by reference as a part of the subcontracting plan required of the Offeror by this clause; provided-

(1) The master subcontracting plan has been approved;

(2) The Offeror ensures that the master subcontracting plan is updated as necessary and provides copies of the approved master subcontracting plan, including evidence of its approval, to the Contracting Officer; and

(3) Goals and any deviations from the master subcontracting plan deemed necessary by the Contracting Officer to satisfy the requirements of this contract are set forth in the individual subcontracting plan.

(g) A commercial plan is the preferred type of subcontracting plan for contractors furnishing commercial products and commercial services. The commercial plan shall relate to the offeror's planned subcontracting generally, for both commercial and Government business, rather than solely to the Government contract. Once the Contractor's commercial plan has been approved, the Government will not require another subcontracting plan from the same Contractor while the plan remains in effect, as long as the product or service being provided by the Contractor continues to meet the definition of a commercial product or commercial service. A Contractor with a commercial plan shall comply with the reporting requirements stated in paragraph (d)(10) of this clause by submitting one SSR in SPR for all contracts covered by its commercial plan. A Contractor authorized to use a commercial subcontracting plan shall include in its subcontracting goals and in its SSR all indirect costs, with the exception of those such as the following: Employee salaries and benefits; payments for petty cash; depreciation; interest; income taxes; property taxes; lease payments; bank fees; fines, claims, and dues; original equipment manufacturer relationships during warranty periods (negotiated up front with the product); utilities and other services purchased from a municipality or an entity solely authorized by the municipality to provide those services in a particular geographical region;

and philanthropic contributions. This report shall be monitored in SPR by the agency that approved the plan. This report shall be submitted within 45 days after the end of the Government's fiscal year.

(h) The Contracting Officer will consider prior compliance of the Offeror with other such subcontracting plans under previous contracts in determining the responsibility of the Offeror for award of the contract.

(i) A contract may have no more than one subcontracting plan. When a contract modification exceeds the subcontracting plan threshold in FAR 19.109(a), or an option is exercised, the goals of the existing subcontracting plan shall be amended to reflect any new subcontracting opportunities. When the goals in a subcontracting plan are amended, these goal changes do not apply retroactively.

(j) Subcontracting plans are not required from subcontractors when the prime contract is awarded under FAR part 12, Acquisition of Commercial Products and Commercial Services, or when the subcontractor provides a commercial product or commercial service subject to the clause at FAR 52.244-6, Subcontracts for Commercial Products and Commercial Services, under a prime contract.

(k) The Contracting Officer will consider failure of the Contractor or subcontractor to comply in good faith with the clause of this contract entitled "Utilization Of Small Business Concerns," or an approved plan required by this clause, a material breach of the contract and may consider the failure in any past performance evaluation of the Contractor.

(l) The Contractor shall submit ISRs and SSRs using the web-based SPR. Do not include purchases from a corporation, company, or subdivision that is an affiliate of the Contractor or subcontractor in these reports. Treat subcontract awards by affiliates as subcontract awards by the Contractor. Limit subcontract award data reported by the Contractor and subcontractors to awards made to their immediate next-tier subcontractors. The Contractor and its subcontractors cannot take credit for awards made to lower tier subcontractors, unless the Contractor or subcontractor has been designated to receive a small business or SDB credit from an ANC or Indian tribe. Include in these reports only subcontracts involving performance in the United States or its outlying areas, with the exception of subcontracts under a contract awarded by the State Department or any other agency that has statutory or regulatory authority to require subcontracting plans for subcontracts performed outside the United States and its outlying areas

(1) *ISR*. This report is not required for commercial plans. The report is required for each contract containing an individual subcontracting plan.

(i) The report shall be submitted semi-annually during contract performance for the periods ending March 31 and September 30. A report is also required for each contract within 45 days of contract completion. Reports are due 45 days after the close of each reporting period, unless otherwise directed by the Contracting Officer. Reports are required when due, regardless of whether there has been any subcontracting activity since the inception of the contract or the previous reporting period. When notified of any anomaly, discrepancy, or error in the ISR, the Contractor shall submit a corrected report within 30 days of receiving the notice.

(ii) (A) When a subcontracting plan contains separate goals for the base period of the contract and each option, the dollar goal inserted on this report shall be the sum of the base period through the current option; for example, for a report submitted after the second option is exercised, the dollar goal would be the sum of the goals for the basic contract, the first option, and the second option.

(B) If a subcontracting plan has been added to the contract pursuant to 19.302-1 or 19.301(e), the Contractor shall report its achievements on a cumulative basis from the date of incorporation of the subcontracting plan into the contract.

(iii) When a subcontracting plan includes indirect costs in the goals, include these costs in this report.

(iv) In the case of a subcontract with a subcontracting plan, the responsibility to monitor the ISR belongs to the entity that awarded the subcontract.

(2) *SSR*. (i) Reports submitted under individual subcontracting plans–

(A) This report encompasses all subcontracting under prime contracts and subcontracts with an executive agency, regardless of the dollar value of the subcontracts. This report also includes indirect costs on a prorated basis when the indirect costs are excluded from the subcontracting goals.

(B) The report may be submitted on a corporate, company or subdivision (*e.g.* plant or division operating as a separate profit center) basis, unless otherwise directed by the agency.

(C) If the Contractor or a subcontractor is performing work for more than one executive agency, a separate report shall be submitted to each executive agency covering only that agency's contracts, provided at least one of that agency's contracts is over the applicable threshold specified in FAR 19.109(a), and the contract contains a subcontracting plan. For DoD, a consolidated report shall be submitted for all contracts awarded by military departments/agencies and/or subcontracts awarded by DoD prime contractors.

(D) The report shall be submitted annually by November 14 for the twelve month period ending September 30. When a Contracting Officer rejects an SSR, the Contractor shall submit a revised report within 30 days of receiving the notice of SSR rejection.

(E) Subcontract awards that are related to work for more than one executive agency shall be appropriately allocated.

(F) The responsibility to monitor SSRs in SPR, including SSRs submitted by subcontractors with subcontracting plans, belongs to the Government agency awarding the prime contracts unless stated otherwise in the contract.

(ii) *Reports submitted under a commercial plan*-

(A) The report shall include all subcontract awards under the commercial plan in effect during the Government's fiscal year and all indirect costs.

(B) The report shall be submitted annually, within thirty days after the end of the Government's fiscal year.

(C) If a Contractor has a commercial plan and is performing work for more than one executive agency, the Contractor shall specify the percentage of dollars attributable to each agency.

(D) The responsibility to monitor SSRs for commercial plans belongs to the Government agency that approved the commercial plan.

(End of clause)

Alternate I (DEVIATION DATE). As prescribed in 19.109(e)(2)(i)(A), substitute the following paragraph (c)(1) for paragraph (c)(1) of the basic clause:

(c)(1) The apparently low bidder, upon request by the Contracting Officer, shall submit a subcontracting plan, where applicable, that separately addresses subcontracting with small business, veteran-owned small business (VOSB), service-disabled veteran-owned small business (SDVOSB), HUBZone small business, small disadvantaged business (SDB), and women-owned small business (WOSB) concerns. If the bidder is submitting an individual subcontracting plan, the plan must separately address subcontracting with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, with a separate part for the basic contract and separate parts for each option (if any). The Contracting Officer shall include the plan in and make it a part of the resultant contract. The apparently low bidder shall submit the subcontracting plan within the timeframe specified by the Contracting Officer. If the Bidder fails to submit the subcontracting plan, then the Bidder shall not be eligible for the award of a contract.

Alternate II (DEVIATION DATE). As prescribed in 19.109(e)(2)(i)(B), substitute the following paragraph (c)(1) for paragraph (c)(1) of the basic clause:

(c)(1) The Offeror shall include with its proposal, submitted in response to this solicitation, a subcontracting plan that separately addresses subcontracting with small business, veteran-owned small business (VOSB), service-disabled veteran-owned small business (SDVOSB), HUBZone small business, small disadvantaged business (SDB), and women-owned small business (WOSB) concerns. If the Offeror is submitting an individual subcontracting plan, the plan must separately address subcontracting with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, with a separate part for the basic contract and separate parts for each option (if any). The Contracting Officer shall include the plan in and make it a part of the resultant contract. The Offeror shall negotiate the subcontracting plan within the timeframe specified by the Contracting Officer. If the Offeror fails to submit and negotiate a subcontracting plan, the Offeror shall not be eligible for award of a contract.

Alternate III (DEVIATION DATE). As prescribed in 19.109(e)(2)(i)(C), substitute the following paragraphs (d)(10) and (l) for paragraphs (d)(10) and (l) in the basic clause:

(d)(10) Assurances that the Offeror will—

(i) Cooperate in any studies or surveys as may be required;

(ii) Submit periodic reports so that the Government can determine the extent of compliance by the Contractor with the subcontracting plan;

(iii) Submit Standard Form (SF) 294 Subcontracting Report for Individual Contract in accordance with paragraph (l) of this clause. Submit the Summary Subcontract Report (SSR), in accordance with paragraph (l) of this clause using the SPR. The reports shall provide information on subcontract awards to small business concerns (including ANCs and Indian tribes that are not small businesses), veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns (including ANCs and Indian tribes

that have not been certified by the Small Business Administration as small disadvantaged businesses), women-owned small business concerns, and for NASA only, Historically Black Colleges and Universities and Minority Institutions. Reporting shall be in accordance with this clause, or as provided in agency regulations; and

(iv) Ensure that its subcontractors with subcontracting plans agree to submit the SF 294 in accordance with paragraph (l) of this clause. Ensure that its subcontractors with subcontracting plans agree to submit the SSR in accordance with paragraph (l) of this clause using the SPR.

(l) The Contractor shall submit a SF 294. The Contractor shall submit SSRs using the web-based SPR. Purchases from a corporation, company, or subdivision that is an affiliate of the Contractor or subcontractor are not included in these reports. Subcontract awards by affiliates shall be treated as subcontract awards by the Contractor. Subcontract award data reported by the Contractor and subcontractors shall be limited to awards made to their immediate next-tier subcontractors. Credit cannot be taken for awards made to lower tier subcontractors, unless the Contractor or subcontractor has been designated to receive a small business or small disadvantaged business credit from an ANC or Indian tribe. Only subcontracts involving performance in the U.S. or its outlying areas should be included in these reports with the exception of subcontracts under a contract awarded by the State Department or any other agency that has statutory or regulatory authority to require subcontracting plans for subcontracts performed outside the United States and its outlying areas.

(1) *SF 294*. This report is not required for commercial plans. The report is required for each contract containing an individual subcontracting plan. For Contractors the report shall be submitted to the Contracting Officer, or as specified elsewhere in this contract. In the case of a subcontract with a subcontracting plan, the report shall be submitted to the entity that awarded the subcontract.

(i) The report shall be submitted semi-annually during contract performance for the periods ending March 31 and September 30. A report is also required for each contract within 45 days of contract completion. Reports are due 45 days after the close of each reporting period, unless otherwise directed by the Contracting Officer. Reports are required when due, regardless of whether there has been any subcontracting activity since the inception of the contract or the previous reporting period. When notified of any anomaly, discrepancy, or error in the report, the Contractor shall submit a revised report within 30 days of receiving the notice of report rejection.

(ii)(A) When a subcontracting plan contains separate goals for the basic contract and each option, as prescribed by FAR 19.206-1(b), the dollar goal inserted on this report shall be the sum of the base period through the current option; for example, for a report submitted after the second option is exercised, the dollar goal would be the sum of the goals for the basic contract, the first option, and the second option.

(B) If a subcontracting plan has been added to the contract pursuant to FAR 19.302-1 or 19.301(d), the Contractor's achievements must be reported in the report on a cumulative basis from the date of incorporation of the subcontracting plan into the contract.

(iii) When a subcontracting plan includes indirect costs in the goals, these costs must be included in this report.

(2)*SSR*. (i) *Reports submitted under subcontracting contract plans*.

(A) This report encompasses all subcontracting under prime contracts and subcontracts with an executive agency, regardless of the dollar value of the subcontracts. This report also includes indirect costs on a prorated basis when the indirect costs are excluded from the subcontracting goals.

(B) The report may be submitted on a corporate, company or subdivision (*e.g.*, plant or division operating as a separate profit center) basis, unless otherwise directed by the agency.

(C) If the Contractor and/or a subcontractor is performing work for more than one executive agency, a separate report shall be submitted to each executive agency covering only that agency's contracts, provided at least one of that agency's contracts is over the applicable threshold specified in FAR 19.109(a), and the contract contains a subcontracting plan. For DoD, a consolidated report shall be submitted for all contracts awarded by military departments/agencies and/or subcontracts awarded by DoD prime contractors.

(D) The report shall be submitted annually by November 14, for the twelve month period ending September 30. When a Contracting Officer rejects an SSR, the Contractor is required to submit a revised SSR within 30 days of receiving the notice of report rejection.

(E) Subcontract awards that are related to work for more than one executive agency shall be appropriately allocated.

(F) The responsibility to monitor SSRs in the SPR, including SSRs submitted by subcontractors with subcontracting plans, belongs to the Government agency awarding the prime contracts unless stated otherwise in the contract.

(ii) *Reports submitted under a commercial plan*.

(A) The report shall include all subcontract awards under the commercial plan in effect during the Government's fiscal year and all indirect costs.

(B) The report shall be submitted annually, within 45 days after the end of the Government's fiscal year.

(C) If a Contractor has a commercial plan and is performing work for more than one executive agency, the Contractor shall specify the percentage of dollars attributable to each agency.

(D) The responsibility to monitor SSRs for commercial plans belongs to the agency that approved the commercial plan.

Alternate IV (DEVIATION DATE). As prescribed in 19.302-1(b)(1), substitute the following paragraphs (c)(1) and (d) for paragraphs (c)(1) and (d) of the basic clause:

(c)(1) The Contractor, upon request by the Contracting Officer, shall submit and negotiate a subcontracting plan, where applicable, that separately addresses subcontracting with small business, veteran-owned small business (VOSB), service-disabled veteran-owned small business (SDVOSB), HUBZone small business, small disadvantaged business (SDB), and women-owned small business (WOSB) concerns. If the Contractor is submitting an individual subcontracting plan, the plan shall separately address subcontracting with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, with a separate part for the basic contract and separate parts for each option (if any). The Contracting Officer shall incorporate the subcontracting plan into the contract. The Contractor shall negotiate the subcontracting plan within the timeframe specified by the Contracting Officer. The subcontracting plan does not apply retroactively.

(d) The Contractor's subcontracting plan shall include the following:

(1) Separate goals, expressed in terms of total dollars subcontracted and as a percentage of total planned subcontracting dollars, for the use of small business, VOSB, SDVOSB, HUBZone small business, SDB, and WOSB concerns as subcontractors. For individual subcontracting plans, and if required by the Contracting Officer, goals shall also be expressed in terms of percentage of total contract dollars, in addition to the goals expressed as a percentage of total subcontract dollars. The Contractor shall include all subcontracts that contribute to contract performance and may include a proportionate share of products and services that are normally allocated as indirect costs. In accordance with 15 U.S.C. 657r(a), a Contractor that is a mentor with an SBA-approved mentor-protégé agreement (see 13 CFR 125.9) and awards a subcontract to its protégé may apply the costs incurred for training it provides to its protégé toward its subcontracting plan goals, if the protégé is a covered territory business or the protégé’s principal office is located in the Commonwealth of Puerto Rico. In accordance with 43 U.S.C. 1626—

(i) Count subcontracts awarded to an ANC or Indian tribe toward the subcontracting goals for small business and SDB concerns, regardless of the size or Small Business Administration certification status of the ANC or Indian tribe; and

(ii) If one or more subcontractors are in the subcontract tier between the prime Contractor and the ANC or Indian tribe, then the ANC or Indian tribe shall designate the appropriate Contractor(s) to count the subcontract toward its small business and small disadvantaged business subcontracting goals.

(A) In most cases, the appropriate Contractor is the Contractor that awarded the subcontract to the ANC or Indian tribe.

(B) If the ANC or Indian tribe designates more than one Contractor to count the subcontract toward its goals, the ANC or Indian tribe shall designate only a portion of the total subcontract award to each Contractor. The sum of the amounts designated to various Contractors cannot exceed the total value of the subcontract.

(C) The ANC or Indian tribe shall give a copy of the written designation to the Contracting Officer, the Contractor, and the subcontractors in between the prime Contractor and the ANC or Indian tribe within 30 days of the date of the subcontract award.

(D) If the Contracting Officer does not receive a copy of the ANC's or the Indian tribe's written designation within 30 days of the subcontract award, the Contracting Officer will consider the Contractor that awarded the subcontract to the ANC or Indian tribe the designated Contractor.

(2) A statement of–

(i) Total dollars planned to be subcontracted for an individual subcontracting plan; or the Contractor's total projected sales, expressed in dollars, and the total value of projected subcontracts to support the sales for a commercial plan, including all indirect costs, with the exception of those such as the following: Employee salaries and benefits; payments for petty cash; depreciation; interest; income taxes; property taxes; lease payments; bank fees; fines, claims, and dues; original equipment manufacturer relationships during warranty periods (negotiated up front with the product); utilities and other services purchased from a municipality or an entity solely authorized by the municipality to provide those services in a particular geographical region; and philanthropic contributions;

(ii) Total dollars planned to be subcontracted to small business concerns (including ANC and Indian tribes);

(iii) Total dollars planned to be subcontracted to veteran-owned small business concerns; (iv) Total dollars planned to be subcontracted to service-disabled veteran-owned small business; (v) Total dollars planned to be subcontracted to HUBZone small business concerns; (vi) Total dollars planned to be subcontracted to small disadvantaged business concerns (including ANCs and Indian tribes); and (vii) Total dollars planned to be subcontracted to women-owned small business concerns.

(3) A description of the principal types of supplies and services to be subcontracted, and an identification of the types planned for subcontracting to

(i) Small business concerns;

(ii) Veteran-owned small business concerns;

(iii) Service-disabled veteran-owned small business concerns;

(iv) HUBZone small business concerns;

(v) Small disadvantaged business concerns; and

(vi) Women-owned small business concerns.

(4) A description of the method used to develop the subcontracting goals in paragraph (d)(1) of this clause.

(5) A description of the method used to identify potential sources for solicitation purposes (e.g., existing company source lists, SAM, veterans service organizations, the National Minority Purchasing Council Vendor Information Service, the Research and Information Division of the Minority Business Development Agency in the Department of Commerce, or small, HUBZone, small disadvantaged, and women-owned small business trade associations). The Contractor may rely on the information contained in SAM as an accurate representation of a concern's size and ownership characteristics for the purposes of maintaining a small, veteran-owned small, service-disabled veteran-owned small, HUBZone small, small disadvantaged, and women-owned small business source list. Use of SAM as its source list does not relieve a firm of its responsibilities (e.g., outreach, assistance, counseling, or publicizing subcontracting opportunities) in this clause.

(6) A statement as to whether or not the Contractor included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with–

(i) Small business concerns (including ANC and Indian tribes);

(ii) Veteran-owned small business concerns;

(iii) Service-disabled veteran-owned small business concerns;

(iv) HUBZone small business concerns;

(v) Small disadvantaged business concerns (including ANC and Indian tribes); and

(vi) Women-owned small business concerns.

(7) The name of the individual employed by the Contractor who will administer the Contractor's subcontracting program, and a description of the duties of the individual.

(8) A description of the efforts the Contractor will make to assure that small business, VOSB, SDVOSB, HUBZone small business, SDB, and WOSB concerns have an equitable opportunity to compete for subcontracts.

(9) Assurances that the Contractor will include the clause of this contract entitled “Utilization of Small Business Concerns” in all subcontracts that offer further subcontracting opportunities, and that the Contractor will require all subcontractors (except small business concerns, including entities that are treated as small business concerns by statute for certain purposes (e.g., ANCs, see 13 CFR 125.3(b)(2))) that receive subcontracts in excess of the applicable threshold specified in FAR 19.302-1(a)(1) on the date of subcontract award, with further subcontracting possibilities to adopt a subcontracting plan that complies with the requirements of this clause.

(10) Assurances that the Contractor will–

(i) Cooperate in any studies or surveys as may be required;

(ii) Submit periodic reports so the Government can determine the extent of compliance by the Contractor with the subcontracting plan;

(iii) Include subcontracting data for each order when reporting subcontracting achievements for an indefinite-delivery, indefinite-quantity contract with an individual subcontracting plan where the contract is intended for use by multiple agencies;

(iv) Submit the Individual Subcontract Report (ISR) and/or the Summary Subcontract Report (SSR), in accordance with paragraph (l) of this clause using the SPR. The reports shall provide information on subcontract awards to small business concerns (including ANCs and Indian tribes that are not small businesses), veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns (including ANCs and Indian tribes that have not been certified by SBA as small disadvantaged businesses), women-

owned small business concerns, and for NASA only, Historically Black Colleges and Universities and Minority Institutions. Reporting shall be in accordance with this clause, or as provided in agency regulations;

(v) Ensure that its subcontractors with subcontracting plans agree to submit the ISR and/or SSR using SPR;

(vi) Provide its prime contract number, its unique entity identifier, and the e-mail address of the Contractor's official responsible for acknowledging receipt of or rejecting the ISRs, to all first-tier subcontractors with subcontracting plans so they can enter this information into the SPR when submitting their ISRs; and

(vii) Require that each subcontractor with a subcontracting plan provide the prime contract number, its own unique entity identifier, and the e-mail address of the subcontractor's official responsible for acknowledging receipt of or rejecting the ISRs, to its subcontractors with subcontracting plans.

(11) A description of the types of records that will be maintained concerning procedures that have been adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of the Contractor's efforts to locate small business, VOSB, SDVOSB, HUBZone small business, SDB, and WOSB concerns and award subcontracts to them. The records shall include at least the following (on a plant-wide or company-wide basis, unless otherwise indicated):

(i) Source lists (e.g., SAM), guides, and other data that identify small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns.

(ii) Organizations contacted in an attempt to locate sources that are small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business concerns.

(iii) Records on each subcontract solicitation resulting in an award of more than the simplified acquisition threshold, as defined in FAR 2.101 on the date of subcontract award, indicating–

(A) Whether small business concerns were solicited and, if not, why not;

(B) Whether veteran-owned small business concerns were solicited and, if not, why not;

(C) Whether service-disabled veteran-owned small business concerns were solicited and, if not, why not;

(D) Whether HUBZone small business concerns were solicited and, if not, why not;

(E) Whether small disadvantaged business concerns were solicited and, if not, why not;

(F) Whether women-owned small business concerns were solicited and, if not, why not; and

(G) If applicable, the reason award was not made to a small business concern.

(iv) Records of any outreach efforts to contact–

(A) Trade associations;

(B) Business development organizations;

(C) Conferences and trade fairs to locate small, HUBZone small, small disadvantaged, service-disabled veteran-owned, and women-owned small business sources; and

(D) Veterans service organizations.

(v) Records of internal guidance and encouragement provided to buyers through–

(A) Workshops, seminars, training, etc.; and

(B) Monitoring performance to evaluate compliance with the program's requirements.

(vi) On a contract-by-contract basis, records to support award data submitted by the Contractor to the Government, including the name, address, and business size of each subcontractor. Contractors having commercial plans need not comply with this requirement.

(12) Assurances that the Contractor will make a good faith effort to acquire articles, equipment, supplies, services, or materials, or obtain the performance of construction work from the small business concerns that it used in preparing the proposal for the modification, in the same or greater scope, amount, and quality used in preparing and submitting the modification proposal. Responding to a request for a quote does not constitute use in preparing a proposal. The Contractor used a small business concern in preparing the proposal for a modification if–

(i) The Contractor identifies the small business concern as a subcontractor in the proposal or associated small business subcontracting plan to furnish certain supplies or perform a portion of the subcontract; or

(ii) The Contractor used the small business concern's pricing or cost information or technical expertise in preparing the proposal, where there is written evidence of an intent or understanding that the small business concern will be awarded a subcontract for the related work when the modification is executed.

(13) Assurances that the Contractor will provide the Contracting Officer with a written explanation if the Contractor fails to acquire articles, equipment, supplies, services or materials or obtain the performance of construction work as

described in paragraph (d)(12) of this clause. The Contractor shall submit this written explanation to the Contracting Officer within 30 days of contract completion.

(14) Assurances that the Contractor will not prohibit a subcontractor from discussing with the contracting officer any material matter pertaining to the payment to or utilization of a subcontractor.

(15) Assurances that the Contractor will pay its small business subcontractors on time and in accordance with the terms and conditions of the underlying subcontract, and notify the Contracting Officer when the prime contractor makes either a reduced or an untimely payment to a small business subcontractor (see 52.242-5).

52.219-10 Incentive Subcontracting Program.

As prescribed in 19.109(f)(1), insert the following clause:

INCENTIVE SUBCONTRACTING PROGRAM (DEVIATION DATE)

(a) Of the total dollars it plans to spend under subcontracts, the Contractor has committed itself in its subcontracting plan to try to award certain percentages to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, respectively.

(b) If the Contractor exceeds its subcontracting goals for small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns in performing this contract, it will receive _____ *[Contracting Officer to insert the appropriate number between 0 and 10]* percent of the dollars in excess of each goal in the plan, unless the Contracting Officer determines that the excess was not due to the Contractor's efforts (*e.g.,*a subcontractor cost overrun caused the actual subcontract amount to exceed that estimated in the subcontracting plan, or the award of subcontracts that had been planned but had not been disclosed in the subcontracting plan during contract negotiations). Determinations under this paragraph are unilateral decisions made solely at the discretion of the Government.

(c) If this is a cost-plus-fixed-fee contract, the sum of the fixed fee and the incentive fee earned under this contract may not exceed the limitations in 15.4 of the Federal Acquisition Regulation.

(End of clause)

52.219-11 Special 8(a) Contract Conditions.

As prescribed in 19.108-10(a), insert the following clause:

SPECIAL 8(A) CONTRACT CONDITIONS (JAN 2017)

The Small Business Administration (SBA) agrees to the following:

(a) To furnish the supplies or services set forth in this contract according to the specifications and the terms and conditions hereof by subcontracting with an eligible concern pursuant to the provisions of section 8(a) of the Small Business Act, as amended (15 U.S.C. 637(a)).

(b) That in the event SBA does not award a subcontract for all or a part of the work hereunder, this contract may be terminated either in whole or in part without cost to either party.

(c) Except for novation agreements, delegates to the _____ *[insert name of contracting agency]* the responsibility for administering the subcontract to be awarded hereunder with complete authority to take any action on behalf of the Government under the terms and conditions of the subcontract; provided, however, that the _____ *[insert name of contracting agency]* shall give advance notice to the SBA before it issues a final notice terminating the right of a subcontractor to proceed with further performance, either in whole or in part, under the subcontract for default or for the convenience of the Government.

(d) That payments to be made under any subcontract awarded under this contract will be made directly to the subcontractor by the _____ *[insert name of contracting agency]*.

(e) That the subcontractor awarded a subcontract hereunder shall have the right of appeal from decisions of the Contracting Officer cognizable under the "Disputes" clause of said subcontract.

(f) To notify the _____ *[insert name of contracting agency]* Contracting Officer immediately upon notification by the subcontractor that the owner or owners upon whom 8(a) eligibility was based plan to relinquish ownership or control of the concern.

(End of clause)

52.219-12 Special 8(a) Subcontract Conditions.

As prescribed in 19.108-10(b), insert the following clause:

SPECIAL 8(A) SUBCONTRACT CONDITIONS (OCT 2019)

(a) The Small Business Administration (SBA) has entered into Contract No._____ *[insert number of contract]* with the _____ *[insert name of contracting agency]* to furnish the supplies or services as described therein. A copy of the contract is attached hereto and made a part hereof.

(b) The _____ *[insert name of subcontractor],* hereafter referred to as the subcontractor, agrees and acknowledges as follows:

(1) That it will, for and on behalf of the SBA, fulfill and perform all of the requirements of Contract No. _____ *[insert number of contract]* for the consideration stated therein and that it has read and is familiar with each and every part of the contract.

(2) That the SBA has delegated responsibility, except for novation agreements, for the administration of this subcontract to the _____ *[insert name of contracting agency]* with complete authority to take any action on behalf of the Government und_d and conditions of this subcontract.

(3) That it will notify the _____ *[insert name of contracting agency]* Contracting Officer in writing immediately upon entering an agreement (either oral or written) to transfer all or part of its stock or other ownership interest to any other party.

(c) Payments, including any progress payments under this subcontract, will be made directly to the subcontractor by the _____ *[insert name of contracting agency]*.

(End of clause)

52.219-13 Notice of Set-Aside of Orders.

As prescribed in 19.104-3(d), insert the following clause:

NOTICE OF SET-ASIDE OF ORDERS (MAR 2020)

(a) The Contracting Officer may set aside orders for the small business concerns identified in 19.000(a)(3).

(b) The Contracting Officer will give notice of the order or orders, if any, to be set aside for small business concerns identified in 19.000(a)(3) and the applicable small business program. This notice, and its restrictions, will apply only to the specific orders that have been set aside for any of the small business concerns identified in 19.000(a)(3).

(End of clause)

Alternate I [Reserved]

52.219-14 Limitations on Subcontracting.

As prescribed in 19.104-3(c), insert the following clause:

LIMITATIONS ON SUBCONTRACTING (DEVIATION DATE)

(a) This clause does not apply to the unrestricted portion of a partial set-aside.

(b) *Definition. Similarly situated entity*, as used in this clause, means a first-tier subcontractor, including an independent contractor, that—

(1) Has the same small business program status as that which qualified the prime contractor for the award (*e.g.*, for a small business set-aside contract, any small business concern, without regard to its socioeconomic status); and

(2) Is considered small for the size standard under the North American Industry Classification System (NAICS) code the prime contractor assigned to the subcontract.

(c) *Applicability.* This clause applies only to—

(1) Contracts that have been set aside for any of the small business concerns identified in 19.000(a)(3);

(2) Part or parts of a multiple-award contract that have been set aside for any of the small business concerns identified in 19.000(a)(3);

(3) Contracts that have been awarded on a sole-source basis in accordance with sections 19.105, 19.106, 19.107, and 19.108;

(4) Orders expected to exceed the simplified acquisition threshold and that are set aside for small business concerns under multiple-award contracts, as described in 8.4 and 16.5;

(5) Orders, regardless of dollar value, that are set aside in accordance with sections 19.105, 19.106, 19.107, and 19.108 under multiple-award contracts, as described in 8.4 and 16.5; and

(6) Contracts using the HUBZone price evaluation preference to award to a HUBZone small business concern unless the concern waived the evaluation preference.

(d) *Independent contractors.* An independent contractor shall be considered a subcontractor.

(e) By submission of an offer and execution of a contract, the Contractor agrees that in performance of a contract assigned a North American Industry Classification System (NAICS) code for—

(1) Services (except construction), it will not pay more than 50 percent of the amount paid by the Government for contract performance to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the prime contractor's 50 percent subcontract amount that cannot be exceeded. When a contract includes both services and supplies, the 50 percent limitation shall apply only to the service portion of the contract;

(2) Supplies (other than procurement from a nonmanufacturer of such supplies), it will not pay more than 50 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the prime contractor's 50 percent subcontract amount that cannot be exceeded. When a contract includes both supplies and services, the 50 percent limitation shall apply only to the supply portion of the contract;

(3) General construction, it will not pay more than 85 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the prime contractor's 85 percent subcontract amount that cannot be exceeded; or

(4) Construction by special trade contractors, it will not pay more than 75 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the prime contractor's 75 percent subcontract amount that cannot be exceeded.

(f) The Contractor shall comply with the limitations on subcontracting as follows:

(1) For contracts, in accordance with paragraphs (c)(1), (2), (3) and (6) of this clause—

[*Contracting Officer check as appropriate.*]

□ By the end of the base term of the contract and then by the end of each subsequent option period; or

□ By the end of the performance period for each order issued under the contract.

(2) For orders, in accordance with paragraphs (c)(4) and (5) of this clause, by the end of the performance period for the order.

(g) A joint venture agrees that, in the performance of the contract, the applicable percentage specified in paragraph (e) of this clause will be performed by the aggregate of the joint venture participants.

(1) In a joint venture comprised of a small business protégé and its mentor approved by the Small Business Administration, the small business protégé shall perform at least 40 percent of the work performed by the joint venture. Work performed by the small business protégé in the joint venture must be more than administrative functions.

(2) In an 8(a) joint venture, the 8(a) participant(s) shall perform at least 40 percent of the work performed by the joint venture. Work performed by the 8(a) participants in the joint venture must be more than administrative functions.

(End of clause)

52.219-15 [Reserved]

52.219-16 Liquidated Damages-Subcontracting Plan.

As prescribed in 19.109(e)(2)(ii) and 19.302-1(b)(2), insert the following clause:

LIQUIDATED DAMAGES-SUBCONTRACTING PLAN (DEVIATION DATE)

(a) The Government will measure performance by applying the percentage goals to the total actual subcontracting dollars, or, if a commercial plan is involved, to the pro rata share of actual subcontracting dollars attributable to Government contracts covered by the commercial plan. If, at contract completion or, in the case of a commercial plan, at the close of the fiscal year for which the plan is applicable, the Contractor has failed to meet its subcontracting goals and the Contracting Officer decides in accordance with paragraph (b) of this clause that the Contractor failed to make a good faith effort to comply with its subcontracting plan, established in accordance with the clause in this contract entitled "Small Business Subcontracting Plan," the Contractor shall pay the Government liquidated damages in a stated amount. The amount of probable damages attributable to the Contractor's failure to comply shall equal the actual dollar amount by which the Contractor failed to achieve each subcontract goal.

(b) Before the Contracting Officer makes a final decision that the Contractor has failed to make a good faith effort to comply with the subcontracting plan, the Contracting Officer shall give the Contractor written notice specifying the failure and permitting the Contractor to demonstrate the good faith efforts it made and to discuss the matter. The Contracting Officer may take failure to respond to the notice as an admission that no valid explanation exists. If, after consideration of all the pertinent data, the Contracting Officer finds that the Contractor failed to make a good faith effort to comply with the subcontracting plan, the Contracting Officer will issue a final decision to that effect and require that the Contractor pay the Government liquidated damages as provided in paragraph (a) of this clause.

(c) With respect to commercial plans, the Contracting Officer who approved the plan will perform the functions of the Contracting Officer under this clause on behalf of all agencies with contracts covered by the commercial plan.

(d) The Contractor has the right of appeal, under the clause in this contract entitled, Disputes, from any final decision of the Contracting Officer.

(e) Liquidated damages shall be in addition to any other remedies that the Government may have.

(End of clause)

52.219-17 Section 8(a) Award.

As prescribed in 19.108-10(c), insert the following clause:

SECTION 8(A) AWARD (OCT 2019)

(a) By execution of a contract, the Small Business Administration (SBA) agrees to the following:

(1) To furnish the supplies or services set forth in the contract according to the specifications and the terms and conditions by subcontracting with the Offeror who has been determined an eligible concern pursuant to the provisions of section 8(a) of the Small Business Act, as amended (15 U.S.C. 637(a)).

(2) Except for novation agreements, delegates to the _____ *[insert name of contracting activity]*the responsibility for administering the contract with complete authority to take any action on behalf of the Government under the terms and conditions of the contract; provided, however that the contracting agency shall give advance notice to the SBA before it issues a final notice terminating the right of the subcontractor to proceed with further performance, either in whole or in part, under the contract.

(3) That payments to be made under the contract will be made directly to the subcontractor by the contracting activity.

(4) To notify the _____ *[insert name of contracting agency]* Contracting Officer immediately upon notification by the subcontractor that the owner or owners upon whom 8(a) eligibility was based plan to relinquish ownership or control of the concern.

(5) That the subcontractor awarded a subcontract hereunder shall have the right of appeal from decisions of the cognizant Contracting Officer under the "Disputes" clause of the subcontract.

(b) The offeror/subcontractor agrees and acknowledges that it will, for and on behalf of the SBA, fulfill and perform all of the requirements of the contract.

(End of clause)

52.219-18 Notification of Competition Limited to Eligible 8(a) Participants.

As prescribed in 19.108-10(d), insert the following clause:

NOTIFICATION OF COMPETITION LIMITED TO ELIGIBLE 8(A) PARTICIPANTS (OCT 2022)

(a) Offers are solicited only from—

(1) Small business concerns expressly certified by the Small Business Administration (SBA) for participation in SBA's 8(a) program and which meet the following criteria at the time of submission of offer—

(i) The Offeror is in conformance with the 8(a) support limitation set forth in its approved business plan; and

(ii) The Offeror is in conformance with the Business Activity Targets set forth in its approved business plan or any remedial action directed by SBA;

(2) A joint venture, in which at least one of the 8(a) program participants that is a party to the joint venture complies with the criteria set forth in paragraph (a)(1) of this clause, that complies with 13 CFR 124.513(c); or

(3) A joint venture—

(i) That is comprised of a mentor and an 8(a) protégé with an approved mentor-protégé agreement under the 8(a) program;

(ii) In which at least one of the 8(a) program participants that is a party to the joint venture complies with the criteria set forth in paragraph (a)(1) of this clause; and

(iii) That complies with 13 CFR 124.513(c).

(b) By submission of its offer, the Offeror represents that it meets the applicable criteria set forth in paragraph (a) of this clause.

(c) Any award resulting from this solicitation will be made to the Small Business Administration, which will subcontract performance to the successful 8(a) offeror selected through the evaluation criteria set forth in this solicitation. A contracting officer may consider a joint venture for contract award. SBA does not approve joint ventures for competitive awards, but see 13 CFR 124.501(g) for SBA's determination of participant eligibility.

(d) The _____ *[insert name of SBA's contractor]*shall notify the_____ *[insert name of contracting agency]*Contracting Officer in writing immediately upon entering an agreement (either oral or written) to transfer all or part of its stock.

(End of clause)

Alternate I (MAR 2023). If the competition is to be limited to 8(a) participants within one or more specific SBA regions or districts, add the following paragraph (a)(1)(iii) to paragraph (a) of the clause:

(iii) The offeror's approved business plan is on the file and serviced by __ *[Contracting Officer completes by inserting the appropriate SBA District and/or Area Office(s) as identified by the SBA]*.

52.219-19 [Reserved]

52.219-20 [Reserved]

52.219-21 [Reserved]

52.219-22 [Reserved]

52.219-23 [Reserved]

52.219-24 [Reserved]

52.219-25 [Reserved]

52.219-26 [Reserved]

52.219-27 Notice of Set-Aside for, or Sole-Source Award to, Service-Disabled Veteran-Owned Small Business (SDVOSB) Concerns Eligible Under the SDVOSB Program.

As prescribed in 19.106-4(a), insert the following clause:

NOTICE OF SET-ASIDE FOR, OR SOLE-SOURCE AWARD TO, SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESS (SDVOSB) CONCERNS ELIGIBLE UNDER THE SDVOSB PROGRAM. (DEVIATION DATE)

(a) *Definition*.

Service-disabled veteran-owned small business (SDVOSB) concern means a small business concern—

(1) (i) Not less than 51 percent of which is owned and controlled by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans; and

(ii) The management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a service-disabled veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran; or

(2) A small business concern eligible under the SDVOSB Program in accordance with 13 CFR part 128 (see FAR 19.106).

(3) *Service-disabled veteran*, as used in this definition, means a veteran as defined in 38 U.S.C. 101(2), with a disability that is service-connected, as defined in 38 U.S.C. 101(16) and who is registered in the Beneficiary Identification and Records Locator Subsystem, or successor system that is maintained by the Department of Veterans Affairs' Veterans Benefits Administration, as a service-disabled veteran.

Service-disabled veteran-owned small business (SDVOSB) concern eligible under the SDVOSB Program means an SDVOSB concern that is designated in the System for Award Management (SAM) as certified by the Small Business Administration (SBA) in accordance with 13 CFR 128.300.

Service-disabled veteran-owned small business (SDVOSB) Program means a program that authorizes contracting officers to limit competition, including award on a sole-source basis, to SDVOSB concerns eligible under the SDVOSB Program.

(b) *Applicability*. This clause applies only to—

(1) Contracts that have been set aside for, or awarded on a sole-source basis to, SDVOSB concerns eligible under the SDVOSB Program;

(2) Part or parts of a multiple-award contract that have been set aside for SDVOSB concerns eligible under the SDVOSB Program; and

(3) Orders set aside for SDVOSB concerns eligible under the SDVOSB Program, under multiple-award contracts as described in 8.4 and 16.5.

(c) *General*. (1) Offers are solicited only from concerns designated in SAM as SDVOSB concerns certified by SBA. Offers received from concerns that are not SDVOSB concerns certified by SBA will not be considered.

(2) Any award resulting from this solicitation will be made only to a concern designated in SAM as an SDVOSB certified by SBA.

(d) A joint venture may be considered an SDVOSB concern if the managing partner of the joint venture complies with the criteria defined in paragraph (a) of this clause and 13 CFR 128.402.

(e) In a joint venture that complies with paragraph (d) of this clause, the SDVOSB party or parties to the joint venture shall perform at least 40 percent of the work performed by the joint venture. Work performed by the SDVOSB party or parties to the joint venture must be more than administrative functions.

(End of clause)

52.219-28 Postaward Small Business Program Rerepresentation.

As prescribed in 19.101(a)(2)(iii)(A), insert the following clause:

POSTAWARD SMALL BUSINESS PROGRAM REREPRESENTATION (DEVIATION DATE)

(a) *Definitions*. As used in this clause—

Long-term contract means a contract of more than five years in duration, including options. However, the term does not include contracts that exceed five years in duration because the period of performance has been extended for a cumulative period not to exceed six months under the clause at 52.217-8, Option to Extend Services, or other appropriate authority.

Small business concern—

(1) Means a concern, including its affiliates, that is independently owned and operated, not dominant in its field of operation, and qualified as a small business under the criteria in 13 CFR part 121 and the size standard in paragraph (c) of this clause.

(2) *Affiliates*, as used in this definition, means business concerns, one of whom directly or indirectly controls or has the power to control the others, or a third party or parties control or have the power to control the others. In determining whether affiliation exists, consideration is given to all appropriate factors including common ownership, common management, and contractual relationships. SBA determines affiliation based on the factors set forth at 13 CFR 121.103.

(b) If the Contractor represented that it was a small business concern, a small disadvantaged business concern, or a joint venture that was any of the small business concerns identified in 19.000(a)(3) prior to award of this contract, the Contractor shall rerepresent its size and socioeconomic status according to paragraph (e) of this clause or, if applicable, paragraph (g) of this clause, upon occurrence of any of the following:

(1) Within 30 days after execution of a novation agreement or within 30 days after modification of the contract to include this clause, if the novation agreement was executed prior to inclusion of this clause in the contract.

(2) Within 30 days after a merger or acquisition that does not require a novation or within 30 days after modification of the contract to include this clause, if the merger or acquisition occurred prior to inclusion of this clause in the contract.

(3) For long-term contracts-

(i) Within 60 to 120 days prior to the end of the fifth year of the contract; and

(ii) Within 60 to 120 days prior to the date specified in the contract for exercising any option thereafter.

(c) The Contractor shall rerepresent its size status in accordance with the size standard in effect at the time of this rerepresentation that corresponds to the North American Industry Classification System (NAICS) code(s) assigned to this contract. The small business size standard corresponding to this NAICS code(s) can be found at https://www.sba.gov/document/support--table-size-standards.

(d) The small business size standard for a Contractor providing an end item that it does not manufacture, process, or produce itself, for a contract other than a construction or service contract, is 500 employees, or 150 employees for information technology value-added resellers under NAICS code 541519, if the acquisition—

(1) Was set aside for small business and has a value above the simplified acquisition threshold;

(2) Used the HUBZone price evaluation preference regardless of dollar value, unless the Contractor waived the price evaluation preference; or

(3) Was an 8(a), HUBZone, service-disabled veteran-owned, economically disadvantaged women-owned, or women-owned small business set-aside or sole-source award regardless of dollar value.

(e) Except as provided in paragraph (g) of this clause, the Contractor shall make the representation(s) required by paragraph (b) of this clause by validating or updating all its representations in the Representations and Certifications section of the System for Award Management (SAM) and its other data in SAM, as necessary, to ensure that they reflect the Contractor's current status. The Contractor shall notify the contracting officer in writing within the timeframes specified in paragraph (b) of this clause, that the data have been validated or updated, and provide the date of the validation or update.

(f) If the Contractor represented that it was other than a small business concern prior to award of this contract, the Contractor may, but is not required to, take the actions required by paragraphs (e) or (g) of this clause.

(g) If the Contractor does not have representations and certifications in SAM, or does not have a representation in SAM for the NAICS code applicable to this contract, the Contractor is required to complete the following rerepresentation and submit it to the contracting office, along with the contract number and the date on which the rerepresentation was completed:

(1) The Contractor represents that it □ is, □ is not a small business concern under *NAICS Code* _____ assigned to *contract number* _____.

(2) [*Complete only if the Contractor represented itself as a small business concern in paragraph (g)(1) of this clause*.] The Contractor represents that it □ is, □ is not, a small disadvantaged business concern as defined in 13 CFR 124.1001.

(3) *Women-owned small business (WOSB) joint venture eligible under the WOSB Program*. The Contractor represents that it □ is, □ is not a joint venture that complies with the requirements of 13 CFR 127.506(a) through (c). [*The Contractor shall enter the name and unique entity identifier of each party to the joint venture:* __.]

(4) *Economically disadvantaged women-owned small business (EDWOSB) joint venture*. The Contractor represents that it □ is, □ is not a joint venture that complies with the requirements of 13 CFR 127.506(a) through (c). [*The Contractor shall enter the name and unique entity identifier of each party to the joint venture:* __ .]

(5) *Service-disabled veteran-owned small business (SDVOSB) joint venture eligible under the SDVOSB Program*. The Contractor represents that it □ is, □ is not an SDVOSB joint venture eligible under the SDVOSB Program that complies with the requirements of 13 CFR 128.402. [*The Contractor shall enter the name and unique entity identifier of each party to the joint venture:* __.]

(6) *HUBZone joint venture eligible under the HUBZone Program.*[*Complete only if the offeror is a HUBZone small business concern.*] The offeror represents, as part of its offer, that It □ is, □ is not a HUBZone joint venture that complies with the requirements of 13 CFR 126.616(a) through (c). [*The Contractor shall enter the name and unique entity identifier of each party to the joint venture:* _____.] Each HUBZone small business concern participating in the HUBZone joint venture must be certified as a HUBZone concern. [*Contractor to sign and date and insert authorized signer's name and title.*_____]

(End of clause)

Alternate I (DEVIATION DATE). As prescribed in 19.101(a)(2)(iii)(B), substitute the following paragraph (g)(1) for paragraph (g)(1) of the basic clause:

(g)(1) The Contractor represents its small business size status for each one of the NAICS codes assigned to this contract.

NAICS Code	**Small business concern (yes/no)**
_____	_____
_____	_____
_____	_____

[*Contracting Officer to insert NAICS codes.*]

52.219-29 Notice of Set-Aside for, or Sole-Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns.

As prescribed in 19.107-4(a), insert the following clause:

NOTICE OF SET-ASIDE FOR, OR SOLE-SOURCE AWARD TO, ECONOMICALLY DISADVANTAGED WOMEN-OWNED SMALL BUSINESS CONCERNS (DEVIATION DATE)

(a) *Definition—*

Economically disadvantaged women-owned small business (EDWOSB) concern as used in this clause, means a small business concern that is at least 51 percent directly and unconditionally owned by, and the management and daily business operations of which are controlled by, one or more women who are citizens of the United States and who are economically disadvantaged in accordance with 13 CFR part 127, and is certified pursuant to 13 CFR 127.300 as an EDWOSB. It automatically qualifies as a women-owned small business (WOSB) concern eligible under the WOSB Program.

(b) *Applicability*. This clause applies only to—

(1) Contracts that have been set aside for, or awarded on a sole-source basis to, EDWOSB concerns;

(2) Part or parts of a multiple-award contract that have been set aside for EDWOSB concerns; and

(3) Orders set aside for EDWOSB concerns under multiple-award contracts as described in 8.4 and 16.5.

(c) *General.* (1) Offers are solicited only from certified EDWOSB concerns. Offers received from concerns that are not certified EDWOSB concerns will not be considered.

(2) Any award resulting from this solicitation will be made to a certified EDWOSB concern.

(d) *Joint venture.* A joint venture may be considered an EDWOSB concern if—

(1) At least one party to the joint venture complies with the criteria defined in paragraph (a) and paragraph (c)(1) of this clause, and 13 CFR 127.506(c); and

(2) Each party to the joint venture qualifies as small under the size standard for the solicitation, or the protégé is small under the size standard for the solicitation in a joint venture comprised of a mentor and protégé with an approved mentor-protégé agreement under the SBA mentor-protégé program.

(e) In a joint venture that complies with paragraph (d) of this clause, the EDWOSB party or parties to the joint venture shall perform at least 40 percent of the work performed by the joint venture. Work performed by the EDWOSB party or parties to the joint venture must be more than administrative functions.

(End of clause)

52.219-30 Notice of Set-Aside for, or Sole-Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program.

As prescribed in 19.107-4(b), insert the following clause:

NOTICE OF SET-ASIDE FOR, OR SOLE-SOURCE AWARD TO, WOMEN-OWNED SMALL BUSINESS CONCERNS ELIGIBLE UNDER THE WOMEN-OWNED SMALL BUSINESS PROGRAM (DEVIATION DATE)

(a) *Definition.*

Women-owned small business (WOSB) concern eligible under the WOSB Program (in accordance with 13 CFR part 127), as used in this clause, means a small business concern that is at least 51 percent directly and unconditionally owned by, and the management and daily business operations of which are controlled by, one or more women who are citizens of the United States, and the concern is certified by SBA or an approved third-party certifier in accordance with 13 CFR 127.300 as a WOSB. A certified EDWOSB is automatically eligible as a certified WOSB.

(b) *Applicability*. This clause applies only to—

(1) Contracts that have been set aside for, or awarded on a sole-source basis to, WOSB concerns eligible under the WOSB Program;

(2) Part or parts of a multiple-award contract that have been set aside for WOSB concerns eligible under the WOSB Program; and

(3) Orders set aside for WOSB concerns eligible under the WOSB Program, under multiple-award contracts as described in 8.4 and 16.5.

(c) *General.* (1) Offers are solicited only from certified WOSB concerns eligible under the WOSB Program. Offers received from concerns that are not certified WOSB concerns eligible under the WOSB Program shall not be considered

(2) Any award resulting from this solicitation will be made to a certified WOSB concern eligible under the WOSB Program.

(d) *Joint venture.* A joint venture may be considered a WOSB concern eligible under the WOSB Program if—

(1) At least one party to the joint venture complies with the criteria defined in paragraph (a) and (c)(1) of this clause, and 13 CFR 127.506(c); and

(2) Each party to the joint venture qualifies as small under the size standard for the solicitation, or the protégé is small under the size standard for the solicitation in a joint venture comprised of a mentor and protégé with an approved mentor-protégé agreement under the SBA mentor-protégé program.

(e) In a joint venture that complies with paragraph (d) of this clause, the WOSB party or parties to the joint venture shall perform at least 40 percent of the work performed by the joint venture. Work performed by the WOSB party or parties to the joint venture must be more than administrative functions.

(End of clause)

52.219-31 Notice of Small Business Reserve.

As prescribed in 19.112(e), insert the following provision:

NOTICE OF SMALL BUSINESS RESERVE (MAR 2020)

(a) This solicitation contains a reserve for one or more small business concerns identified at 19.000(a)(3). The small business program eligibility requirements apply.

(b) The small business concern(s) eligible for participation in the reserve shall submit one offer that addresses each portion of the solicitation for which it wants to compete. Award of the contract will be based on criteria identified elsewhere in the solicitation.

(End of provision)

52.219-32 [Reserved]

(DEVIATION DATE)

52.219-33 Nonmanufacturer Rule.

As prescribed in 19.104-3(e)(1), insert the following clause:

NONMANUFACTURER RULE (DEVIATION DATE)

(a) *Definitions*. As used in this clause—

Manufacturer means the concern that transforms raw materials, miscellaneous parts, or components into the end item. Concerns that only minimally alter the item being procured do not qualify as manufacturers of the end item. Concerns that add substances, parts, or components to an existing end item to modify its performance will not be considered the end item manufacturer, where those identical modifications can be performed by and are available from the manufacturer of the existing end item.

Nonmanufacturer means a concern, including a supplier, that provides an end item it did not manufacture, process, or produce.

(b) *Applicability.*

(1) This clause does not apply to contracts awarded pursuant to the unrestricted portion of a partial set-aside or to a contractor that is the manufacturer of the product or end item.

(2) This clause applies to—

(i) Contracts that have been awarded pursuant to a set-aside for any of the small business concerns identified in 19.000(a)(3);

(ii) Contracts that have been awarded on a sole-source basis in accordance with sections 19.105, 19.106, 19.107, and 19.108;

(iii) Orders expected to exceed the simplified acquisition threshold and that are set aside for small business under multiple-award contracts, as described in 8.4 and 16.5;

(iv) Orders, regardless of dollar value, that are set aside in accordance with sections 19.105, 19.106, 19.107, and 19.108 under multiple-award contracts as described in 8.4 and 16.5; and

(v) Contracts using the HUBZone price evaluation preference to award to a HUBZone concern unless the Contractor waived the evaluation preference.

(c) *Requirements.*

(1) The Contractor shall—

(i) Provide an end item that a small business has manufactured, processed, or produced in the United States or its outlying areas; for kit assemblers who are nonmanufacturers, see paragraph (c)(2) of this clause instead;

(ii) Be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied; and

(iii) Take ownership or possession of the item(s) with its personnel, equipment, or facilities in a manner consistent with industry practice; for example, providing storage, transportation, or delivery.

(2) When the end item being acquired is a kit of supplies, at least 50 percent of the total cost of the components of the kit shall be manufactured, processed, or produced in the United States or its outlying areas by small business concerns.

(End of clause)

52.220 [Reserved]

52.221 [Reserved]

52.222 [Reserved]

52.222-1 Notice to the Government of Labor Disputes.

As prescribed in 22.102-2(a), insert the following clause:

NOTICE TO THE GOVERNMENT OF LABOR DISPUTES (DEVIATION DATE)

If the Contractor has knowledge that any actual or potential labor dispute is delaying or threatens to delay the timely performance of this contract, the Contractor must immediately give notice, including all relevant information, to the Contracting Officer.

(End of clause)

52.222-2 Payment for Overtime Premiums.

As prescribed in 22.102-2(b), insert the following clause:

PAYMENT FOR OVERTIME PREMIUMS (DEVIATION DATE)

(a) The use of overtime is authorized under this contract if the overtime premium cost does not exceed * ___ or the overtime premium is paid for work—

(1) Necessary to cope with emergencies such as those resulting from accidents, natural disasters, breakdowns of production equipment, or occasional production bottlenecks of a sporadic nature;

(2) By indirect-labor employees such as those performing duties in connection with administration, protection, transportation, maintenance, standby plant protection, operation of utilities, or accounting;

(3) To perform tests, industrial processes, laboratory procedures, loading or unloading of transportation conveyances, and operations in flight or afloat that are continuous in nature and cannot reasonably be interrupted or completed otherwise; or

(4) That will result in lower overall costs to the Government.

(b) Any request for estimated overtime premiums that exceeds the amount specified above must include all estimated overtime for contract completion and must-

(1) Identify the work unit; *e.g.,* department or section in which the requested overtime will be used, together with present workload, staffing, and other data of the affected unit sufficient to permit the Contracting Officer to evaluate the necessity for the overtime;

(2) Demonstrate the effect that denial of the request will have on the contract delivery or performance schedule;

(3) Identify the extent to which approval of overtime would affect the performance or payments in connection with other Government contracts, together with identification of each affected contract; and

(4) Provide reasons why the required work cannot be performed by using multishift operations or by employing additional personnel.

* Insert either "zero" or the dollar amount agreed to during negotiations.

(End of clause)

52.222-3 Convict Labor.

As prescribed in 22.201-2, insert the following clause:

CONVICT LABOR (DEVIATION DATE)

(a) Except as provided in paragraph (b) of this clause, the Contractor must not employ in the performance of this contract any person undergoing a sentence of imprisonment imposed by any court of a State, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, or the U.S. Virgin Islands.

(b) The Contractor is not prohibited from employing persons—

(1) On parole or probation to work at paid employment during the term of their sentence;

(2) Who have been pardoned or who have served their terms; or

(3) Confined for violation of the laws of any of the States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, or the U.S. Virgin Islands who are authorized to work at paid employment in the community under the laws of such jurisdiction, if-

(i) The worker is paid or is in an approved work training program on a voluntary basis;

(ii) Representatives of local union central bodies or similar labor union organizations have been consulted;

(iii) Such paid employment will not result in the displacement of employed workers, or be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality, or impair existing contracts for services;

(iv) The rates of pay and other conditions of employment will not be less than those paid or provided for work of a similar nature in the locality in which the work is being performed; and

(v) The Attorney General of the United States has certified that the work-release laws or regulations of the jurisdiction involved are in conformity with the requirements of Executive Order11755, as amended by Executive Orders 12608 and 12943.

(End of clause)

52.222-4 Contract Work Hours and Safety Standards -Overtime Compensation.

As prescribed in 22.301-2, insert the following clause:

CONTRACT WORK HOURS AND SAFETY STANDARDS-OVERTIME COMPENSATION (DEVIATION DATE)

(a) *Overtime requirements*. No Contractor or subcontractor employing laborers or mechanics (see Federal Acquisition Regulation 22.301-1) must require or permit them to work over 40 hours in any workweek unless they are paid at least 1 and 1/2 times the basic rate of pay for each hour worked over 40 hours.

(b) *Violation; liability for unpaid wages; liquidated damages*. The responsible Contractor and subcontractor are liable for unpaid wages if they violate the terms in paragraph (a) of this clause. In addition, the Contractor and subcontractor are liable for liquidated damages payable to the Government. The Contracting Officer will assess liquidated damages at the rate specified at 29 CFR 5.5(b)(2) per affected employee for each calendar day on which the employer required or permitted the employee to work in excess of the standard workweek of 40 hours without paying overtime wages required by the Contract Work Hours and Safety Standards statute (found at 40 U.S.C. chapter 37). In accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 Note), the Department of Labor adjusts this civil monetary penalty for inflation no later than January 15 each year.

(c) *Withholding for unpaid wages and liquidated damages*. The Contracting Officer will withhold from payments due under the contract sufficient funds required to satisfy any Contractor or subcontractor liabilities for unpaid wages and liquidated damages. If amounts withheld under the contract are insufficient to satisfy Contractor or subcontractor liabilities, the Contracting Officer will withhold payments from other Federal or federally assisted contracts held by the same Contractor that are subject to the Contract Work Hours and Safety Standards statute.

(d) Payrolls and basic records. (1) The Contractor and its subcontractors must maintain payrolls and basic payroll records for all laborers and mechanics working on the contract during the contract and must make them available to the Government until 3 years after contract completion. The records must contain the name and address of each employee, social security number, labor classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid. The records need not duplicate those required for construction work by Department of Labor regulations at 29 CFR 5.5(a)(3) implementing the Construction Wage Rate Requirements statute.

(2) The Contractor and its subcontractors must allow authorized representatives of the Contracting Officer or the Department of Labor to inspect, copy, or transcribe records maintained under paragraph (d)(1) of this clause. The Contractor or subcontractor also must allow authorized representatives of the Contracting Officer or Department of Labor to interview employees in the workplace during working hours.

(e) *Subcontracts*. The Contractor must insert the provisions set forth in paragraphs (a) through (d) of this clause in subcontracts that may require or involve the employment of laborers and mechanics and require subcontractors to include these provisions in any such lower tier subcontracts. The Contractor must be responsible for compliance by any subcontractor or lower-tier subcontractor with the provisions set forth in paragraphs (a) through (d) of this clause.

(End of clause)

52.222-5 Construction Wage Rate Requirements-Secondary Site of the Work.

As prescribed in 22.402-4(g), insert the following provision:

CONSTRUCTION WAGE RATE REQUIREMENTS-SECONDARY SITE OF THE WORK (DEVIATION DATE)

(a) (1) The offeror must notify the Government if the offeror intends to perform work at any secondary site of the work, as defined in paragraph (a)(1)(ii) of the FAR clause at 52.222-6, Construction Wage Rate Requirements, of this solicitation.

(2) If the offeror is unsure if a planned work site satisfies the criteria for a secondary site of the work, the offeror must request a determination from the Contracting Officer.

(b) (1) If the wage determination provided by the Government for work at the primary site of the work is not applicable to the secondary site of the work, the offeror must request a wage determination from the Contracting Officer.

(2) The due date for receipt of offers will not be extended as a result of an offeror's request for a wage determination for a secondary site of the work.

(End of provision)

52.222-6 Construction Wage Rate Requirements.

As prescribed in 22.402-4(a)(1), insert the following clause:

CONSTRUCTION WAGE RATE REQUIREMENTS (DEVIATION DATE)

(a) *Definition.*—"Site of the work"— (1) Means—

(i) *The primary site of the work*. The physical place or places where the construction called for in the contract will remain when work on it is completed; and

(ii) *The secondary site of the work, if any*. Any other site where a significant portion of the building or work is constructed, provided that such site is-

(A) Located in the United States; and

(B) Established specifically for the performance of the contract or project;

(2) Except as provided in paragraph (3) of this definition, includes any fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc., provided-

(i) They are dedicated exclusively, or nearly so, to performance of the contract or project; and

(ii) They are adjacent or virtually adjacent to the "primary site of the work" as defined in paragraph (a)(1)(i), or the "secondary site of the work" as defined in paragraph (a)(1)(ii) of this definition;

(3) Does not include permanent home offices, branch plant establishments, fabrication plants, or tool yards of a Contractor or subcontractor whose locations and continuance in operation are determined wholly without regard to a particular Federal contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, yards, etc., of a commercial or material supplier which are established by a supplier of materials for the project before opening of bids and not on the Project site, are not included in the "site of the work." Such permanent, previously established facilities are not a part of the "site of the work" even if the operations for a period of time may be dedicated exclusively or nearly so, to the performance of a contract.

(b) (1) All laborers and mechanics employed or working upon the site of the work will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR Part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, or as may be incorporated for a secondary site of the work, regardless of any contractual relationship which may be alleged to exist between the Contractor and such laborers and mechanics. Any wage determination incorporated for a secondary site of the work must be effective from the first day on which work under the contract was performed at that site and must be incorporated without any adjustment in contract price or estimated cost. Laborers employed by the construction Contractor or construction subcontractor that are transporting portions of the building or work between the secondary site of the work and the primary site of the work must be paid in accordance with the wage determination applicable to the primary site of the work.

(2) Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Construction Wage Rate Requirements statute on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (e) of this clause; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such period.

(3) Such laborers and mechanics must be paid not less than the appropriate wage rate and fringe benefits in the wage determination for the classification of work actually performed, without regard to skill, except as provided in the clause entitled Apprentices and Trainees. Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein; provided that the employer's payroll records accurately set forth the time spent in each classification in which work is performed.

(4) The wage determination (including any additional classifications and wage rates conformed under paragraph (c) of this clause) and the Construction Wage Rate Requirements (Davis-Bacon Act) poster (WH-1321) must be posted at all times by the Contractor and its subcontractors at the primary site of the work and the secondary site of the work, if any, in a prominent and accessible place where it can be easily seen by the workers.

(c) (1) The Contractor must complete and submit to the Contracting Officer the Standard Form (SF) 1444, Request for Authorization of Additional Classification and Rate, if any class of laborers or mechanics that is not listed in the wage determination applicable to the contract is to be employed under the contract. Upon receipt of a complete SF 1444, the Contracting Officer will submit a report to the Administrator, Wage and Hour Division, for approving, modifying, disapproving, or rendering a final determination, of the additional classification and wage rate including any amount designated for fringe benefits.

(2) The wage rate (including fringe benefits, where appropriate) determined pursuant to subparagraph (c) of this clause must be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

(d) Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the Contractor must either pay the benefit as stated in the wage determination or must pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(e) If the Contractor does not make payments to a trustee or other third person, the Contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program; provided, that the Secretary of Labor has found, upon the written request of the Contractor, that the applicable standards of the Construction Wage Rate Requirements statute have been met. The Secretary of Labor may require the Contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

(End of clause)

52.222-7 Withholding of Funds.

As prescribed in 22.402-4(a)(2), insert the following clause:

WITHHOLDING OF FUNDS (DEVIATION DATE)

The Contracting Officer must, upon his or her own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the Contractor under this contract or any other Federal contract with the same Prime Contractor, or any other federally assisted contract subject to prevailing wage requirements, which is held by the same Prime Contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the Contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work, all or part of the wages required by the contract, the Contracting Officer may, after written notice to the Contractor, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(End of clause)

52.222-8 Payrolls and Basic Records.

As prescribed in 22.402-4(a)(3), insert the following clause:

PAYROLLS AND BASIC RECORDS (DEVIATION DATE)

(a) Payrolls and basic records relating thereto must be maintained by the Contractor during the course of the work and preserved for a period of 3 years thereafter for all laborers and mechanics working at the site of the work. Such records must contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in 40 U.S.C. 3141(2)(B) (Construction Wage Rate Requirement statute)), daily and weekly number of hours worked, deductions made, and actual wages paid. Whenever the Secretary of Labor has found, under paragraph (d) of the clause entitled Construction Wage Rate Requirements, that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in 40 U.S.C. 3141(2)(B), the Contractor must maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs must maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

(b) (1) The Contractor must submit weekly for each week in which any contract work is performed a copy of all payrolls to the Contracting Officer. The payrolls submitted must set out accurately and completely all of the information required to be maintained under paragraph (a) of this clause, except that full social security numbers and home addresses must not be included on weekly transmittals. Instead the payrolls must only need to include an individually identifying number for each employee (e.g., the last four digits of the employee's social security number). The required weekly payroll information may be submitted in any form desired. Optional Form WH-347 is available for this purpose and may be obtained from the U.S. Department of Labor Wage and Hour Division website at https://www.dol.gov/agencies/whd/forms. The Prime Contractor is responsible for the submission of copies of payrolls by all subcontractors. Contractors and subcontractors must maintain the full social security number and current address of each covered worker, and must provide them upon request to the Contracting Officer, the Contractor, or the Wage and Hour Division of the Department of Labor for purposes of an investigation or audit of compliance with prevailing wage requirements. It is not a violation of this section for a Prime Contractor to require a subcontractor to provide addresses and social security numbers to the Prime Contractor for its own records, without weekly submission to the Contracting Officer.

(2) Each payroll submitted must be accompanied by a "Statement of Compliance," signed by the Contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and must certify-

(i) That the payroll for the payroll period contains the information required to be maintained under paragraph (a) of this clause and that such information is correct and complete;

(ii) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in the Regulations, 29 CFR Part 3; and

(iii) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

(3) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 must satisfy the requirement for submission of the "Statement of Compliance" required by subparagraph (b)(2) of this clause.

(4) The falsification of any of the certifications in this clause may subject the Contractor or subcontractor to civil or criminal prosecution under Section 1001 of Title 18 and Section 3729 of Title 31 of the United States Code.

(c) The Contractor or subcontractor must make the records required under paragraph (a) of this clause available for inspection, copying, or transcription by the Contracting Officer or authorized representatives of the Contracting Officer or the Department of Labor. The Contractor or subcontractor must permit the Contracting Officer or representatives of the Contracting Officer or the Department of Labor to interview employees during working hours on the job. If the Contractor or subcontractor fails to submit required records or to make them available, the Contracting Officer may, after written notice to the Contractor, take such action as may be necessary to cause the suspension of any further payment. Furthermore, failure to

submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

(End of clause)

52.222-9 Apprentices and Trainees.

As prescribed in 22.402-4(a)(4), insert the following clause:

APPRENTICES AND TRAINEES (DEVIATION DATE)

(a) Apprentices. (1) An apprentice will be permitted to work at less than the predetermined rate for the work performed when employed-

(i) Pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer, and Labor Services (OATELS) or with a State Apprenticeship Agency recognized by the OATELS; or

(ii) In the first 90 days of probationary employment as an apprentice in such an apprenticeship program, even though not individually registered in the program, if certified by the OATELS or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice.

(2) The allowable ratio of apprentices to journeymen on the job site in any craft classification must not be greater than the ratio permitted to the Contractor as to the entire work force under the registered program.

(3) Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated in paragraph (a)(1) of this clause, must be paid not less than the applicable wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program must be paid not less than the applicable wage rate on the wage determination for the work actually performed.

(4) Where a Contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the Contractor's or subcontractor's registered program must be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination.

(5) Apprentices must be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringes must be paid in accordance with that determination.

(6) In the event OATELS, or a State Apprenticeship Agency recognized by OATELS, withdraws approval of an apprenticeship program, the Contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(b) Trainees. (1) Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer, and Labor Services (OATELS). The ratio of trainees to journeymen on the job site must not be greater than permitted under the plan approved by OATELS.

(2) Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees must be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees must be paid the full amount of fringe benefits listed in the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate in the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the OATELS must be paid not less than the applicable wage rate in the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program must be paid not less than the applicable wage rate in the wage determination for the work actually performed.

(3) In the event OATELS withdraws approval of a training program, the Contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(c) *Equal employment opportunity.* The utilization of apprentices, trainees, and journeymen under this clause must be in conformity with the equal employment opportunity requirements of Executive Order11246, as amended, and 29 CFR Part 30.

(End of clause)

52.222-10 Compliance with Copeland Act Requirements.

As prescribed in 22.402-4(a)(5), insert the following clause:

COMPLIANCE WITH COPELAND ACT REQUIREMENTS (DEVIATION DATE)

The Contractor must comply with the requirements of 29 CFR Part 3, which are hereby incorporated by reference in this contract.

(End of clause)

52.222-11 Subcontracts (Labor Standards).

As prescribed in 22.402-4(a)(6), insert the following clause:

SUBCONTRACTS (LABOR STANDARDS) (DEVIATION DATE)

(a) *Definition.* "Construction, alteration or repair," as used in this clause, means all types of work done by laborers and mechanics employed by the construction Contractor or construction subcontractor on a particular building or work at the site thereof, including without limitation-

(1) Altering, remodeling, installation (if appropriate) on the site of the work of items fabricated off-site;

(2) Painting and decorating;

(3) Manufacturing or furnishing of materials, articles, supplies, or equipment on the site of the building or work;

(4) Transportation of materials and supplies between the site of the work within the meaning of paragraphs (a)(1)(i) and (ii) of the "site of the work" as defined in the FAR clause at 52.222-6, Construction Wage Rate Requirements of this contract, and a facility which is dedicated to the construction of the building or work and is deemed part of the site of the work within the meaning of paragraph (2) of the "site of the work" definition; and

(5) Transportation of portions of the building or work between a secondary site where a significant portion of the building or work is constructed, which is part of the "site of the work" definition in paragraph (a)(1)(ii) of the FAR clause at 52.222-6, Construction Wage Rate Requirements, and the physical place or places where the building or work will remain (paragraph (a)(1)(i) of the FAR clause at 52.222-6, in the "site of the work" definition).

(b) The Contractor must insert in any subcontracts for construction, alterations and repairs within the United States the clauses entitled-

(1) Construction Wage Rate Requirements;

(2) Contract Work Hours and Safety Standards-Overtime Compensation (if the clause is included in this contract);

(3) Apprentices and Trainees;

(4) Payrolls and Basic Records;

(5) Compliance with Copeland Act Requirements;

(6) Withholding of Funds;

(7) Subcontracts (Labor Standards);

(8) Contract Termination-Debarment;

(9) Disputes Concerning Labor Standards;

(10) Compliance with Construction Wage Rate Requirements and Related Regulations; and

(11) Certification of Eligibility.

(c) The prime Contractor must be responsible for compliance by any subcontractor or lower tier subcontractor performing construction within the United States with all the contract clauses cited in paragraph (b).

(d) (1) Within 14 days after award of the contract, the Contractor must deliver to the Contracting Officer a completed Standard Form (SF) 1413, Statement and Acknowledgment, for each subcontract for construction within the United States,

including the subcontractor's signed and dated acknowledgment that the clauses set forth in paragraph (b) of this clause have been included in the subcontract.

(2) Within 14 days after the award of any subsequently awarded subcontract the Contractor must deliver to the Contracting Officer an updated completed SF 1413 for such additional subcontract.

(e) The Contractor must insert the substance of this clause, including this paragraph (e) in all subcontracts for construction within the United States.

(End of clause)

52.222-12 Contract Termination-Debarment.

As prescribed in 22.402-4(a)(7), insert the following clause:

CONTRACT TERMINATION-DEBARMENT (MAY 2014)

A breach of the contract clauses entitled Construction Wage Rate Requirements, Contract Work Hours and Safety Standards-Overtime Compensation, Apprentices and Trainees, Payrolls and Basic Records, Compliance with Copeland Act Requirements, Subcontracts (Labor Standards), Compliance with Construction Wage Rate Requirements and Related Regulations, or Certification of Eligibility may be grounds for termination of the contract, and for debarment as a Contractor and subcontractor as provided in 29 CFR 5.12.

(End of clause)

52.222-13 Compliance with Construction Wage Rate Requirements and Related Regulations.

As prescribed in 22.402-4(a)(8), insert the following clause:

COMPLIANCE WITH CONSTRUCTION WAGE RATE REQUIREMENTS AND RELATED REGULATIONS (MAY 2014)

All rulings and interpretations of the Construction Wage Rate Requirements and related statutes contained in 29 CFR parts 1, 3, and 5 are hereby incorporated by reference in this contract.

(End of clause)

52.222-14 Disputes Concerning Labor Standards.

As prescribed in 22.402-4(a)(9), insert the following clause:

DISPUTES CONCERNING LABOR STANDARDS (DEVIATION DATE)

The United States Department of Labor has set forth in 29 CFR parts 5, 6, and 7 procedures for resolving disputes concerning labor standards requirements. Such disputes must be resolved in accordance with those procedures and not the Disputes clause of this contract. Disputes within the meaning of this clause include disputes between the Contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

(End of clause)

52.222-15 Certification of Eligibility.

As prescribed in 22.402-4(a)(10), insert the following clause:

CERTIFICATION OF ELIGIBILITY (MAY 2014)

(a) By entering into this contract, the Contractor certifies that neither it nor any person or firm who has an interest in the Contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of 40 U.S.C. 3144(b)(2) or 29 CFR 5.12(a)(1).

(b) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of 40 U.S.C. 3144(b)(2) or 29 CFR 5.12(a)(1).

(c) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

(End of clause)

52.222-16 Approval of Wage Rates.

As prescribed in 22.402-4(b), insert the following clause:

APPROVAL OF WAGE RATES (DEVIATION DATE)

All straight time wage rates, and overtime rates based thereon, for laborers and mechanics engaged in work under this contract must be submitted for approval in writing by the head of the contracting activity or a representative expressly designated for this purpose, if the straight time wages exceed the rates for corresponding classifications contained in the applicable Construction Wage Rate Requirements minimum wage determination included in the contract. Any amount paid by the Contractor to any laborer or mechanic in excess of the agency approved wage rate shall be at the expense of the Contractor and shall not be reimbursed by the Government. If the Government refuses to authorize the use of the overtime, the Contractor is not released from the obligation to pay employees at the required overtime rates for any overtime actually worked.

(End of clause)

52.222-17 [Reserved]

52.222-18 Certification Regarding Knowledge of Child Labor for Listed End Products.

As prescribed in 22.1502-2(a)(1), insert the following provision:

CERTIFICATION REGARDING KNOWLEDGE OF CHILD LABOR FOR LISTED END PRODUCTS (FEB 2021)

(a) *Definition*.

Forced or indentured child labor means all work or service-

(1) Exacted from any person under the age of 18 under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily; or

(2) Performed by any person under the age of 18 pursuant to a contract the enforcement of which can be accomplished by process or penalties.

(b) *Listed end products*. The following end product(s) being acquired under this solicitation is (are) included in the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor, identified by their country of origin. There is a reasonable basis to believe that listed end products from the listed countries of origin may have been mined, produced, or manufactured by forced or indentured child labor.

Listed End Product	Listed Countries of Origin
_____	_____
_____	_____

(c) *Certification*. The Government will not make award to an offeror unless the offeror, by checking the appropriate block, certifies to either paragraph (c)(1) or paragraph (c)(2) of this provision.

❑ (1) The offeror will not supply any end product listed in paragraph (b) of this provision that was mined, produced, or manufactured in a corresponding country as listed for that end product.

❑ (2) The offeror may supply an end product listed in paragraph (b) of this provision that was mined, produced, or manufactured in the corresponding country as listed for that product. The offeror certifies that it has made a good faith effort

to determine whether forced or indentured child labor was used to mine, produce, or manufacture such end product. On the basis of those efforts, the offeror certifies that it is not aware of any such use of child labor.

(End of provision)

52.222-19 Child Labor-Cooperation with Authorities and Remedies.

As prescribed in 22.1502-2(a)(2), insert the following clause:

CHILD LABOR-COOPERATION WITH AUTHORITIES AND REMEDIES (DEVIATION DATE)

(a) *Applicability*. This clause does not apply to the extent that the Contractor is supplying end products mined, produced, or manufactured in-

(1) Israel, and the anticipated value of the acquisition is $50,000 or more;

(2) Mexico, and the anticipated value of the acquisition is $105,767 or more; or

(3) Armenia, Aruba, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Italy, Japan, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, New Zealand, North Macedonia, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan, Ukraine, or the United Kingdom and the anticipated value of the acquisition is $174,000 or more.

(b) *Cooperation with Authorities*. To enforce the laws prohibiting the manufacture or importation of products mined, produced, or manufactured by forced or indentured child labor, authorized officials may need to conduct investigations to determine whether forced or indentured child labor was used to mine, produce, or manufacture any product furnished under this contract. If the solicitation includes the provision 52.222-18, Certification Regarding Knowledge of Child Labor for Listed End Products, the Contractor agrees to cooperate fully with authorized officials of the contracting agency, the Department of the Treasury, or the Department of Justice by providing reasonable access to records, documents, persons, or premises upon reasonable request by the authorized officials.

(c) *Violations*. The Government may impose remedies set forth in paragraph (d) for the following violations:

(1) The Contractor has submitted a false certification regarding knowledge of the use of forced or indentured child labor for listed end products.

(2) The Contractor has failed to cooperate, if required, in accordance with paragraph (b) of this clause, with an investigation of the use of forced or indentured child labor by an Inspector General, Attorney General, or the Secretary of the Treasury.

(3) The Contractor uses forced or indentured child labor in its mining, production, or manufacturing processes.

(4) The Contractor has furnished under the contract end products or components that have been mined, produced, or manufactured wholly or in part by forced or indentured child labor. (The Government will not pursue remedies at paragraph (d)(2) or paragraph (d)(3) of this clause unless sufficient evidence indicates that the Contractor knew of the violation.)

(d) Remedies. (1) The Contracting Officer may terminate the contract.

(2) The suspending and debarring official may suspend the Contractor in accordance with procedures in FAR subpart 9.4.

(3) The suspending and debarring official may debar the Contractor for a period not to exceed 3 years in accordance with the procedures in FAR subpart 9.4.

(End of clause)

52.222-20 Contracts for Materials, Supplies, Articles, and Equipment.

As prescribed in 22.601-5, insert the following clause in solicitations and contracts:

CONTRACTS FOR MATERIALS, SUPPLIES, ARTICLES, AND EQUIPMENT (DEVIATION DATE)

If this contract is for the manufacture or furnishing of materials, supplies, articles or equipment in an amount that exceeds or may exceed the threshold specified in Federal Acquisition Regulation 22.601-1 on the date of award of this contract, and is subject to 41 U.S.C. chapter 65, the following terms and conditions apply:

(a) All stipulations required by 41 U.S.C. chapter 65 and regulations issued by the Secretary of Labor (41 CFR Chapter 50) are incorporated by reference. These stipulations are subject to all applicable rulings and interpretations of the Secretary of Labor that are now, or may hereafter, be in effect.

(b) All employees whose work relates to this contract must be paid not less than the minimum wage prescribed by regulations issued by the Secretary of Labor (41 CFR 50-202.2). Learners, student learners, apprentices, and workers with disabilities may be employed at less than the prescribed minimum wage (see 41 CFR 50-202.3) to the same extent that such employment is permitted under section 14 of the Fair Labor Standards Act (41 U.S.C. 6508).

(End of clause)

52.222-21 [Reserved]

(DEVIATION DATE)

52.222-22 [Reserved]

(DEVIATION DATE)

52.222-23 [Reserved]

(DEVIATION DATE)

52.222-24 [Reserved]

52.222-25 [Reserved]

(DEVIATION DATE)

52.222-26 [Reserved]

(DEVIATION DATE)

52.222-27 [Reserved]

(DEVIATION DATE)

52.222-28 [Reserved]

52.222-29 [Reserved]

(DEVIATION DATE)

52.222-30 Construction Wage Rate Requirements-Price Adjustment (None or Separately Specified Method).

As prescribed in 22.402-4(d), insert the following clause:

CONSTRUCTION WAGE RATE REQUIREMENTS-PRICE ADJUSTMENT
(NONE OR SEPARATELY SPECIFIED METHOD) (AUG 2018)

(a) The wage determination issued under the Construction Wage Rate Requirements statute by the Administrator, Wage and Hour *Division, U.S.* Department of Labor, that is effective for an option to extend the term of the contract, will apply to that option period.

(b) The Contracting Officer will make no adjustment in contract price, other than provided for elsewhere in this contract, to cover any increases or decreases in wages and benefits as a result of-

(1) Incorporation of the Department of Labor's wage determination applicable at the exercise of the option to extend the term of the contract;

(2) Incorporation of a wage determination otherwise applied to the contract by operation of law; or

(3) An increase in wages and benefits resulting from any other requirement applicable to workers subject to the Construction Wage Rate Requirements statute.

(End of clause)

52.222-31 Construction Wage Rate Requirements-Price Adjustment (Percentage Method).

As prescribed in 22.402-4(e), insert the following clause:

CONSTRUCTION WAGE RATE REQUIREMENTS-PRICE ADJUSTMENT (PERCENTAGE METHOD) (AUG 2018)

(a) The wage determination issued under the Construction Wage Rate Requirements statute by the Administrator, Wage and Hour *Division, U.S*. Department of Labor, that is effective for an option to extend the term of the contract, will apply to that option period.

(b) The Contracting Officer will adjust the portion of the contract price or contract unit price(s) containing the labor costs subject to the Construction Wage Rate Requirements statute to provide for an increase in wages and fringe benefits at the exercise of each option to extend the term of the contract in accordance with the following procedures:

(1) The Contracting Officer has determined that the portion of the contract price or contract unit price(s) containing labor costs subject to the Construction Wage Rate Requirements statute is _____ *[Contracting Officer insert percentage rate]* percent.

(2) The Contracting Officer will increase the portion of the contract price or contract unit price(s) containing the labor costs subject to the Construction Wage Rate Requirements statute by the percentage rate published in _____ *[Contracting Officer insert publication]*.

(c) The Contracting Officer will make the price adjustment at the exercise of each option to extend the term of the contract. This adjustment is the only adjustment that the Contracting Officer will make to cover any increases in wages and benefits as a result of-

(1) Incorporation of the Department of Labor's wage determination applicable at the exercise of the option to extend the term of the contract;

(2) Incorporation of a wage determination otherwise applied to the contract by operation of law; or

(3) An increase in wages and benefits resulting from any other requirement applicable to workers subject to the Construction Wage Rate Requirements statute.

(End of clause)

52.222-32 Construction Wage Rate Requirements-Price Adjustment (Actual Method).

As prescribed in 22.402-4(f), insert the following clause:

CONSTRUCTION WAGE RATE REQUIREMENTS-PRICE ADJUSTMENT (ACTUAL METHOD) (DEVIATION DATE)

(a) The wage determination issued under the Construction Wage Rate Requirements statute by the Administrator, Wage and Hour *Division, U.S*. Department of Labor, that is effective for an option to extend the term of the contract, will apply to that option period.

(b) (1) The Contractor states that if the prices in this contract contain an allowance for wage or benefit increases, such allowance will not be included in any request for contract price adjustment submitted under this clause.

(2) The Contractor must provide with each request for contract price adjustment under this clause a statement that the prices in the contract do not include any allowance for any increased cost for which adjustment is being requested.

(c) The Contracting Officer will adjust the contract price or contract unit price labor rates to reflect the Contractor's actual increase or decrease in wages and fringe benefits to the extent that the increase is made to comply with, or the decrease is voluntarily made by the Contractor as a result of—

(1) Incorporation of the Department of Labor's Construction Wage Rate Requirements wage determination applicable at the exercise of an option to extend the term of the contract; or

(2) Incorporation of a Construction Wage Rate Requirements wage determination otherwise applied to the contract by operation of law.

(d) Any adjustment will be limited to increases or decreases in wages and fringe benefits as described in paragraph (c) of this clause, and the accompanying increases or decreases in social security and unemployment taxes and workers' compensation insurance, but will not otherwise include any amount for general and administrative costs, overhead, or profit.

(e) The Contractor must notify the Contracting Officer of any increase claimed under this clause within 30 days after receiving a revised wage determination unless this notification period is extended in writing by the Contracting Officer. The Contractor must notify the Contracting Officer promptly of any decrease under this clause, but nothing in this clause precludes the Government from asserting a claim within the period permitted by law. The notice must contain a statement of the amount claimed and any relevant supporting data, including payroll records that the Contracting Officer may reasonably require. Upon agreement of the parties, the Contracting Officer will modify the contract price or contract unit price in writing. The Contractor must continue performance pending agreement on or determination of any such adjustment and its effective date.

(f) Contract price adjustment computations must be computed as follows:

(1) *Computation for contract unit price per single craft hour for schedule of indefinite-quantity work*. For each labor classification, the difference between the actual wage and benefit rates (combined) paid and the wage and benefit rates (combined) required by the new wage determination must be added to the original contract unit price if the difference results in a combined increase. If the difference computed results in a combined decrease, the contract unit price must be decreased by that amount if the Contractor provides notification as provided in paragraph (e) of this clause.

(2) *Computation for contract unit price containing multiple craft hours for schedule of indefinite-quantity work*. For each labor classification, the difference between the actual wage and benefit rates (combined) paid and the wage and benefit rates (combined) required by the new wage determination must be multiplied by the actual number of hours expended for each craft involved in accomplishing the unit-priced work item. The product of this computation will then be divided by the actual number of units ordered in the preceding contract period. The total of these computations for each craft will be added to the current contract unit price to obtain the new contract unit price. The extended amount for the line item will be obtained by multiplying the new unit price by the estimated quantity. If actual hours are not available from the preceding contract period for computation of the adjustment for a specific contract unit of work, the Contractor, in agreement with the Contracting Officer, must estimate the total hours per craft per contract unit of work.

Example: Asphalt Paving-Current Price $3.38 per Square Yard										
DBA Craft	**New WD**		**Hourly rate paid**		**Diff.**		**Actual Hrs**	**Actual units (sq.yard)**		**Increase/ sqyard**
Equip. Opr.	$18.50	–	$18.00	=	$.50	x	600 hrs./	3,000 sq. yrd.	=	$.10
Truck Driver	$19.00	–	$18.25	=	$.75	x	525 hrs./	3,000 sq. yrd.	=	$.13
Laborer	$11.50	–	$11.25	=	$.25	x	750 hrs./	3,000 sq. yrd.	=	$.06
								Total increase per square yard =		$.29*
* Note: Adjustment for labor rate increases or decreases may be accompanied by social security and unemployment taxes and workers' compensation insurance.										
Current unit price (per square yard)			$3.38							
Add DBA price adj.			+.29							
New unit price (per square yard)		=	$3.67							

(End of clause)

52.222-33 Notice of Requirement for Project Labor Agreement.

As prescribed in 22.502-3(a)(1), insert the following provision:

NOTICE OF REQUIREMENT FOR PROJECT LABOR AGREEMENT (DEVIATION DATE)

(a) *Definitions*. As used in this provision, the following terms are defined in clause 52.222-34, Project Labor Agreement, of this solicitation "construction," "labor organization," "large-scale construction project," and "project labor agreement."

(b) Offerors must—

(1) Negotiate or become a party to a project labor agreement with one or more labor organizations for the term of the resulting construction contract; and

(2) Require its subcontractors to become a party to the resulting project labor agreement.

(c) The project labor agreement reached pursuant to this provision must-

(1) Bind the Offeror and subcontractors engaged in construction on the construction project to comply with the project labor agreement;

(2) Allow the Offeror and all subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;

(3) Contain guarantees against strikes, lockouts, and similar job disruptions;

(4) Set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the term of the project labor agreement;

(5) Provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and

(6) Fully conform to all statutes, regulations, Executive orders, and agency requirements.

(d) Any project labor agreement reached pursuant to this provision does not change the terms of the resulting contract or provide for any price adjustment by the Government.

(e) The Offeror must submit to the Contracting Officer a copy of the project labor agreement with its offer.

(End of provision)

Alternate I (DEVIATION DATE). As prescribed in 22.502-3(a)(2), substitute the following paragraphs (b) and (e) for paragraphs (b) and (e) of the basic provision.

(b) The apparent successful offeror must—

(1) Negotiate or become a party to a project labor agreement with one or more labor organizations for the term of the resulting construction contract; and

(2) Require its subcontractors to become a party to the resulting project labor agreement.

(e) The apparent successful offeror must submit to the Contracting Officer a copy of the project labor agreement prior to contract award.

Alternate II (DEVIATION DATE). As prescribed in 22.502-3(a)(3), substitute the following paragraph (b) in lieu of paragraphs (b) through (e) of the basic provision:

(b) If awarded the contract, the Offeror must—

(1) Negotiate or become a party to a project labor agreement with one or more labor organizations for the term of the resulting construction contract; and

(2) Require its subcontractors to become a party to the resulting project labor agreement.

Alternate III (DEVIATION DATE). As prescribed in 22.502-3(a)(4), substitute the following paragraph (b) in lieu of paragraphs (b) through (e) of the basic provision:

(b)(1) If awarded the contract, the Offeror may be required by the agency to negotiate or become a party to a project labor agreement with one or more labor organizations for the term of the order. The Contracting Officer will require that an executed copy of the project labor agreement be submitted to the agency—

(i) With the order offer;

(ii) Prior to award of the order; or

(iii) After award of the order.

(2) The Offeror must require its subcontractors to become a party to the resulting project labor agreement for the term of the order.

52.222-34 Project Labor Agreement.

As prescribed in 22.502-3(b)(1), insert the following clause:

PROJECT LABOR AGREEMENT (DEVIATION DATE)

(a) *Definitions*. As used in this clause-

Construction means construction, reconstruction, rehabilitation, modernization, alteration, conversion, extension, repair, or improvement of buildings, structures, highways, or other real property.

Labor organization means a labor organization as defined in 29 U.S.C. 152(5) of which building and construction employees are members.

Large-scale construction project means a Federal construction project within the United States for which the total estimated cost of the construction contract(s) to the Federal Government is $35 million or more.

Project labor agreement means a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project and is an agreement described in 29 U.S.C. 158(f).

(b) The Contractor must maintain in a current status throughout the life of the contract the project labor agreement entered into prior to the award of the contract.

(c) *Subcontracts*. The Contractor must include the substance of this clause, including this paragraph (c), in subcontracts with subcontractors engaged in construction on the construction project.

(End of clause)

Alternate I (DEVIATION DATE) . As prescribed in 22.502-3(b)(2), substitute the following paragraphs (b) through (f) for paragraphs (b) and (c) of the basic clause:

(b) The Contractor must—

(1) Negotiate or become a party to a project labor agreement with one or more labor organizations for the term of this construction contract; and

(2) Submit an executed copy of the project labor agreement to the Contracting Officer as required in the solicitation.

(c) The project labor agreement reached pursuant to this clause must-

(1) Bind the Contractor and subcontractors engaged in construction on the construction project to comply with the project labor agreement;

(2) Allow the Contractor and all subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;

(3) Contain guarantees against strikes, lockouts, and similar job disruptions;

(4) Set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the term of the project labor agreement;

(5) Provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and

(6) Fully conform to all statutes, regulations, Executive orders, and agency requirements.

(d) Any project labor agreement reached pursuant to this clause does not change the terms of this contract or provide for any price adjustment by the Government.

(e) The Contractor must maintain in a current status throughout the life of the contract the project labor agreement entered into pursuant to this clause.

(f) *Subcontracts*. The Contractor must require subcontractors engaged in construction on the construction project to agree to any project labor agreement negotiated by the prime contractor pursuant to this clause, and must include the substance of paragraphs (d) through (f) of this clause in subcontracts with subcontractors engaged in construction on the construction project.

Alternate II (DEVIATION DATE). As prescribed in 22.502-3(b)(3), substitute the following paragraphs (b) through (f) for paragraphs (b) through (f) of the basic clause:

(b) When notified by the agency (*e.g.*, by the notice of intent to place an order under 16.505(b)(1)) that this order will use a project labor agreement, the Contractor must negotiate or become a party to a project labor agreement with one or more labor organizations for the term of the order. The Contracting Officer must require that an executed copy of the project labor agreement be submitted to the agency—

(1) With the order offer;

(2) Prior to award of the order; or

(3) After award of the order.

(c) The project labor agreement reached pursuant to this clause must—

(1) Bind the Contractor and subcontractors engaged in construction on the construction project to comply with the project labor agreement;

(2) Allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;

(3) Contain guarantees against strikes, lockouts, and similar job disruptions;

(4) Set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the term of the project labor agreement;

(5) Provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and

(6) Fully conform to all statutes, regulations, Executive orders, and agency requirements.

(d) Any project labor agreement reached pursuant to this clause does not change the terms of this contract or provide for any price adjustment by the Government.

(e) The Contractor must maintain in a current status throughout the life of the order any project labor agreement entered into pursuant to this clause.

(f) *Subcontracts*. For each order that uses a project labor agreement, the Contractor must—

(1) Require subcontractors engaged in construction on the construction project to agree to any project labor agreement negotiated by the prime contractor pursuant to this clause; and

(2) Include the substance of paragraphs (d) through (f) of this clause in subcontracts with subcontractors engaged in construction on the construction project.

52.222-35 Equal Opportunity for Veterans.

As prescribed in 22.1302-2(a)(1), insert the following clause:

EQUAL OPPORTUNITY FOR VETERANS (DEVIATION DATE)

(a) *Definitions*. As used in this clause-

"Active duty wartime or campaign badge veteran," "Armed Forces service medal veteran," "disabled veteran," "protected veteran," "qualified disabled veteran," and "recently separated veteran" have the meanings given at Federal Acquisition Regulation (FAR) 22.1301.

(b) Equal opportunity requirements. The Contractor must abide by the requirements of 38 U.S.C. 4212(a)(1) and (2). These requirements prohibit discrimination against qualified protected veterans, and requires affirmative action by the Contractor to employ and advance in employment qualified protected veterans.

(c) Subcontracts. The Contractor must insert the terms of this clause in subcontracts valued at or above the threshold specified in FAR 22.1302-1(a)(2) on the date of subcontract award, unless exempted by rules, regulations, or orders of the Secretary of Labor. The Contractor must act as specified by the Director, Office of Federal Contract Compliance Programs, to enforce the terms, including action for noncompliance. Such necessary changes in language may be made as shall be appropriate to identify properly the parties and their undertakings.

(End of clause)

Alternate I (JUL 2014). As prescribed in 22.1302-2(a)(2), add the following as a preamble to the clause:

Notice: The following term(s) of this clause are waived for this contract: _____ *[List term(s)]*.

52.222-36 Equal Opportunity for Workers with Disabilities.

As prescribed in 22.1401-2(a)(1), insert the following clause:

EQUAL OPPORTUNITY FOR WORKERS WITH DISABILITIES (DEVIATION DATE)

(a) Equal opportunity clause. The Contractor must abide by the requirements of the equal opportunity clause at 41 CFR 60-741.5(a), as of March 24, 2014. This clause prohibits discrimination against qualified individuals on the basis of disability, and requires affirmative action by the Contractor to employ and advance in employment qualified individuals with disabilities.

(b) Subcontracts. The Contractor must include the terms of this clause in every subcontract or purchase order in excess of the threshold specified in Federal Acquisition Regulation (FAR) 22.1401-2(a)(1) on the date of subcontract award, unless exempted by rules, regulations, or orders of the Secretary, so that such provisions will be binding upon each subcontractor or vendor. The Contractor must act as specified by the Director, Office of Federal Contract Compliance Programs of the U.S. Department of Labor, to enforce the terms, including action for noncompliance. Such necessary changes in language may be made as shall be appropriate to identify properly the parties and their undertakings.

(End of clause)

Alternate I (JULY 2014). As prescribed in 22.1401-2(a)(2), add the following as a preamble to the clause:

Notice: The following term(s) of this clause are waived for this contract: _____ *[List term(s)]*.

52.222-37 Employment Reports on Veterans.

As prescribed in 22.1302-2(b), insert the following clause:

EMPLOYMENT REPORTS ON VETERANS (DEVIATION DATE)

(a) *Definitions.* As used in this clause, "active duty wartime or campaign badge veteran," "Armed Forces service medal veteran," "disabled veteran," "protected veteran," and "recently separated veteran," have the meanings given in Federal Acquisition Regulation (FAR) 22.1301.

(b) Unless the Contractor is a State or local government agency, the Contractor must report at least annually, as required by the Secretary of Labor, on-

(1) The total number of employees in the contractor's workforce, by job category and hiring location, who are protected veterans (*i.e.*, active duty wartime or campaign badge veterans, Armed Forces service medal veterans, disabled veterans, and recently separated veterans);

(2) The total number of new employees hired during the period covered by the report, and of the total, the number of protected veterans (*i.e.*, active duty wartime or campaign badge veterans, Armed Forces service medal veterans, disabled veterans, and recently separated veterans); and

(3) The maximum number and minimum number of employees of the Contractor or subcontractor during the period covered by the report.

(c) The Contractor must report the above items by filing the VETS-4212 "Federal Contractor Veterans' Employment Report" (see "VETS-4212 Federal Contractor Reporting" and "Filing Your VETS-4212 Report" at http://www.dol.gov/vets/vets4212.htm).

(d) The Contractor must file VETS-4212 Reports no later than September 30 of each year.

(e) The employment activity report required by paragraphs (b)(2) and (b)(3) of this clause must reflect total new hires, and maximum and minimum number of employees, during the most recent 12–month period preceding the ending date selected for the report.

(f) The number of veterans reported must be based on data known to the contractor when completing the VETS-4212. The contractor's knowledge of veterans status may be obtained in a variety of ways, including an invitation to applicants to self-identify (in accordance with 41 CFR 60-300.42), voluntary self-disclosure by employees, or actual knowledge of veteran status by the contractor. This paragraph does not relieve an employer of liability for discrimination under 38 U.S.C. 4212.

(g) The Contractor must insert the terms of this clause in subcontracts valued at or above the threshold specified in FAR 22.1302-1(b) on the date of subcontract award, unless exempted by rules, regulations, or orders of the Secretary of Labor.

(End of clause)

52.222-38 [Reserved]

(DEVIATION DATE)

52.222-39 [Reserved]

52.222-40 Notification of Employee Rights Under the National Labor Relations Act.

As prescribed in 22.1602-2(a), insert the following clause:

NOTIFICATION OF EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT (DEVIATION DATE)

(a) During the term of this contract, the Contractor must post an employee notice, of such size and in such form, and containing such content as prescribed by the Secretary of Labor, in conspicuous places in and about its plants and offices where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract, including all places where notices to employees are customarily posted both physically and electronically, in the languages employees speak, in accordance with 29 CFR471.2 (d) and (f).

(1) Physical posting of the employee notice must be in conspicuous places in and about the Contractor's plants and offices so that the notice is prominent and readily seen by employees who are covered by the National Labor Relations Act and engage in activities related to the performance of the contract.

(2) If the Contractor customarily posts notices to employees electronically, then the Contractor must also post the required notice electronically by displaying prominently, on any Web site that is maintained by the Contractor and is customarily used for notices to employees about terms and conditions of employment, a link to the Department of Labor's Web site that contains the full text of the poster. The link to the Department's Web site, as referenced in (b)(3) of this section, must read, "Important Notice about Employee Rights to Organize and Bargain Collectively with Their Employers."

(b) This required employee notice, printed by the Department of Labor, may be-

(1) Obtained from the Division of Interpretations and Standards, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5609, Washington, DC 20210, (202) 693-0123, or from any field office of the Office of Labor–Management Standards or Office of Federal Contract Compliance Programs;

(2) Provided by the Federal contracting agency if requested;

(3) Downloaded from the Office of Labor–Management Standards Web site at http://www.dol.gov/olms/regs/compliance/EO13496.htm; or

(4) Reproduced and used as exact duplicate copies of the Department of Labor's official poster.

(c) The required text of the employee notice referred to in this clause is located at Appendix A, Subpart A, 29 CFR Part 471.

(d) The Contractor must comply with all provisions of the employee notice and related rules, regulations, and orders of the Secretary of Labor.

(e) In the event that the Contractor does not comply with the requirements set forth in paragraphs (a) through (d) of this clause, this contract may be terminated or suspended in whole or in part, and the Contractor may be suspended or debarred in accordance with 29 CFR 471.14 and subpart 9.4. Such other sanctions or remedies may be imposed as are provided by 29 CFR part 471, which implements Executive Order 13496 or as otherwise provided by law.

(f) Subcontracts. (1) The Contractor must include the substance of this clause, including this paragraph (f), in every subcontract that exceeds $10,000 and will be performed wholly or partially in the United States, unless exempted by the rules, regulations, or orders of the Secretary of Labor issued pursuant to section 3 of Executive Order 13496 of January 30, 2009, so that such provisions will be binding upon each subcontractor.

(2) The Contractor must not procure supplies or services in a way designed to avoid the applicability of Executive Order 13496 or this clause.

(3) The Contractor must take such action with respect to any such subcontract as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of sanctions for noncompliance.

(4) However, if the Contractor becomes involved in litigation with a subcontractor, or is threatened with such involvement, as a result of such direction, the Contractor may request the United States, through the Secretary of Labor, to enter into such litigation to protect the interests of the United States.

(End of clause)

52.222-41 Service Contract Labor Standards.

As prescribed in 22.1002-2(b)(1), insert the following clause:

SERVICE CONTRACT LABOR STANDARDS (DEVIATION DATE)

(a) *Definitions*. As used in this clause—

Contractor, when this clause is used in any subcontract, must be deemed to refer to the subcontractor, except in the term "Government Prime Contractor."

Service employee means any person engaged in the performance of this contract other than any person employed in a bona fide executive, administrative, or professional capacity, as these terms are defined in Part 541 of Title 29, *Code of Federal Regulations*, as revised. It includes all such persons regardless of any contractual relationship that may be alleged to exist between a Contractor or subcontractor and such persons.

(b) *Applicability*. This contract is subject to the following provisions and to all other applicable provisions of 41 U.S.C. chapter 67, Service Contract Labor Standards, and regulations of the Secretary of Labor (29 CFR Part 4). This clause does not apply to contracts or subcontracts administratively exempted by the Secretary of Labor or exempted by 41 U.S.C. 6702, as interpreted in Subpart C of 29 CFR Part 4.

(c) Compensation. (1) Each service employee employed in the performance of this contract by the Contractor or any subcontractor must be paid not less than the minimum monetary wages and must be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor, or authorized representative, as specified in any wage determination attached to this contract.

(2) (i) If a wage determination is attached to this contract, the Contractor must classify any class of service employee which is not listed therein and which is to be employed under the contract (*i.e.,* the work to be performed is not performed by any classification listed in the wage determination) so as to provide a reasonable relationship (*i.e.,* appropriate level of skill comparison) between such unlisted classifications and the classifications listed in the wage determination. Such conformed class of employees must be paid the monetary wages and furnished the fringe benefits as are determined pursuant to the procedures in this paragraph (c).

(ii) This conforming procedure must be initiated by the Contractor prior to the performance of contract work by the unlisted class of employee. The Contractor must submit Standard Form (SF) 1444, Request For Authorization of Additional Classification and Rate, to the Contracting Officer no later than 30 days after the unlisted class of employee performs any contract work. The Contracting Officer must review the proposed classification and rate and promptly submit the completed SF 1444 (which must include information regarding the agreement or disagreement of the employees' authorized representatives or the employees themselves together with the agency recommendation), and all pertinent information to the Wage and Hour *Division, U.S*. Department of Labor. The Wage and Hour Division will approve, modify, or disapprove the action or render a final determination in the event of disagreement within 30 days of receipt or will notify the Contracting Officer within 30 days of receipt that additional time is necessary.

(iii) The final determination of the conformance action by the Wage and Hour Division must be transmitted to the Contracting Officer who must promptly notify the Contractor of the action taken. Each affected employee must be furnished by the Contractor with a written copy of such determination or it must be posted as a part of the wage determination.

(iv) (A) The process of establishing wage and fringe benefit rates that bear a reasonable relationship to those listed in a wage determination cannot be reduced to any single formula. The approach used may vary from wage determination to wage determination depending on the circumstances. Standard wage and salary administration practices which rank various job classifications by pay grade pursuant to point schemes or other job factors may, for example, be relied upon. Guidance may also be obtained from the way different jobs are rated under Federal pay systems (Federal Wage Board Pay System and the General Schedule) or from other wage determinations issued in the same locality. Basic to the establishment of any conformable wage rate(s) is the concept that a pay relationship should be maintained between job classifications based on the skill required and the duties performed.

(B) In the case of a contract modification, an exercise of an option, or extension of an existing contract, or in any other case where a Contractor succeeds a contract under which the classification in question was previously conformed pursuant to paragraph (c) of this clause, a new conformed wage rate and fringe benefits may be assigned to the conformed classification by indexing (*i.e.,* adjusting) the previous conformed rate and fringe benefits by an amount equal to the average (mean) percentage increase (or decrease, where appropriate) between the wages and fringe benefits specified for all classifications to be used on the contract which are listed in the current wage determination, and those specified for the corresponding classifications in the previously applicable wage determination. Where conforming actions are accomplished in accordance with this paragraph prior to the performance of contract work by the unlisted class of employees, the Contractor must advise the Contracting Officer of the action taken but the other procedures in subdivision (c)(2)(ii) of this clause need not be followed.

(C) No employee engaged in performing work on this contract must in any event be paid less than the currently applicable minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of1938, as amended.

(v) The wage rate and fringe benefits finally determined under this subparagraph (c)(2) of this clause must be paid to all employees performing in the classification from the first day on which contract work is performed by them in the classification. Failure to pay the unlisted employees the compensation agreed upon by the interested parties and/or finally determined by the Wage and Hour Division retroactive to the date such class of employees commenced contract work shall be a violation of the Service Contract Labor Standards statute and this contract.

(vi) Upon discovery of failure to comply with subparagraph (c)(2) of this clause, the Wage and Hour Division must make a final determination of conformed classification, wage rate, and/or fringe benefits which must be retroactive to the date such class or classes of employees commenced contract work.

(3) *Adjustment of compensation*. If the term of this contract is more than 1 year, the minimum monetary wages and fringe benefits required to be paid or furnished thereunder to service employees under this contract must be subject to adjustment after 1 year and not less often than once every 2 years, under wage determinations issued by the Wage and Hour Division.

(d) *Obligation to furnish fringe benefits*. The Contractor or subcontractor may discharge the obligation to furnish fringe benefits specified in the attachment or determined under subparagraph (c)(2) of this clause by furnishing equivalent combinations of bona fide fringe benefits, or by making equivalent or differential cash payments, only in accordance with Subpart D of 29 CFR Part 4.

(e) *Minimum wage*. In the absence of a minimum wage attachment for this contract, neither the Contractor nor any subcontractor under this contract shall pay any person performing work under this contract (regardless of whether the person is a service employee) less than the minimum wage specified by section 6(a)(1) of the Fair Labor Standards Act of1938. Nothing in this clause shall relieve the Contractor or any subcontractor of any other obligation under law or contract for payment of a higher wage to any employee.

(f) *Successor contracts*. If this contract succeeds a contract subject to the Service Contract Labor Standards statute under which substantially the same services were furnished in the same locality and service employees were paid wages and fringe benefits provided for in a collective bargaining agreement, in the absence of the minimum wage attachment for this contract setting forth such collectively bargained wage rates and fringe benefits, neither the Contractor nor any subcontractor under this contract shall pay any service employee performing any of the contract work (regardless of whether or not such employee was employed under the predecessor contract), less than the wages and fringe benefits provided for in such collective bargaining agreement, to which such employee would have been entitled if employed under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for under such agreement. No Contractor or subcontractor under this contract may be relieved of the foregoing obligation unless the limitations of 29 CFR 4.1 b(b) apply or unless the Secretary of Labor or the Secretary's authorized representative finds, after a hearing as provided in 29 CFR 4.10 that the wages and/or fringe benefits provided for in such agreement are substantially at variance with those which prevail for services of a character similar in the locality, or determines, as provided in 29 CFR 4.11, that the collective bargaining agreement applicable to service employees employed under the predecessor contract was not entered into as a result of arm's length negotiations. Where it is found in accordance with the review procedures provided in 29 CFR 4.10 and/or 4.11 and parts 6 and 8 that some or all of the wages and/or fringe benefits contained in a predecessor Contractor's collective bargaining agreement are substantially at variance with those which prevail for services of a character similar in the locality, and/or that the collective bargaining agreement applicable to service employees employed under the predecessor contract was not entered into as a result of arm's length negotiations, the Department will issue a new or revised wage determination setting forth the applicable wage rates and fringe benefits. Such determination must be made part of the contract or subcontract, in accordance with the decision of the Administrator, the Administrative Law Judge, or the Administrative Review Board, as the case may be, irrespective of whether such issuance occurs prior to or after the award of a contract or subcontract (53 Comp. Gen. 401 (1973)). In the case of a wage determination issued solely as a result of a finding of substantial variance, such determination must be effective as of the date of the final administrative decision.

(g) *Notification to employees*. The Contractor and any subcontractor under this contract must notify each service employee commencing work on this contract of the minimum monetary wage and any fringe benefits required to be paid pursuant to this contract, or must post the wage determination attached to this contract. The poster provided by the Department of Labor (Publication WH 1313) must be posted in a prominent and accessible place at the worksite. Failure to comply with this requirement is a violation of 41 U.S.C. 6703 and of this contract.

(h) *Safe and sanitary working conditions*. The Contractor or subcontractor must not permit any part of the services called for by this contract to be performed in buildings or surroundings or under working conditions provided by or under the control or supervision of the Contractor or subcontractor which are unsanitary, hazardous, or dangerous to the health or safety of the service employees. The Contractor or subcontractor must comply with the safety and health standards applied under 29 CFR Part 1925.

(i) *Records*. (1) The Contractor and each subcontractor performing work subject to the Service Contract Labor Standards statute must make and maintain for 3 years from the completion of the work, and make them available for inspection and transcription by authorized representatives of the Wage and Hour *Division, a* record of the following:

(i) For each employee subject to the Service Contract Labor Standards statute-

(A) Name and address and social security number;

(B) Correct work classification or classifications, rate or rates of monetary wages paid and fringe benefits provided, rate or rates of payments in lieu of fringe benefits, and total daily and weekly compensation;

(C) Daily and weekly hours worked by each employee; and

(D) Any deductions, rebates, or refunds from the total daily or weekly compensation of each employee.

(ii) For those classes of service employees not included in any wage determination attached to this contract, wage rates or fringe benefits determined by the interested parties or by the Administrator or authorized representative under the terms of paragraph (c) of this clause. A copy of the report required by subdivision (c)(2)(ii) of this clause will fulfill this requirement.

(iii) Any list of the predecessor Contractor's employees which had been furnished to the Contractor as prescribed by paragraph (n) of this clause.

(2) The Contractor must also make available a copy of this contract for inspection or transcription by authorized representatives of the Wage and Hour Division.

(3) Failure to make and maintain or to make available these records for inspection and transcription shall be a violation of the regulations and this contract, and in the case of failure to produce these records, the Contracting Officer, upon direction of the Department of Labor and notification to the Contractor, must take action to cause suspension of any further payment or advance of funds until the violation ceases.

(4) The Contractor must permit authorized representatives of the Wage and Hour Division to conduct interviews with employees at the worksite during normal working hours.

(j) *Pay periods*. The Contractor must unconditionally pay to each employee subject to the Service Contract Labor Standards statute all wages due free and clear and without subsequent deduction (except as otherwise provided by law or regulations, 29 CFR Part 4), rebate, or kickback on any account. These payments must be made no later than one pay period following the end of the regular pay period in which the wages were earned or accrued. A pay period under this statute may not be of any duration longer than semi-monthly.

(k) *Withholding of payments and termination of contract*. The Contracting Officer must withhold or cause to be withheld from the Government Prime Contractor under this or any other Government contract with the Prime Contractor such sums as an appropriate official of the Department of Labor requests or such sums as the Contracting Officer decides may be necessary to pay underpaid employees employed by the Contractor or subcontractor. In the event of failure to pay any employees subject to the Service Contract Labor Standards statute all or part of the wages or fringe benefits due under the Service Contract Labor Standards statute, the Contracting Officer may, after authorization or by direction of the Department of Labor and written notification to the Contractor, take action to cause suspension of any further payment or advance of funds until such violations have ceased. Additionally, any failure to comply with the requirements of this clause may be grounds for termination of the right to proceed with the contract work. In such event, the Government may enter into other contracts or arrangements for completion of the work, charging the Contractor in default with any additional cost.

(l) *Subcontracts*. The Contractor agrees to insert this clause in all subcontracts subject to the Service Contract Labor Standards statute.

(m) *Collective bargaining agreements applicable to service employees*. If wages to be paid or fringe benefits to be furnished any service employees employed by the Government Prime Contractor or any subcontractor under the contract are provided for in a collective bargaining agreement which is or will be effective during any period in which the contract is being performed, the Government Prime Contractor must report such fact to the Contracting Officer, together with full information as to the application and accrual of such wages and fringe benefits, including any prospective increases, to service employees engaged in work on the contract, and a copy of the collective bargaining agreement. Such report must be made upon commencing performance of the contract, in the case of collective bargaining agreements effective at such time,

and in the case of such agreements or provisions or amendments thereof effective at a later time during the period of contract performance such agreements must be reported promptly after negotiation thereof.

(n) *Seniority list*. Not less than 10 days prior to completion of any contract being performed at a Federal facility where service employees may be retained in the performance of the succeeding contract and subject to a wage determination which contains vacation or other benefit provisions based upon length of service with a Contractor (predecessor) or successor (29 CFR 4.173), the incumbent Prime Contractor must furnish the Contracting Officer a certified list of the names of all service employees on the Contractor's or subcontractor's payroll during the last month of contract performance. Such list must also contain anniversary dates of employment on the contract either with the current or predecessor Contractors of each such service employee. The Contracting Officer must turn over such list to the successor Contractor at the commencement of the succeeding contract.

(o) *Rulings and interpretations*. Rulings and interpretations of the Service Contract Labor Standards statute are contained in Regulations, 29 CFR Part 4.

(p) *Contractor's Representation*. (1) By entering into this contract, the Contractor (and officials thereof) represents that neither it nor any person or firm who has a substantial interest in the Contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of the sanctions imposed under 41 U.S.C. 6706.

(2) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract under 41 U.S.C. 6706.

(3) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

(q) *Variations, tolerances, and exemptions involving employment*. Notwithstanding any of the provisions in paragraphs (b) through (o) of this clause, the following employees may be employed in accordance with the following variations, tolerances, and exemptions, which the Secretary of Labor, pursuant to 41 U.S.C. 6707 prior to its amendment by Pub.L.92-473, found to be necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business:

(1) Apprentices, student-learners, and workers whose earning capacity is impaired by age, physical or mental deficiency, or injury may be employed at wages lower than the minimum wages otherwise required by 41 U.S.C. 6703(1) without diminishing any fringe benefits or cash payments in lieu thereof required under 41 U.S.C. 6703(2), in accordance with the conditions and procedures prescribed for the employment of apprentices, student-learners, persons with disabilities, and disabled clients of work centers under section 14 of the Fair Labor Standards Act of 1938, in the regulations issued by the Administrator (29 CFR parts 520, 521, 524, and 525).

(2) The Administrator will issue certificates under the statute for the employment of apprentices, student-learners, persons with disabilities, or disabled clients of work centers not subject to the Fair Labor Standards Act of 1938, or subject to different minimum rates of pay under the two statutes, authorizing appropriate rates of minimum wages (but without changing requirements concerning fringe benefits or supplementary cash payments in lieu thereof), applying procedures prescribed by the applicable regulations issued under the Fair Labor Standards Act of 1938 (29 CFR parts 520, 521, 524, and 525).

(3) The Administrator will also withdraw, annul, or cancel such certificates in accordance with the regulations in 29 CFR parts 525 and 528.

(r) *Apprentices*. Apprentices will be permitted to work at less than the predetermined rate for the work they perform when they are employed and individually registered in a bona fide apprenticeship program registered with a State Apprenticeship Agency which is recognized by the U.S. Department of Labor, or if no such recognized agency exists in a State, under a program registered with the Office of Apprenticeship and Training, Employer, and Labor Services (OATELS), U.S. Department of Labor. Any employee who is not registered as an apprentice in an approved program must be paid the wage rate and fringe benefits contained in the applicable wage determination for the journeyman classification of work actually performed. The wage rates paid apprentices must not be less than the wage rate for their level of progress set forth in the registered program, expressed as the appropriate percentage of the journeyman's rate contained in the applicable wage determination. The allowable ratio of apprentices to journeymen employed on the contract work in any craft classification must not be greater than the ratio permitted to the Contractor as to his entire work force under the registered program.

(s) *Tips*. An employee engaged in an occupation in which the employee customarily and regularly receives more than $30 a month in tips may have the amount of these tips credited by the employer against the minimum wage required by 41 U.S.C. 6703(1), in accordance with section 3(m) of the Fair Labor Standards Act and Regulations, 29 CFR Part 531. However, the amount of credit must not exceed $1.34 per hour beginning January 1,1981. To use this provision-

(1) The employer must inform tipped employees about this tip credit allowance before the credit is utilized;

(2) The employees must be allowed to retain all tips (individually or through a pooling arrangement and regardless of whether the employer elects to take a credit for tips received);

(3) The employer must be able to show by records that the employee receives at least the applicable Service Contract Labor Standards minimum wage through the combination of direct wages and tip credit; and

(4) The use of such tip credit must have been permitted under any predecessor collective bargaining agreement applicable by virtue of 41 U.S.C. 6707(c).

(t) *Disputes concerning labor standards*. The U.S. Department of Labor has set forth in 29 CFR parts 4, 6, and 8 procedures for resolving disputes concerning labor standards requirements. Such disputes must be resolved in accordance with those procedures and not the Disputes clause of this contract. Disputes within the meaning of this clause include disputes between the Contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

(End of clause)

52.222-42 Statement of Equivalent Rates for Federal Hires.

As prescribed in 22.1002-2(c)(1), insert the following clause:

STATEMENT OF EQUIVALENT RATES FOR FEDERAL HIRES (MAY 2014)

In compliance with the Service Contract Labor Standards statute and the regulations of the Secretary of Labor (29 CFR Part 4), this clause identifies the classes of service employees expected to be employed under the contract and states the wages and fringe benefits payable to each if they were employed by the contracting agency subject to the provisions of 5 U.S.C.5341 or 5332.

This Statement is for Information Only: It is not a Wage Determination

Employee Class	**Monetary Wage-Fringe Benefits**

(End of clause)

52.222-43 Fair Labor Standards Act and Service Contract Labor Standards-Price Adjustment (Multiple Year and Option Contracts).

As prescribed in 22.1002-2(d)(1), insert the following clause:

FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT LABOR STANDARDS-
PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS) (DEVIATION DATE)

(a) This clause applies to both contracts subject to area prevailing wage determinations and contracts subject to collective bargaining agreements.

(b) The Contractor warrants that the prices in this contract do not include any allowance for any contingency to cover increased costs for which adjustment is provided under this clause.

(c) The wage determination, issued under the Service Contract Labor Standards statute, (41 U.S.C. chapter 67), by the Administrator, Wage and Hour *Division, U.S.* Department of Labor, current on the anniversary date of a multiple year contract or the beginning of each renewal option period, must apply to this contract. If no such determination has been made applicable to this contract, then the Federal minimum wage as established by section 6(a)(1) of the Fair Labor Standards Act

of1938, as amended, (29 U.S.C. 206) current on the anniversary date of a multiple year contract or the beginning of each renewal option period, must apply to this contract.

(d) The contract price, contract unit price labor rates, or fixed hourly labor rates will be adjusted to reflect the Contractor's actual increase or decrease in applicable wages and fringe benefits to the extent that the increase is made to comply with or the decrease is voluntarily made by the Contractor as a result of:

(1) The Department of Labor wage determination applicable on the anniversary date of the multiple year contract, or at the beginning of the renewal option period. For example, the prior year wage determination required a minimum wage rate of $4.00 per hour. The Contractor chose to pay $4.10. The new wage determination increases the minimum rate to $4.50 per hour. Even if the Contractor voluntarily increases the rate to $4.75 per hour, the allowable price adjustment is $.40 per hour;

(2) An increased or decreased wage determination otherwise applied to the contract by operation of law; or

(3) An amendment to the Fair Labor Standards Act of1938 that is enacted after award of this contract, affects the minimum wage, and becomes applicable to this contract under law.

(e) Any adjustment will be limited to increases or decreases in wages and fringe benefits as described in paragraph (d) of this clause, and the accompanying increases or decreases in social security and unemployment taxes and workers' compensation insurance, but must not otherwise include any amount for general and administrative costs, overhead, or profit.

(f) The Contractor must notify the Contracting Officer of any increase claimed under this clause within 30 days after receiving a new wage determination unless this notification period is extended in writing by the Contracting Officer. The Contractor must promptly notify the Contracting Officer of any decrease under this clause, but nothing in the clause shall preclude the Government from asserting a claim within the period permitted by law. The notice must contain a statement of the amount claimed and the change in fixed hourly rates (if this is a time-and-materials or labor-hour contract), and any relevant supporting data, including payroll records, that the Contracting Officer may reasonably require. Upon agreement of the parties, the contract price, contract unit price labor rates, or fixed hourly rates must be modified in writing. The Contractor must continue performance pending agreement on or determination of any such adjustment and its effective date.

(g) The Contracting Officer or an authorized representative must have access to and the right to examine any directly pertinent books, documents, papers and records of the Contractor until the expiration of 3 years after final payment under the contract.

(End of clause)

52.222-44 Fair Labor Standards Act and Service Contract Labor Standards-Price Adjustment.

As prescribed in 22.1002-2(d)(2), insert the following clause:

FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT LABOR STANDARDS-PRICE ADJUSTMENT (DEVIATION DATE)

(a) This clause applies to both contracts subject to area prevailing wage determinations and contracts subject to Contractor collective bargaining agreements.

(b) The Contractor warrants that the prices in this contract do not include any allowance for any contingency to cover increased costs for which adjustment is provided under this clause.

(c) The contract price, contract unit price labor rates, or fixed hourly labor rates will be adjusted to reflect increases or decreases by the Contractor in wages and fringe benefits to the extent that these increases or decreases are made to comply with-

(1) An increased or decreased wage determination applied to this contract by operation of law; or

(2) An amendment to the Fair Labor Standards Act of1938 that is enacted subsequent to award of this contract, affects the minimum wage, and becomes applicable to this contract under law.

(d) Any such adjustment will be limited to increases or decreases in wages and fringe benefits as described in paragraph (c) of this clause, and to the accompanying increases or decreases in social security and unemployment taxes and workers' compensation insurance; it must not otherwise include any amount for general and administrative costs, overhead, or profit.

(e) The Contractor must notify the Contracting Officer of any increase claimed under this clause within 30 days after the effective date of the wage change, unless this period is extended by the Contracting Officer in writing. The Contractor must promptly notify the Contracting Officer of any decrease under this clause, but nothing in the clause shall preclude the Government from asserting a claim within the period permitted by law. The notice must contain a statement of the amount and the change in fixed hourly rates (if this is a time-and-materials or labor-hour contract) claimed and any relevant supporting data that the Contracting Officer may reasonably require. Upon agreement of the parties, the contract price,

contract unit price labor rates, or fixed hourly rates must be modified in writing. The Contractor must continue performance pending agreement on or determination of any such adjustment and its effective date.

(f) The Contracting Officer or an authorized representative must, until the expiration of 3 years after final payment under the contract, have access to and the right to examine any directly pertinent books, documents, papers, and records of the Contractor.

(End of clause)

52.222-45 [Reserved]

52.222-46 [Reserved]

(DEVIATION DATE)

52.222-47 [Reserved]

52.222-48 Exemption from Application of the Service Contract Labor Standards to Contracts for Maintenance, Calibration, or Repair of Certain Equipment-Certification.

As prescribed in 22.1002-2(e)(1), insert the following provision:

EXEMPTION FROM APPLICATION OF THE SERVICE CONTRACT LABOR STANDARDS TO CONTRACTS FOR MAINTENANCE, CALIBRATION, OR REPAIR OF CERTAIN EQUIPMENT-CERTIFICATION (DEVIATION DATE)

(a) The offeror must check the following certification:

Certification

The offeror □ does □ does not certify that-

(1) The items of equipment to be serviced under this contract are used regularly for other than Government purposes, and are sold or traded by the offeror (or subcontractor in the case of an exempt subcontractor) in substantial quantities to the general public in the course of normal business operations;

(2) The services will be furnished at prices which are, or are based on, established catalog or market prices for the maintenance, calibration, or repair of equipment.

(i) An "established catalog price" is a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or the offeror, is either published or otherwise available for inspection by customers, and states prices at which sales currently, or were last, made to a significant number of buyers constituting the general public.

(ii) An "established market price" is a current price, established in the usual course of trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or offeror; and

(3) The compensation (wage and fringe benefits) plan for all service employees performing work under the contract are the same as that used for these employees and equivalent employees servicing the same equipment of commercial customers.

(b) Certification by the offeror as to its compliance with respect to the contract also constitutes its certification as to compliance by its subcontractor if it subcontracts out the exempt services. If the offeror certifies to the conditions in paragraph (a) of this provision, and the Contracting Officer determines in accordance with FAR 22.1002-1(e)(3) that the Service Contract Labor Standards statute-

(1) Will not apply to this offeror, then the Service Contract Labor Standards clause in this solicitation will not be included in any resultant contract to this offeror; or

(2) Will apply to this offeror, then the clause at 52.222-51, Exemption from Application of the Service Contract Labor Standards to Contracts for Maintenance, Calibration, or Repair of Certain Equipment-Requirements, in this solicitation will not be included in any resultant contract awarded to this offeror, and the offeror may be provided an opportunity to submit a new offer on that basis.

(c) If the offeror does not certify to the conditions in paragraph (a) of this provision-

(1) The clause in this solicitation at 52.222-51, Exemption from Application of the Service Contract Labor Standards to Contracts for Maintenance, Calibration, or Repair of Certain Equipment-Requirements, will not be included in any resultant contract awarded to this offeror; and

(2) The offeror must notify the Contracting Officer as soon as possible, if the Contracting Officer did not attach a Service Contract Labor Standards wage determination to the solicitation.

(d) The Contracting Officer may not make an award to the offeror, if the offeror fails to execute the certification in paragraph (a) of this provision or to contact the Contracting Officer as required in paragraph (c) of this provision.

(End of provision)

52.222-49 Service Contract Labor Standards-Place of Performance Unknown.

As prescribed in 22.1002-2(f), insert the following clause:

SERVICE CONTRACT LABOR STANDARDS-PLACE OF PERFORMANCE UNKNOWN (DEVIATION DATE)

(a) This contract is subject to the Service Contract Labor Standards statute, and the place of performance was unknown when the solicitation was issued. In addition to places or areas identified in wage determinations, if any, attached to the solicitation, wage determinations have also been requested for the following: _____ *[insert places or areas]*. The Contracting Officer will request wage determinations for additional places or areas of performance if asked to do so in writing by _____ *[insert time and date]*.

(b) Offerors who intend to perform in a place or area of performance for which a wage determination has not been attached or requested may nevertheless submit bids or proposals. However, a wage determination must be requested and incorporated in the resultant contract retroactive to the date of contract award, and there shall be no adjustment in the contract price.

(End of clause)

52.222-50 Combating Trafficking in Persons.

As prescribed in 22.1703-2(a)(1), insert the following clause:

COMBATING TRAFFICKING IN PERSONS (DEVIATION DATE)

(a) *Definitions*. As used in this clause-

Agent means any individual, including a director, an officer, an employee, or an independent contractor, authorized to act on behalf of the organization.

Coercion means-

(1) Threats of serious harm to or physical restraint against any person;

(2) Any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(3) The abuse or threatened abuse of the legal process.

Commercial sex act means any sex act on account of which anything of value is given to or received by any person.

Commercially available off-the-shelf (COTS) item —

(1) Means any item of supply (including construction material) that is—

(i) A commercial product (as defined in paragraph (1) of the definition of "commercial product" at Federal Acquisition Regulation (FAR) 2.101;

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

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

Debt bondage means the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

Employee means an employee of the Contractor directly engaged in the performance of work under the contract who has other than a minimal impact or involvement in contract performance.

Forced Labor means knowingly providing or obtaining the labor or services of a person-

(1) By threats of serious harm to, or physical restraint against, that person or another person;

(2) By means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or

(3) By means of the abuse or threatened abuse of law or the legal process.

Involuntary servitude includes a condition of servitude induced by means of-

(1) Any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such conditions, that person or another person would suffer serious harm or physical restraint; or

(2) The abuse or threatened abuse of the legal process.

Recruitment fees means fees of any type, including charges, costs, assessments, or other financial obligations, that are associated with the recruiting process, regardless of the time, manner, or location of imposition or collection of the fee.

(1) Recruitment fees include, but are not limited to, the following fees (when they are associated with the recruiting process) for-

(i) Soliciting, identifying, considering, interviewing, referring, retaining, transferring, selecting, training, providing orientation to, skills testing, recommending, or placing employees or potential employees;

(ii) Advertising;

(iii) Obtaining permanent or temporary labor certification, including any associated fees;

(iv) Processing applications and petitions;

(v) Acquiring visas, including any associated fees;

(vi) Acquiring photographs and identity or immigration documents, such as passports, including any associated fees;

(vii) Accessing the job opportunity, including required medical examinations and immunizations; background, reference, and security clearance checks and examinations; and additional certifications;

(viii) An employer's recruiters, agents or attorneys, or other notary or legal fees;

(ix) Language interpretation or translation, arranging for or accompanying on travel, or providing other advice to employees or potential employees;

(x) Government-mandated fees, such as border crossing fees, levies, or worker welfare funds;

(xi) Transportation and subsistence costs-

(A) While in transit, including, but not limited to, airfare or costs of other modes of transportation, terminal fees, and travel taxes associated with travel from the country of origin to the country of performance and the return journey upon the end of employment; and

(B) From the airport or disembarkation point to the worksite;

(xii) Security deposits, bonds, and insurance; and

(xiii) Equipment charges.

(2) A recruitment fee, as described in the introductory text of this definition, is a recruitment fee, regardless of whether the payment is-

(i) Paid in property or money;

(ii) Deducted from wages;

(iii) Paid back in wage or benefit concessions;

(iv) Paid back as a kickback, bribe, in-kind payment, free labor, tip, or tribute; or

(v) Collected by an employer or a third party, whether licensed or unlicensed, including, but not limited to-

(A) Agents;

(B) Labor brokers;

(C) Recruiters;

(D) Staffing firms (including private employment and placement firms);

(E) Subsidiaries/affiliates of the employer;

(F) Any agent or employee of such entities; and

(G) Subcontractors at all tiers.

Severe forms of trafficking in persons means-

(1) Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

(2) The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

Sex trafficking means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.

Subcontract means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract.

Subcontractor means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

United States means the 50 States, the District of Columbia, and outlying areas.

(b) *Policy.* The United States Government has adopted a policy prohibiting trafficking in persons including the trafficking-related activities of this clause. Contractors, contractor employees, and their agents must not—

(1) Engage in severe forms of trafficking in persons during the period of performance of the contract;

(2) Procure commercial sex acts during the period of performance of the contract;

(3) Use forced labor in the performance of the contract;

(4) Destroy, conceal, confiscate, or otherwise deny access by an employee to the employee's identity or immigration documents, such as passports or drivers' licenses, regardless of issuing authority;

(5) (i) Use misleading or fraudulent practices during the recruitment of employees or offering of employment, such as failing to disclose, in a format and language understood by the employee or potential employee, basic information or making material misrepresentations during the recruitment of employees regarding the key terms and conditions of employment, including wages and fringe benefits, the location of work, the living conditions, housing and associated costs (if employer or agent provided or arranged), any significant costs to be charged to the employee or potential employee, and, if applicable, the hazardous nature of the work;

(ii) Use recruiters that do not comply with local labor laws of the country in which the recruiting takes place;

(6) Charge employees or potential employees recruitment fees;

(7) (i) Fail to provide return transportation or pay for the cost of return transportation upon the end of employment-

(A) For an employee who is not a national of the country in which the work is taking place and who was brought into that country for the purpose of working on a U.S. Government contract or subcontract (for portions of contracts performed outside the United States); or

(B) For an employee who is not a United States national and who was brought into the United States for the purpose of working on a U.S. Government contract or subcontract, if the payment of such costs is required under existing temporary worker programs or pursuant to a written agreement with the employee (for portions of contracts performed inside the United States); except that—

(ii) The requirements of paragraphs (b)(7)(i) of this clause must not apply to an employee who is—

(A) Legally permitted to remain in the country of employment and who chooses to do so; or

(B) Exempted by an authorized official of the contracting agency from the requirement to provide return transportation or pay for the cost of return transportation;

(iii) The requirements of paragraph (b)(7)(i) of this clause are modified for a victim of trafficking in persons who is seeking victim services or legal redress in the country of employment, or for a witness in an enforcement action related to trafficking in persons. The contractor must provide the return transportation or pay the cost of return transportation in a way that does not obstruct the victim services, legal redress, or witness activity. For example, the contractor must not only offer return transportation to a witness at a time when the witness is still needed to testify. This paragraph does not apply when the exemptions at paragraph (b)(7)(ii) of this clause apply.

(8) Provide or arrange housing that fails to meet the host country housing and safety standards; or

(9) If required by law or contract, fail to provide an employment contract, recruitment agreement, or other required work document in writing. Such written work document must be in a language the employee understands. If the employee must relocate to perform the work, the work document must be provided to the employee at least five days prior to the employee relocating. The employee's work document must include, but is not limited to, details about work description, wages, prohibition on charging recruitment fees, work location(s), living accommodations and associated costs, time off, roundtrip transportation arrangements, grievance process, and the content of applicable laws and regulations that prohibit trafficking in persons.

(c) *Contractor requirements*. The Contractor must-

(1) Notify its employees and agents of-

(i) The United States Government's policy prohibiting trafficking in persons, described in paragraph (b) of this clause; and

(ii) The actions that will be taken against employees or agents for violations of this policy. Such actions for employees may include, but are not limited to, removal from the contract, reduction in benefits, or termination of employment; and

(2) Take appropriate action, up to and including termination, against employees, agents, or subcontractors that violate the policy in paragraph (b) of this clause.

(d) *Notification.* (1) The Contractor must inform the Contracting Officer and the agency Inspector General immediately of —

(i) Any credible information it receives from any source (including host country law enforcement) that alleges a Contractor employee, subcontractor, subcontractor employee, or their agent has engaged in conduct that violates the policy in paragraph (b) of this clause (see also 18 U.S.C. 1351, Fraud in Foreign Labor Contracting, and 52.203-13(b)(3)(i)(A), if that clause is included in the solicitation or contract, which requires disclosure to the agency Office of the Inspector General when the Contractor has credible evidence of fraud); and

(ii) Any actions taken against a Contractor employee, subcontractor, subcontractor employee, or their agent pursuant to this clause.

(2) If the allegation may be associated with more than one contract, the Contractor must inform the contracting officer for the contract with the highest dollar value.

(e) *Remedies.* In addition to other remedies available to the Government, the Contractor's failure to comply with the requirements of paragraphs (c), (d), (g), (h), or (i) of this clause may result in—

(1) Requiring the Contractor to remove a Contractor employee or employees from the performance of the contract;

(2) Requiring the Contractor to terminate a subcontract;

(3) Suspension of contract payments until the Contractor has taken appropriate remedial action;

(4) Loss of award fee, consistent with the award fee plan, for the performance period in which the Government determined Contractor non-compliance;

(5) Declining to exercise available options under the contract;

(6) Termination of the contract for default or cause, in accordance with the termination clause of this contract; or

(7) Suspension or debarment.

(f) *Mitigating and aggravating factors.* When determining remedies, the Contracting Officer may consider the following:

(1) *Mitigating factors*. The Contractor had a Trafficking in Persons compliance plan or an awareness program at the time of the violation, was in compliance with the plan, and has taken appropriate remedial actions for the violation, that may include reparation to victims for such violations.

(2) *Aggravating factors*. The Contractor failed to abate an alleged violation or enforce the requirements of a compliance plan, when directed by the Contracting Officer to do so.

(g) *Full cooperation*. (1) The Contractor must, at a minimum—

(i) Disclose to the agency Inspector General information sufficient to identify the nature and extent of an offense and the individuals responsible for the conduct;

(ii) Provide timely and complete responses to Government auditors' and investigators' requests for documents;

(iii) Cooperate fully in providing reasonable access to its facilities and staff (both inside and outside the U.S.) to allow contracting agencies and other responsible Federal agencies to conduct audits, investigations, or other actions to ascertain compliance with the Trafficking Victims Protection Act of 2000 (22 U.S.C. chapter 78), E.O. 13627, or any other applicable law or regulation establishing restrictions on trafficking in persons, the procurement of commercial sex acts, or the use of forced labor; and

(iv) Protect all employees suspected of being victims of or witnesses to prohibited activities, prior to returning to the country from which the employee was recruited, and must not prevent or hinder the ability of these employees from cooperating fully with Government authorities.

(2) The requirement for full cooperation does not foreclose any Contractor rights arising in law, the FAR, or the terms of the contract. It does not-

(i) Require the Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine;

(ii) Require any officer, director, owner, employee, or agent of the Contractor, including a sole proprietor, to waive his or her attorney client privilege or Fifth Amendment rights; or

(iii) Restrict the Contractor from—

(A) Conducting an internal investigation; or

(B) Defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation.

(h) *Compliance plan*. (1) This paragraph (h) applies to any portion of the contract that—

(i) Is for supplies, other than commercially available off-the-shelf items, acquired outside the United States, or services to be performed outside the United States; and

(ii) Has an estimated value that exceeds $700,000.

(2) The Contractor must maintain a compliance plan during the performance of the contract that is appropriate—

(i) To the size and complexity of the contract; and

(ii) To the nature and scope of the activities to be performed for the Government, including the number of non-United States citizens expected to be employed and the risk that the contract or subcontract will involve services or supplies susceptible to trafficking in persons.

(3) *Minimum requirements*. The compliance plan must include, at a minimum, the following:

(i) An awareness program to inform contractor employees about the Government's policy prohibiting trafficking-related activities described in paragraph (b) of this clause, the activities prohibited, and the actions that will be taken against the employee for violations. Additional information about Trafficking in Persons and examples of awareness programs can be found at the Web site for the Department of State's Office to Monitor and Combat Trafficking in Persons at http://www.state.gov/j/tip/.

(ii) A process for employees to report, without fear of retaliation, activity inconsistent with the policy prohibiting trafficking in persons, including a means to make available to all employees the hotline phone number of the Global Human Trafficking Hotline at 1-844-888-FREE and its email address at help@befree.org.

(iii) A recruitment and wage plan that only permits the use of recruitment companies with trained employees, prohibits charging recruitment fees to the employee or potential employee, and ensures that wages meet applicable host-country legal requirements or explains any variance.

(iv) A housing plan, if the Contractor or subcontractor intends to provide or arrange housing, that ensures that the housing meets host-country housing and safety standards.

(v) Procedures to prevent agents and subcontractors at any tier and at any dollar value from engaging in trafficking in persons (including activities in paragraph (b) of this clause) and to monitor, detect, and terminate any agents, subcontracts, or subcontractor employees that have engaged in such activities.

(4) *Posting*. (i) The Contractor must post the relevant contents of the compliance plan, no later than the initiation of contract performance, at the workplace (unless the work is to be performed in the field or not in a fixed location) and on the Contractor's Web site (if one is maintained). If posting at the workplace or on the Web site is impracticable, the Contractor must provide the relevant contents of the compliance plan to each worker in writing.

(ii) The Contractor must provide the compliance plan to the Contracting Officer upon request.

(5) *Certification*. Annually after receiving an award, the Contractor must submit a certification to the Contracting Officer that—

(i) It has implemented a compliance plan to prevent any prohibited activities identified at paragraph (b) of this clause and to monitor, detect, and terminate any agent, subcontract or subcontractor employee engaging in prohibited activities; and

(ii) After having conducted due diligence, either—

(A) To the best of the Contractor's knowledge and belief, neither it nor any of its agents, subcontractors, or their agents is engaged in any such activities; or

(B) If abuses relating to any of the prohibited activities identified in paragraph (b) of this clause have been found, the Contractor or subcontractor has taken the appropriate remedial and referral actions.

(i) *Subcontracts*. (1) The Contractor must include the substance of this clause, including this paragraph (i), in all subcontracts and in all contracts with agents. The requirements in paragraph (h) of this clause apply only to any portion of the subcontract that—

(i) Is for supplies, other than commercially available off-the-shelf items, acquired outside the United States, or services to be performed outside the United States; and

(ii) Has an estimated value that exceeds $700,000.

(2) If any subcontractor is required by this clause to submit a certification, the Contractor must require submission prior to the award of the subcontract and annually thereafter. The certification must cover the items in paragraph (h)(5) of this clause.

(End of clause)

Alternate I (DEVIATION DATE). As prescribed in 22.1703-2(a)(2), substitute the following paragraph in place of paragraph (c)(1)(i) of the basic clause:

(c)(1)(i)(A) The United States Government's policy prohibiting trafficking in persons described in paragraph (b) of this clause; and

(B) The following directive(s) or notice(s) applicable to employees performing work at the contract place(s) of performance as indicated below:

Document Title	Document may be obtained from:	Applies to performance in/at:
_____	_____	_____
_____	_____	_____

[*Contracting Officer must insert title of directive/notice; indicate the document is attached or provide source (such as website link) for obtaining document; and, indicate the contract performance location outside the United States to which the document applies.*]

52.222-51 Exemption from Application of the Service Contract Labor Standards to Contracts for Maintenance, Calibration, or Repair of Certain Equipment-Requirements.

As prescribed in 22.1002-2(e)(2), insert the following clause:

EXEMPTION FROM APPLICATION OF THE SERVICE CONTRACT LABOR STANDARDS TO CONTRACTS FOR MAINTENANCE, CALIBRATION, OR REPAIR OF CERTAIN EQUIPMENT-REQUIREMENTS (DEVIATION DATE)

(a) The items of equipment to be serviced under this contract are used regularly for other than Government purposes, and are sold or traded by the Contractor in substantial quantities to the general public in the course of normal business operations.

(b) The services must be furnished at prices which are, or are based on, established catalog or market prices for the maintenance, calibration, or repair of equipment.

(1) An "established catalog price" is a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or the Contractor, is either published or otherwise available for inspection by customers, and states prices at which sales currently, or were last, made to a significant number of buyers constituting the general public.

(2) An "established market price" is a current price, established in the usual course of trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or Contractor.

(c) The compensation (wage and fringe benefits) plan for all service employees performing work under the contract must be the same as that used for these employees and for equivalent employees servicing the same equipment of commercial customers.

(d) The Contractor is responsible for compliance with all the conditions of this exemption by its subcontractors. The Contractor must determine the applicability of this exemption to any subcontract on or before subcontract award. In making a judgment that the exemption applies, the Contractor must consider all factors and make an affirmative determination that all of the conditions in paragraphs (a) through (c) of this clause will be met.

(e) If the Department of Labor determines that any conditions for exemption in paragraphs (a) through (c) of this clause have not been met, the exemption shall be deemed inapplicable, and the contract shall become subject to the Service Contract Labor Standards statute. In such case, the procedures at 29 CFR 4.123(e)(1)(iv) and 29 CFR 4.5(c) will be followed.

(f) The Contractor must include the substance of this clause, including this paragraph (f), in subcontracts for exempt services under this contract.

(End of clause)

52.222-52 Exemption from Application of the Service Contract Labor Standards to Contracts for Certain Services-Certification.

As prescribed in 22.1002-2(e)(3), insert the following provision:

EXEMPTION FROM APPLICATION OF THE SERVICE CONTRACT LABOR STANDARDS TO CONTRACTS FOR CERTAIN SERVICES-CERTIFICATION (DEVIATION DATE)

(a) The offeror must check the following certification:

Certification

The offeror □ does □ does not certify that-

(1) The services under the contract are offered and sold regularly to non-Governmental customers, and are provided by the offeror (or subcontractor in the case of an exempt subcontract) to the general public in substantial quantities in the course of normal business operations;

(2) The contract services are furnished at prices that are, or are based on, established catalog or market prices. An "established catalog price" is a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or the offeror, is either published or otherwise available for inspection by customers, and states prices at which sales currently, or were last, made to a significant number of buyers constituting the general public. An "established market price" is a current price, established in the usual course of ordinary and usual trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or offeror;

(3) Each service employee who will perform the services under the contract will spend only a small portion of his or her time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the Government contract; and

(4) The offeror uses the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the offeror uses for these employees and for equivalent employees servicing commercial customers.

(b) Certification by the offeror as to its compliance with respect to the contract also constitutes its certification as to compliance by its subcontractor if it subcontracts out the exempt services. If the offeror certifies to the conditions in paragraph (a) of this provision, and the Contracting Officer determines in accordance with FAR 22.1002-1(f)(3) that the Service Contract Labor Standards statute-

(1) Will not apply to this offeror, then the Service Contract Labor Standards clause in this solicitation will not be included in any resultant contract to this offeror; or

(2) Will apply to this offeror, then the clause at FAR 52.222-53, Exemption from Application of the Service Contract Labor Standards to Contracts for Certain Services-Requirements, in this solicitation will not be included in any resultant contract awarded to this offer, and the offeror may be provided an opportunity to submit a new offer on that basis.

(c) If the offeror does not certify to the conditions in paragraph (a) of this provision-

(1) The clause of this solicitation at 52.222-53, Exemption from Application of the Service Contract Labor Standards to Contracts for Certain Services-Requirements, will not be included in any resultant contract to this offeror; and

(2) The offeror must notify the Contracting Officer as soon as possible if the Contracting Officer did not attach a Service Contract Labor Standards wage determination to the solicitation.

(d) The Contracting Officer may not make an award to the offeror, if the offeror fails to execute the certification in paragraph (a) of this provision or to contact the Contracting Officer as required in paragraph (c) of this provision.

(End of provision)

52.222-53 Exemption from Application of the Service Contract Labor Standards to Contracts for Certain Services-Requirements.

As prescribed in 22.1002-2(e)(4), insert the following clause:

EXEMPTION FROM APPLICATION OF THE SERVICE CONTRACT LABOR STANDARDS TO CONTRACTS FOR CERTAIN SERVICES-REQUIREMENTS (DEVIATION DATE)

(a) The services under this contract are offered and sold regularly to non-Governmental customers, and are provided by the Contractor to the general public in substantial quantities in the course of normal business operations.

(b) The contract services are furnished at prices that are, or are based on, established catalog or market prices. An "established catalog price" is a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or the Contractor, is either published or otherwise available for inspection by customers, and states prices at which sales currently, or were last, made to a significant number of buyers constituting the general public. An "established market price" is a current price, established in the usual course of ordinary and usual trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or Contractor.

(c) Each service employee who will perform the services under the contract will spend only a small portion of his or her time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the Government contract.

(d) The Contractor uses the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the Contractor uses for these employees and for equivalent employees servicing commercial customers.

(e) (1) Except for services identified in FAR 22.1002-1(f)(1)(iv), the subcontractor for exempt services must be selected for award based on other factors in addition to price or cost with the combination of other factors at least as important as price or cost; or

(2) A subcontract for exempt services must be awarded on a sole source basis.

(f) The Contractor is responsible for compliance with all the conditions of this exemption by its subcontractors. The Contractor must determine in advance, based on the nature of the subcontract requirements and knowledge of the practices of likely subcontractors, that all or nearly all likely subcontractors will meet the conditions in paragraphs (a) through (d) of this clause. If the services are currently being performed under a subcontract, the Contractor must consider the practices of the existing subcontractor in making a determination regarding the conditions in paragraphs (a) through (d) of this clause. If the Contractor has reason to doubt the validity of the certification, the requirements of the Service Contract Labor Standards statute must be included in the subcontract.

(g) If the Department of Labor determines that any conditions for exemption at paragraphs (a) through (e) of this clause have not been met, the exemption must be deemed inapplicable, and the contract must become subject to the Service Contract Labor Standards statute. In such case, the procedures in at 29 CFR 4.123(e)(2)(iii) and 29 CFR 4.5(c) will be followed.

(h) The Contractor must include the substance of this clause, including this paragraph (h), in subcontracts for exempt services under this contract.

(End of clause)

52.222-54 Employment Eligibility Verification.

As prescribed in 22.1802-2, Insert the following clause:

EMPLOYMENT ELIGIBILITY VERIFICATION (DEVIATION DATE)

(a) *Definitions*. As used in this clause-

Commercially available off-the-shelf (COTS) item—

(1) Means any item of supply that is—

(i) A commercial product (as defined in paragraph (1) of the definition of "commercial product" at Federal Acquisition Regulation (FAR) 2.101);

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

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

(2) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products. Per 46 CFR 525.1 (c)(2), "bulk cargo" means cargo that is loaded and carried in bulk onboard ship without mark or count, in a loose unpackaged form, having homogenous characteristics. Bulk cargo loaded into intermodal equipment, except LASH or Seabee barges, is subject to mark and count and, therefore, ceases to be bulk cargo.

Employee assigned to the contract means an employee who was hired after November 6, 1986 (after November 27, 2009 in the Commonwealth of the Northern Mariana Islands), who is directly performing work, in the United States, under a contract that is required to include the clause prescribed at 22.1802-2. An employee is not considered to be directly performing work under a contract if the employee-

(1) Normally performs support work, such as indirect or overhead functions; and

(2) Does not perform any substantial duties applicable to the contract.

Subcontract

Subcontractor means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime Contractor or another subcontractor.

United States, as defined in 8 U.S.C. 1101(a)(38), means the 50 States, the District of Columbia, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands.

(b) *Enrollment and verification requirements*. (1) If the Contractor is not enrolled as a Federal Contractor in E-Verify at time of contract award, the Contractor must-

(i) *Enroll*. Enroll as a Federal Contractor in the E-Verify program within 30 calendar days of contract award;

(ii) *Verify all new employees*. Within 90 calendar days of enrollment in the E-Verify program, begin to use E-Verify to initiate verification of employment eligibility of all new hires of the Contractor, who are working in the United States, whether or not assigned to the contract, within 3 business days after the date of hire (but see paragraph (b)(3) of this section); and

(iii) *Verify employees assigned to the contract*. For each employee assigned to the contract, initiate verification within 90 calendar days after date of enrollment or within 30 calendar days of the employee's assignment to the contract, whichever date is later (but see paragraph (b)(4) of this section).

(2) If the Contractor is enrolled as a Federal Contractor in E-Verify at time of contract award, the Contractor must use E-Verify to initiate verification of employment eligibility of-

(i) *All new employees*. (A) *Enrolled 90 calendar days or more*. The Contractor must initiate verification of all new hires of the Contractor, who are working in the United States, whether or not assigned to the contract, within 3 business days after the date of hire (but see paragraph (b)(3) of this section); or

(B) *Enrolled less than 90 calendar days*. Within 90 calendar days after enrollment as a Federal Contractor in E-Verify, the Contractor must initiate verification of all new hires of the Contractor, who are working in the United States, whether or not assigned to the contract, within 3 business days after the date of hire (but see paragraph (b)(3) of this section); or

(ii) *Employees assigned to the contract*. For each employee assigned to the contract, the Contractor must initiate verification within 90 calendar days after date of contract award or within 30 days after assignment to the contract, whichever date is later (but see paragraph (b)(4) of this section).

(3) If the Contractor is an institution of higher education (as defined at 20 U.S.C. 1001(a)); a State or local government or the government of a Federally recognized Indian tribe; or a surety performing under a takeover agreement entered into with a Federal agency pursuant to a performance bond, the Contractor may choose to verify only employees assigned to the contract, whether existing employees or new hires. The Contractor must follow the applicable verification requirements at (b)(1) or (b)(2) respectively, except that any requirement for verification of new employees applies only to new employees assigned to the contract.

(4) *Option to verify employment eligibility of all employees*. The Contractor may elect to verify all existing employees hired after November 6, 1986 (after November 27, 2009, in the Commonwealth of the Northern Mariana Islands), rather than just those employees assigned to the contract. The Contractor must initiate verification for each existing employee working in the United States who was hired after November 6, 1986 (after November 27, 2009, in the Commonwealth of the Northern Mariana Islands), within 180 calendar days of-

(i) Enrollment in the E-Verify program; or

(ii) Notification to E-Verify Operations of the Contractor's decision to exercise this option, using the contact information provided in the E-Verify program Memorandum of Understanding (MOU).

(5) The Contractor must comply, for the period of performance of this contract, with the requirements of the E-Verify program MOU.

(i) The Department of Homeland Security (DHS) or the Social Security Administration (SSA) may terminate the Contractor's MOU and deny access to the E-Verify system in accordance with the terms of the MOU. In such case, the Contractor will be referred to a suspending and debarring official.

(ii) During the period between termination of the MOU and a decision by the suspending and debarring official whether to suspend or debar, the Contractor is excused from its obligations under paragraph (b) of this clause. If the Contractor is not suspended, debarred, or subject to a voluntary exclusion, then the Contractor must reenroll in E-Verify.

(c) *Web site*. Information on registration for and use of the E-Verify program can be obtained via the Internet at the Department of Homeland Security Web site: https://www.e-Verify.gov.

(d) *Individuals previously verified*. The Contractor is not required by this clause to perform additional employment verification using E-Verify for any employee-

(1) Whose employment eligibility was previously verified by the Contractor through the E-Verify program;

(2) Who has been granted and holds an active U.S. Government security clearance for access to confidential, secret, or top secret information in accordance with the National Industrial Security Program Operating Manual; or

(3) Who has undergone a completed background investigation and been issued credentials pursuant to Homeland Security Presidential Directive (HSPD)-12, Policy for a Common Identification Standard for Federal Employees and Contractors.

(e) *Subcontracts*. The Contractor must include the requirements of this clause, including this paragraph (e) (appropriately modified for identification of the parties), in each subcontract that-

(1) Is for— (i) Services (except for commercial services that are part of the purchase of a COTS item (or an item that would be a COTS item, but for minor modifications), performed by the COTS provider, and are normally provided for that COTS item); or

(ii) Construction;

(2) Has a value of more than $3,500; and

(3) Includes work performed in the United States.

(End of clause)

52.222-55 Minimum Wages for Contractor Workers Under Executive Order 14026.

As prescribed in 22.1906, insert the following clause:

MINIMUM WAGES FOR CONTRACTOR WORKERS UNDER EXECUTIVE ORDER 14026 (DEVIATION DATE)

(a) *Definitions.* As used in this clause—

United States means the 50 states, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, Johnston Island, Wake Island, and the outer Continental Shelf as defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331, *et seq.*).

Worker—

(1) (i) Means any person engaged in performing work on, or in connection with, a contract covered by Executive Order 14026, and —

(A) Whose wages under such contract are governed by the Fair Labor Standards Act (29 U.S.C. chapter 8), the Service Contract Labor Standards statute (41 U.S.C. chapter 67), or the Wage Rate Requirements (Construction) statute (40 U.S.C. chapter 31, subchapter IV);

(B) Other than individuals employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541; and

(C) Regardless of the contractual relationship alleged to exist between the individual and the employer.

(ii) Includes workers performing on, or in connection with, the contract whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c).

(iii) Also includes any person working on, or in connection with, the contract and individually registered in a bona fide apprenticeship or training program registered with the Department of Labor's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship.

(2) (i) A worker performs *on* a contract if the worker directly performs the specific services called for by the contract; and

(ii) A worker performs *in connection with* a contract if the worker's work activities are necessary to the performance of a contract but are not the specific services called for by the contract.

(b) *Executive Order minimum wage rate.*

(1) The Contractor must pay to workers, while performing in the United States, and performing on, or in connection with, this contract, a minimum hourly wage rate of $15.00 per hour beginning January 30, 2022.

(2) The Contractor must adjust the minimum wage paid, if necessary, beginning January 1, 2023, and annually thereafter, to meet the applicable annual E.O. minimum wage. The Administrator of the Department of Labor's Wage and Hour Division (the Administrator) will publish annual determinations in the Federal Register no later than 90 days before the effective date of the new E.O. minimum wage rate. The Administrator will also publish the applicable E.O. minimum wage on *https://www.sam.gov* (or any successor Web site), and a general notice on all wage determinations issued under the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute, that will provide information on the E.O. minimum wage and how to obtain annual updates. The applicable published E.O. minimum wage is incorporated by reference into this contract.

(3) (i) The Contractor may request a price adjustment only after the effective date of the new annual E.O. minimum wage determination. Prices will be adjusted only for increased labor costs (including subcontractor labor costs) as a result of an increase in the annual E.O. minimum wage, and for associated labor costs (including those for subcontractors). Associated labor costs must include increases or decreases that result from changes in social security and unemployment taxes and workers' compensation insurance, but will not otherwise include any amount for general and administrative costs, overhead, or profit.

(ii) Subcontractors may be entitled to adjustments due to the new minimum wage, pursuant to paragraph (b)(2). Contractors must consider any subcontractor requests for such price adjustment.

(iii) The Contracting Officer must not adjust the contract price under this clause for any costs other than those identified in paragraph (b)(3)(i) of this clause, and must not provide duplicate price adjustments with any price adjustment under clauses implementing the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute.

(4) The Contractor warrants that the prices in this contract do not include allowance for any contingency to cover increased costs for which adjustment is provided under this clause.

(5) A pay period under this clause may not be longer than semi-monthly, but may be shorter to comply with any applicable law or other requirement under this contract establishing a shorter pay period. Workers must be paid no later than one pay period following the end of the regular pay period in which such wages were earned or accrued.

(6) The Contractor must pay, unconditionally to each worker, all wages due free and clear without subsequent rebate or kickback. The Contractor may make deductions that reduce a worker's wages below the E.O. minimum wage rate only if done in accordance with 29 CFR 23.230, Deductions.

(7) The Contractor must not discharge any part of its minimum wage obligation under this clause by furnishing fringe benefits or, with respect to workers whose wages are governed by the Service Contract Labor Standards statute, the cash equivalent thereof.

(8) Nothing in this clause shall excuse the Contractor from compliance with any applicable Federal or State prevailing wage law or any applicable law or municipal ordinance or any applicable contract establishing a minimum wage higher than the E.O. 14026 minimum wage. However, wage increases under such other laws or municipal ordinances are not subject to price adjustment under this subpart.

(9) The Contractor must pay the E.O. minimum wage rate whenever it is higher than any applicable collective bargaining agreement(s) wage rate.

(10) The Contractor must follow the policies and procedures in 29 CFR 23.240(b) and 23.280 for treatment of workers engaged in an occupation in which they customarily and regularly receive more than $30 a month in tips.

(c) (1) This clause applies to workers as defined in paragraph (a). As provided in that definition—

(i) Workers are covered regardless of the contractual relationship alleged to exist between the contractor or subcontractor and the worker;

(ii) Workers with disabilities whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c) are covered; and

(iii) Workers who are registered in a bona fide apprenticeship program or training program registered with the Department of Labor's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship, are covered.

(2) This clause does not apply to—

(i) Fair Labor Standards Act (FLSA)-covered individuals performing in connection with contracts covered by the E.O., *i.e.* those individuals who perform duties necessary to the performance of the contract, but who are not directly engaged in performing the specific work called for by the contract, and who spend less than 20 percent of their hours worked in a particular workweek performing in connection with such contracts;

(ii) Individuals exempted from the minimum wage requirements of the FLSA under 29 U.S.C. 213(a) and 214(a) and (b), unless otherwise covered by the Service Contract Labor Standards statute, or the Wage Rate Requirements (Construction) statute. These individuals include but are not limited to—

(A) Learners, apprentices, or messengers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(a);

(B) Students whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(b); and

(C) Those employed in a bona fide executive, administrative, or professional capacity (29 U.S.C. 213(a)(1) and 29 CFR part 541).

(d) *Notice.* The Contractor must notify all workers performing work on, or in connection with, this contract of the applicable E.O. minimum wage rate under this clause. With respect to workers covered by the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute, the Contractor may meet this requirement by posting, in a prominent and accessible place at the worksite, the applicable wage determination under those statutes. With respect to workers whose wages are governed by the FLSA, the Contractor must post notice, utilizing the poster provided by the Administrator, which can be obtained at *www.dol.gov/agencies/whd/government-contracts,* in a prominent and accessible place at the worksite. Contractors that customarily post notices to workers electronically may post the notice electronically provided the electronic posting is displayed prominently on any Web site that is maintained by the contractor, whether external or internal, and customarily used for notices to workers about terms and conditions of employment.

(e) *Payroll Records.*

(1) The Contractor must make and maintain records, for three years after completion of the work, containing the following information for each worker:

(i) Name, address, and social security number;

(ii) The worker's occupation(s) or classification(s);

(iii) The rate or rates of wages paid;

(iv) The number of daily and weekly hours worked by each worker;

(v) Any deductions made; and

(vi) Total wages paid.

(2) The Contractor must make records pursuant to paragraph (e)(1) of this clause available for inspection and transcription by authorized representatives of the Administrator. The Contractor must also make such records available upon request of the Contracting Officer.

(3) The Contractor must make a copy of the contract available, as applicable, for inspection or transcription by authorized representatives of the Administrator.

(4) Failure to comply with this paragraph (e) shall be a violation of 29 CFR 23.260 and this contract. Upon direction of the Administrator or upon the Contracting Officer's own action, payment must be withheld until such time as the noncompliance is corrected.

(5) Nothing in this clause limits or otherwise modifies the Contractor's payroll and recordkeeping obligations, if any, under the Service Contract Labor Standards statute, the Wage Rate Requirements (Construction) statute, the Fair Labor Standards Act, or any other applicable law.

(f) *Access.* The Contractor must permit authorized representatives of the Administrator to conduct investigations, including interviewing workers at the worksite during normal working hours.

(g) *Withholding.* The Contracting Officer, upon his or her own action or upon written request of the Administrator, must withhold funds or cause funds to be withheld, from the Contractor under this or any other Federal contract with the same Contractor, sufficient to pay workers the full amount of wages required by this clause.

(h) *Disputes.* Department of Labor has set forth in 29 CFR 23.510, Disputes concerning contractor compliance, the procedures for resolving disputes concerning a contractor's compliance with Department of Labor regulations at 29 CFR part 23. Such disputes must be resolved in accordance with those procedures and not the Disputes clause of this contract. These disputes include disputes between the Contractor (or any of its subcontractors) and the contracting agency, the Department of Labor, or the workers or their representatives.

(i) *Antiretaliation.* The Contractor must not discharge or in any other manner discriminate against any worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under or related to compliance with the E.O. or this clause, or has testified or is about to testify in any such proceeding.

(j) *Subcontractor compliance.* The Contractor is responsible for subcontractor compliance with the requirements of this clause and may be held liable for unpaid wages due subcontractor workers.

(k) *Subcontracts.* The Contractor must include the substance of this clause, including this paragraph (k) in all subcontracts, regardless of dollar value, that are subject to the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute, and are to be performed in whole or in part in the United States.

(End of clause)

52.222-56 Certification Regarding Trafficking in Persons Compliance Plan.

As prescribed in 22.1703-2(b), insert the following provision:

CERTIFICATION REGARDING TRAFFICKING IN PERSONS COMPLIANCE PLAN (DEVIATION DATE)

(a) The term "commercially available off-the-shelf (COTS) item," is defined in the clause of this solicitation entitled "Combating Trafficking in Persons" (FAR clause 52.222-50).

(b) The apparent successful Offeror must submit, prior to award, a certification, as specified in paragraph (c) of this provision, for the portion (if any) of the contract that-

(1) Is for supplies, other than commercially available off-the-shelf items, to be acquired outside the United States, or services to be performed outside the United States; and

(2) Has an estimated value that exceeds $700,000.

(c) The certification must state that-

(1) It has implemented a compliance plan to prevent any prohibited activities identified in paragraph (b) of the clause at 52.222-50, Combating Trafficking in Persons, and to monitor, detect, and terminate the contract with a subcontractor engaging in prohibited activities identified at paragraph (b) of the clause at 52.222-50, Combating Trafficking in Persons; and

(2) After having conducted due diligence, either-

(i) To the best of the Offeror's knowledge and belief, neither it nor any of its proposed agents, subcontractors, or their agents is engaged in any such activities; or

(ii) If abuses relating to any of the prohibited activities identified in 52.222-50(b) have been found, the Offeror or proposed subcontractor has taken the appropriate remedial and referral actions.

(End of provision)

52.222-57 [Reserved]

52.222-58 [Reserved]

52.222-59 [Reserved]

52.222-60 [Reserved]

52.222-61 [Reserved]

52.222-62 Paid Sick Leave Under Executive Order 13706.

As prescribed at 22.2102-5, insert the following clause:

PAID SICK LEAVE UNDER EXECUTIVE ORDER 13706 (DEVIATION DATE)

(a) *Definitions*. As used in this clause (in accordance with 29 CFR 13.2)-

Child, "domestic partner", and "domestic violence" have the meaning given in 29 CFR 13.2.

Employee –

(1) (i) Means any person engaged in performing work on or in connection with a contract covered by Executive Order (E.O.) 13706; and

(A) Whose wages under such contract are governed by the Service Contract Labor Standards statute (41 U.S.C. chapter 67), the Wage Rate Requirements (Construction) statute (40 U.S.C. chapter 31, subchapter IV), or the Fair Labor Standards Act (29 U.S.C. chapter 8);

(B) Including employees who qualify for an exemption from the Fair Labor Standards Act's minimum wage and overtime provisions;

(C) Regardless of the contractual relationship alleged to exist between the individual and the employer; and

(ii) Includes any person performing work on or in connection with the contract and individually registered in a bona fide apprenticeship or training program registered with the Department of Labor's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship.

(2) (i) An employee performs "on" a contract if the employee directly performs the specific services called for by the contract; and

(ii) An employee performs "in connection with" a contract if the employee's work activities are necessary to the performance of a contract but are not the specific services called for by the contract.

Individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship has the meaning given in 29 CFR 13.2.

Multiemployer plan means a plan to which more than one employer is required to contribute and which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer.

Paid sick leave means compensated absence from employment that is required by E.O. 13706 and 29 CFR Part 13.

Parent, "sexual assault", "spouse", and "stalking" have the meaning given in 29 CFR 13.2.

United States means the 50 States and the District of Columbia.

(b) *Executive Order 13706*. (1) This contract is subject to E.O. 13706 and the regulations issued by the Secretary of Labor in 29 CFR Part 13 pursuant to the E.O.

(2) If this contract is not performed wholly within the United States, this clause only applies with respect to that part of the contract that is performed within the United States.

(c) *Paid sick leave*. The Contractor must-

(1) Permit each employee engaged in performing work on or in connection with this contract to earn not less than 1 hour of paid sick leave for every 30 hours worked;

(2) Allow accrual and use of paid sick leave as required by E.O. 13706 and 29 CFR Part 13;

(3) Comply with the accrual, use, and other requirements set forth in 29 CFR 13.5 and 13.6, which are incorporated by reference in this contract;

(4) Provide paid sick leave to all employees when due free and clear and without subsequent deduction (except as otherwise provided by 29 CFR 13.24), rebate, or kickback on any account;

(5) Provide pay and benefits for paid sick leave used no later than one pay period following the end of the regular pay period in which the paid sick leave was taken; and

(6) Be responsible for the compliance by any subcontractor with the requirements of E.O. 13706, 29 CFR Part 13, and this clause.

(d) Contractors may fulfill their obligations under E.O. 13706 and 29 CFR Part 13 jointly with other contractors through a multiemployer plan, or may fulfill their obligations through an individual fund, plan, or program (see 29 CFR 13.8).

(e) *Withholding*. The Contracting Officer must, upon his or her own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the Contractor under this or any other Federal contract with the same Contractor, so much of the accrued payments or advances as may be considered necessary to pay employees the full amount owed to compensate for any violation of the requirements of E.O. 13706, 29 CFR Part 13, or this clause, including-

(1) Any pay and/or benefits denied or lost by reason of the violation;

(2) Other actual monetary losses sustained as a direct result of the violation; and

(3) Liquidated damages.

(f) *Payment suspension/contract termination/contractor debarment*. (1) In the event of a failure to comply with E.O. 13706, 29 CFR Part 13, or this clause, the contracting agency may, on its own action or after authorization or by direction of the Department of Labor and written notification to the Contractor take action to cause suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(2) Any failure to comply with the requirements of this clause may be grounds for termination for default or cause.

(3) A breach of the contract clause may be grounds for debarment as a contractor and subcontractor as provided in 29 CFR 13.52.

(g) The paid sick leave required by E.O. 13706, 29 CFR Part 13, and this clause is in addition to the Contractor's obligations under the Service Contract Labor Standards statute and Wage Rate Requirements (Construction) statute, and the Contractor may not receive credit toward its prevailing wage or fringe benefit obligations under those Acts for any paid sick leave provided in satisfaction of the requirements of E.O. 13706 and 29 CFR Part 13.

(h) Nothing in E.O. 13706 or 29 CFR Part 13 shall excuse noncompliance with or supersede any applicable Federal or State law, any applicable law or municipal ordinance, or a collective bargaining agreement requiring greater paid sick leave or leave rights than those established under E.O. 13706 and 29 CFR Part 13.

(i) *Recordkeeping*. (1) The Contractor must make and maintain, for no less than three (3) years from the completion of the work on the contract, records containing the following information for each employee, which the Contractor must make

available upon request for inspection, copying, and transcription by authorized representatives of the Administrator of the Wage and Hour Division of the Department of Labor:

(i) Name, address, and social security number of each employee.

(ii) The employee's occupation(s) or classification(s).

(iii) The rate or rates of wages paid (including all pay and benefits provided).

(iv) The number of daily and weekly hours worked.

(v) Any deductions made.

(vi) The total wages paid (including all pay and benefits provided) each pay period.

(vii) A copy of notifications to employees of the amount of paid sick leave the employee has accrued, as required under 29 CFR 13.5(a)(2).

(viii) A copy of employees' requests to use paid sick leave, if in writing, or, if not in writing, any other records reflecting such employee requests.

(ix) Dates and amounts of paid sick leave taken by employees (unless the Contractor's paid time off policy satisfies the requirements of E.O. 13706 and 29 CFR Part 13 as described in 29 CFR 13.5(f)(5), leave must be designated in records as paid sick leave pursuant to E.O. 13706).

(x) A copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests, as required under 29 CFR 13.5(d)(3).

(xi) Any records reflecting the certification and documentation the Contractor may require an employee to provide under 29 CFR 13.5(e), including copies of any certification or documentation provided by an employee.

(xii) Any other records showing any tracking of or calculations related to an employee's accrual or use of paid sick leave.

(xiii) The relevant contract.

(xiv) The regular pay and benefits provided to an employee for each use of paid sick leave.

(xv) Any financial payment made for unused paid sick leave upon a separation from employment intended, pursuant to 29 CFR 13.5(b)(5), to relieve the Contractor from the obligation to reinstate such paid sick leave as otherwise required by 29 CFR 13.5(b)(4).

(2) (i) If the Contractor wishes to distinguish between an employee’s covered and noncovered work, the Contractor must keep records or other proof reflecting such distinctions. Only if the Contractor adequately segregates the employee's time will time spent on noncovered work be excluded from hours worked counted toward the accrual of paid sick leave. Similarly, only if the Contractor adequately segregates the employee's time may the Contractor properly refuse an employee's request to use paid sick leave on the ground that the employee was scheduled to perform noncovered work during the time he or she asked to use paid sick leave.

(ii) If the Contractor estimates covered hours worked by an employee who performs work in connection with contracts covered by the E.O. pursuant to 29 CFR 13.5(a)(1)(i) or (iii), the Contractor must keep records or other proof of the verifiable information on which such estimates are reasonably based. Only if the Contractor relies on an estimate that is reasonable and based on verifiable information will an employee's time spent in connection with noncovered work be excluded from hours worked counted toward the accrual of paid sick leave. If the Contractor estimates the amount of time an employee spends performing in connection with contracts covered by the E.O., the Contractor must permit the employee to use his or her paid sick leave during any work time for the Contractor.

(3) In the event the Contractor is not obligated by the Service Contract Labor Standards statute, the Wage Rate Requirements (Construction) statute, or the Fair Labor Standards Act to keep records of an employee's hours worked, such as because the employee is exempt from the Fair Labor Standards Act's minimum wage and overtime requirements, and the Contractor chooses to use the assumption permitted by 29 CFR 13.5(a)(1)(iii), the Contractor is excused from the requirement in paragraph (i)(1)(iv) of this clause and 29 CFR 13.25(a)(4) to keep records of the employee's number of daily and weekly hours worked.

(4) (i) Records relating to medical histories or domestic violence, sexual assault, or stalking, created for purposes of E.O. 13706, whether of an employee or an employee's child, parent, spouse, domestic partner, or other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship, must be maintained as confidential records in separate files/records from the usual personnel files.

(ii) If the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA), section 503 of the Rehabilitation Act of 1973, and/or the Americans with Disabilities Act (ADA) apply to records or documents created to comply with the recordkeeping requirements in this contract clause, the records and documents must also be

maintained in compliance with the confidentiality requirements of the GINA, section 503 of the Rehabilitation Act of 1973, and/or ADA as described in 29 CFR 1635.9, 41 CFR 60-741.23(d), and 29 CFR 1630.14(c)(1), respectively.

(iii) The Contractor must not disclose any documentation used to verify the need to use 3 or more consecutive days of paid sick leave for the purposes listed in 29 CFR 13.5(c)(1)(iv) (as described in 29 CFR 13.5(e)(1)(ii)) and must maintain confidentiality about any domestic abuse, sexual assault, or stalking, unless the employee consents or when disclosure is required by law.

(5) The Contractor must permit authorized representatives of the Wage and Hour Division to conduct interviews with employees at the worksite during normal working hours.

(6) Nothing in this contract clause limits or otherwise modifies the Contractor's recordkeeping obligations, if any, under the Service Contract Labor Standards statute, the Wage Rate Requirements (Construction) statute, the Fair Labor Standards Act, the Family and Medical Leave Act, E.O. 14026, their respective implementing regulations, or any other applicable law.

(j) Interference/discrimination. (1) The Contractor must not in any manner interfere with an employee's accrual or use of paid sick leave as required by E.O. 13706 or 29 CFR Part 13. Interference includes, but is not limited to-

(i) Miscalculating the amount of paid sick leave an employee has accrued;

(ii) Denying or unreasonably delaying a response to a proper request to use paid sick leave;

(iii) Discouraging an employee from using paid sick leave;

(iv) Reducing an employee's accrued paid sick leave by more than the amount of such leave used;

(v) Transferring an employee to work on contracts not covered by the E.O. to prevent the accrual or use of paid sick leave;

(vi) Disclosing confidential information contained in certification or other documentation provided to verify the need to use paid sick leave; or

(vii) Making the use of paid sick leave contingent on the employee's finding a replacement worker or the fulfillment of the Contractor's operational needs.

(2) The Contractor must not discharge or in any other manner discriminate against any employee for–

(i) Using, or attempting to use, paid sick leave as provided for under E.O. 13706 and 29 CFR Part 13;

(ii) Filing any complaint, initiating any proceeding, or otherwise asserting any right or claim under E.O. 13706 and 29 CFR Part 13;

(iii) Cooperating in any investigation or testifying in any proceeding under E.O. 13706 and 29 CFR Part 13; or

(iv) Informing any other person about his or her rights under E.O. 13706 and 29 CFR Part 13.

(k) *Notice*. The Contractor must notify all employees performing work on or in connection with a contract covered by the E.O. of the paid sick leave requirements of E.O. 13706, 29 CFR Part 13, and this clause by posting a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it may be readily seen by employees. Contractors that customarily post notices to employees electronically may post the notice electronically, provided such electronic posting is displayed prominently on any Web site that is maintained by the Contractor, whether external or internal, and customarily used for notices to employees about terms and conditions of employment.

(l) *Disputes concerning labor standards*. Disputes related to the application of E.O. 13706 to this contract must not be subject to the general disputes clause of the contract. Such disputes must be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR Part 13. Disputes within the meaning of this contract clause include disputes between the Contractor (or any of its subcontractors) and the contracting agency, the Department of Labor, or the employees or their representatives.

(m) *Subcontracts*. The Contractor must insert the substance of this clause, including this paragraph (m), in all subcontracts, regardless of dollar value, that are subject to the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute, and are to be performed in whole or in part in the United States.

(End of clause)

52.222-90 Addressing DEI Discrimination by Federal Contractors.

As prescribed in 22.2203, insert the following clause:

ADDRESSING DEI DISCRIMINATION BY FEDERAL CONTRACTORS (DEVIATION DATE)

(a) *Definitions*. As used in this clause—

Program participation means membership or participation in, or access or admission to: training, mentoring, or leadership development programs; educational opportunities; clubs; associations; or similar opportunities that are sponsored or established by the contractor or subcontractor.

Racially discriminatory diversity, equity, and inclusion (DEI) activities means disparate treatment based on race or ethnicity in the recruitment, employment (e.g., hiring, promotions), contracting (*e.g.*, vendor agreements), program participation, or allocation or deployment of an entity's resources.

(b) In connection with the performance of work under this contract, the Contractor agrees as follows:

(1) The Contractor will not engage in any racially discriminatory DEI activities;

(2) The Contractor will furnish all information and reports, including providing access to books, records, and accounts, as required by the Contracting Officer, for purposes of ascertaining compliance with this clause;

(3) In the event of the Contractor's or a subcontractor's noncompliance with this clause, this contract may be canceled, terminated, or suspended in whole or in part, and the Contractor or subcontractor may be declared ineligible for further Government contracts;

(4) The Contractor will report any subcontractor's known or reasonably knowable conduct that may violate this clause to the Contracting Officer and take any appropriate remedial actions directed by the Contracting Officer; and

(5) The Contractor will inform the Contracting Officer if a subcontractor sues the Contractor and the suit puts at issue, in any way, the validity of this clause.

(6) The Contractor recognizes that compliance with the requirements of this clause are material to the Government's payment decisions for purposes of 31 U.S.C. 3729(b)(4).

(c) The Contractor must include the substance of this clause, including this paragraph (c), in subcontracts at any tier, including those for commercial products and commercial services, except those where the place of delivery or performance is outside the United States.

(End of clause)

52.223 [Reserved]

52.223-1 Biobased Product Certification.

As prescribed in 23.108(c)(1), insert the following provision:

BIOBASED PRODUCT CERTIFICATION (DEVIATION DATE)

As required by the Farm Security and Rural Investment Act of 2002 (7 U.S.C. 8101(4)) and the Energy Policy Act of 2005 (7 U.S.C. 8102(a)(2)(F)), the Offeror certifies, by signing this offer, that biobased products (within categories of products listed by the United States Department of Agriculture at https://www.biopreferred.gov/resources/categories.html to be used or delivered in the performance of the contract, other than biobased products that are not purchased by the Offeror as a direct result of this contract, will comply with the applicable specifications or other contractual requirements.

(End of provision)

52.223-2 Reporting of Biobased Products Under Service and Construction Contracts.

As prescribed in 23.108(c)(2), insert the following clause:

REPORTING OF BIOBASED PRODUCTS UNDER SERVICE AND CONSTRUCTION CONTRACTS (DEVIATION DATE)

(a) *Definitions.* As used in this clause—

Biobased product means a product determined by the U.S. Department of Agriculture (USDA) to be a commercial product or industrial product (other than food or feed) that is composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials, or that is an intermediate ingredient or feedstock. The term includes, with respect to forestry materials, forest products that meet biobased content requirements, notwithstanding the market share the product holds, the age of the product, or whether the market for the product is new or emerging. (7 U.S.C. 8101) (7 CFR 4270.2).

USDA-designated product category a generic grouping of biobased products that are listed by USDA in a procurement guideline (7 CFR part 4270) and for which USDA has provided minimum biobased content standards (see https://www.biopreferred.gov/resources/categories.html).

(b) *Requirement*. The Contractor shall—

(1) Report to https://www.sam.gov, with a copy to the Contracting Officer, on the product types and dollar value of any biobased products in USDA-designated product categories purchased by the Contractor during the previous Government fiscal year, between October 1 and September 30; and

(2) Submit this report no later than—

(i) October 31 of each year during contract performance; and

(ii) At the end of contract performance.

(End of clause)

52.223-3 Hazardous Material Identification and Safety Data.

As prescribed in 23.304(a)(1), insert the following clause:

HAZARDOUS MATERIAL IDENTIFICATION AND SAFETY DATA (DEVIATION DATE)

(a) *Hazardous material*, 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).

(b) The Offeror must list any hazardous material, as defined in paragraph (a) of this clause, to be delivered under this contract. The hazardous material shall be properly identified and include any applicable identification number, such as National Stock Number or Special Item Number. This information shall also be included on the Safety Data Sheet submitted under this contract.

Material (If none, insert *None*)	Identification No.

_____	_____
_____	_____
_____	_____

(c) This list must be updated during performance of the contract whenever the Contractor determines that any other material to be delivered under this contract is hazardous.

(d) The apparently successful offeror agrees to submit, for each item as required prior to award, a Safety Data Sheet, meeting the requirements of 29 CFR 1910.1200(g) and the latest version of Federal Standard No. 313, for all hazardous material identified in paragraph (b) of this clause. Data shall be submitted in accordance with Federal Standard No. 313, whether or not the apparently successful offeror is the actual manufacturer of these items. Failure to submit the Safety Data Sheet prior to award may result in the apparently successful offeror being considered nonresponsible and ineligible for award.

(e) If, after award, there is a change in the composition of the item(s) or a revision to Federal Standard No. 313, which renders incomplete or inaccurate the data submitted under paragraph (d) of this clause, the Contractor shall promptly notify the Contracting Officer and resubmit the data.

(f) Neither the requirements of this clause nor any act or failure to act by the Government shall relieve the Contractor of any responsibility or liability for the safety of Government, Contractor, or subcontractor personnel or property.

(g) Nothing contained in this clause shall relieve the Contractor from complying with applicable Federal, State, and local laws, codes, ordinances, and regulations (including the obtaining of licenses and permits) in connection with hazardous material.

(h) The Government's rights in data furnished under this contract with respect to hazardous material are as follows:

(1) To use, duplicate and disclose any data to which this clause is applicable. The purposes of this right are to—

(i) Apprise personnel of the hazards to which they may be exposed in using, handling, packaging, transporting, or disposing of hazardous materials;

(ii) Obtain medical treatment for those affected by the material; and

(iii) Have others use, duplicate, and disclose the data for the Government for these purposes.

(2) To use, duplicate, and disclose data furnished under this clause, in accordance with subparagraph (h)(1) of this clause, in precedence over any other clause of this contract providing for rights in data.

(3) The Government is not precluded from using similar or identical data acquired from other sources.

(End of clause)

Alternate I (DEVIATION DATE). As prescribed in 23.304(a)(2), add the following paragraph (i) to the basic clause:

(i) Except as provided in paragraph (i)(2) the Contractor shall prepare and submit a sufficient number of Safety Data Sheets (SDS's), meeting the requirements of 29 CFR 1910.1200(g) and the latest version of Federal Standard No. 313, for all hazardous materials identified in paragraph (b) of this clause.

(1) For items shipped to consignees, the Contractor shall include a copy of the SDS with the packing list or other suitable shipping document which accompanies each shipment. Alternatively, the Contractor is permitted to transmit SDS's to consignees in advance of receipt of shipments by consignees, if authorized in writing by the Contracting Officer.

(2) For items shipped to consignees identified by mailing address as agency depots, distribution centers or customer supply centers, the Contractor shall provide one copy of the SDS's in or on each shipping container. If affixed to the outside of each container, the SDS must be placed in a weather resistant envelope.

52.223-4 Recovered Material Certification.

As prescribed in 23.108(b)(1), insert the following provision:

RECOVERED MATERIAL CERTIFICATION (MAY 2008)

As required by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6962(c)(3)(A)(i)), the offeror certifies, by signing this offer, that the percentage of recovered materials content for EPA-designated items to be delivered or used in the

performance of the contract will be at least the amount required by the applicable contract specifications or other contractual requirements.

(End of provision)

52.223-5 Pollution Prevention and Right-to-Know Information.

As prescribed in 23.403, insert the following clause:

POLLUTION PREVENTION AND RIGHT-TO-KNOW INFORMATION (MAY 2024)

(a) *Definitions*. As used in this clause-

Toxic chemical means a chemical or chemical category listed in 40 CFR 372.65.

(b) Federal facilities are required to comply with the provisions of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) (42 U.S.C. 11001-11050), and the Pollution Prevention Act of 1990 (PPA) (42 U.S.C. 13101-13109).

(c) The Contractor shall provide all information needed by the Federal facility to comply with the following:

(1) The emergency planning reporting requirements of section 302 of EPCRA.

(2) The emergency notice requirements of section 304 of EPCRA.

(3) The list of Material Safety Data Sheets, required by section 311 of EPCRA.

(4) The emergency and hazardous chemical inventory forms of section 312 of EPCRA.

(5) The toxic chemical release inventory of Section 313 of EPCRA, which includes the reduction and recycling information required by section 6607 of PPA.

(End of clause)

52.223-6 [Reserved]

52.223-7 Notice of Radioactive Materials.

As prescribed in 23.304(b), insert the following clause:

NOTICE OF RADIOACTIVE MATERIALS (DEVIATION DATE)

(a) The Contractor shall notify the Contracting Officer or designee, in writing, _____*days prior to the delivery of, or prior to completion of any servicing required by this contract of, items containing either (1) radioactive material requiring specific licensing under the regulations issued pursuant to the Atomic Energy Act of 1954, as amended, as set forth in title 10 of the Code of Federal Regulations, in effect on the date of this contract, or (2) other radioactive material not requiring specific licensing in which the specific activity is greater than 0.002 microcuries per gram or the activity per item equals or exceeds 0.01 microcuries. Such notice shall specify the part or parts of the items which contain radioactive materials, a description of the materials, the name and activity of the isotope, the manufacturer of the materials, and any other information known to the Contractor which will put users of the items on notice as to the hazards involved.

(b) If there has been no change affecting the quantity of activity, or the characteristics and composition of the radioactive material from deliveries under this contract or prior contracts, the Contractor may request that the Contracting Officer or designee waive the notice requirement in paragraph (a) of this clause. Any such request shall—

(1) Be submitted in writing;

(2) State that the quantity of activity, characteristics, and composition of the radioactive material have not changed; and

(3) Cite the contract number on which the prior notification was submitted and the contracting office to which it was submitted.

(c) All items, parts, or subassemblies which contain radioactive materials in which the specific activity is greater than 0.002 microcuries per gram or activity per item equals or exceeds 0.01 microcuries, and all containers in which such items, parts or subassemblies are delivered to the Government shall be clearly marked and labeled as required by the latest revision of MIL-STD 129 in effect on the date of the contract.

(d) This clause, including this paragraph (d), shall be inserted in all subcontracts for radioactive materials meeting the criteria in paragraph (a) of this clause.

* The Contracting Officer shall insert the number of days required in advance of delivery of the item or completion of the servicing to assure that required licenses are obtained and appropriate personnel are notified to institute any necessary safety and health precautions.

(End of clause)

52.223-8 [Reserved]

52.223-9 Estimate of Percentage of Recovered Material Content for EPA-Designated Items.

As prescribed in 23.108(b)(2), insert the following clause:

ESTIMATE OF PERCENTAGE OF RECOVERED MATERIAL CONTENT FOR EPA-DESIGNATED ITEMS (MAY 2008)

(a) *Definitions*. As used in this clause-

*Postconsumer 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. Postconsumer material is a part of the broader category of "recovered material."

Recovered material 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.

(b) The Contractor, on completion of this contract, shall-

(1) Estimate the percentage of the total recovered material content for EPA-designated item(s) delivered and/or used in contract performance, including, if applicable, the percentage of post-consumer material content; and

(2) Submit this estimate to _____ *[Contracting Officer complete in accordance with agency procedures]*.

(End of clause)

Alternate I (MAY 2008). As prescribed in 23.108(b)(2), redesignate paragraph (b) of the basic clause as paragraph (c) and add the following paragraph (b) to the basic clause:

(b) The Contractor shall execute the following certification required by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6962(i)(2)(C)):

CERTIFICATION

I, _____ *(name of certifier)*, am an officer or employee responsible for the performance of this contract and hereby certify that the percentage of recovered material content for EPA-designated items met the applicable contract specifications or other contractual requirements.

_____ *[Signature of the Officer or Employee]*

_____ *[Typed Name of the Officer or Employee]*

_____ *[Title]*

_____ *[Name of Company, Firm, or Organization]*

_____ *[Date]*

(End of certification)

52.223-10 [Reserved]

(DEVIATION DATE)

52.223-11 Ozone-Depleting Substances.

As prescribed in 23.108(d)(1), insert the following clause:

OZONE-DEPLETING SUBSTANCES (DEVIATION DATE)

(a) *Definition*. As used in this clause–

Ozone-depleting substance means any substance the Environmental Protection Agency designates in 40 CFR part 82 as—

(1) Class I, including, but not limited to, chlorofluorocarbons, halons, carbon tetrachloride, and methyl chloroform; or

(2) Class II, including, but not limited to, hydrochlorofluorocarbons.

(b) Requirement. In accordance with 40 CFR 82.84(a)(5), the Contractor shall label products that contain or are manufactured with ozone-depleting substances in the manner and to the extent required by 42 U.S.C. 7671j(b), (c), (d), and (e) and 40 CFR part 82, subpart E, as follows:

Warning: Contains (or manufactured with, if applicable) *_____, a substance(s) which harm(s) public health and environment by destroying ozone in the upper atmosphere.

* The Contractor shall insert the name of the substance(s).

(End of clause)

52.223-12 Maintenance, Service, Repair, or Disposal of Refrigeration Equipment and Air Conditioners.

As prescribed in 23.108(d)(2), insert the following clause:

MAINTENANCE, SERVICE, REPAIR, OR DISPOSAL OF REFRIGERATION EQUIPMENT AND AIR CONDITIONERS (DEVIATION DATE)

In accordance with 40 CFR 82.84(a)(3), the Contractor shall comply with the applicable requirements of sections 608 and 609 of the Clean Air Act (42 U.S.C. 7671g and 7671h) as each or both apply to this contract.

(End of clause)

52.223-13 [Reserved]

52.223-14 [Reserved]

52.223-15 [Reserved]

52.223-16 [Reserved]

52.223-17 [Reserved]

52.223-18 [Reserved]

52.223-19 [Reserved]

(DEVIATION DATE)

52.223-20 [Reserved]

(DEVIATION DATE)

52.223-21 [Reserved]

(DEVIATION DATE)

52.223-22 [Reserved]

(DEVIATION DATE)

52.223-23 Sustainable Products.

As prescribed in 23.108(a), insert the following clause:

SUSTAINABLE PRODUCTS (DEVIATION DATE)

(a) *Definitions.* As used in this clause—

Sustainable product means—

(1) A product that contains recovered material designated by the EPA under the Comprehensive Procurement Guidelines (42 U.S.C. 6962) (40 CFR part 247) (https://www.epa.gov/smm/comprehensive-procurement-guideline-cpg-program#products).

(2) An energy-efficient product or low standby power device (42 U.S.C. 8259b) (10 CFR part 436, subpart C) (https://www.energy.gov/eere/femp/search-energy-efficient-products, https://www.energystar.gov/products?s=mega, and https://www.energy.gov/femp/low-standby-power-product-list).

(3) A biobased product that meets the content requirements of the USDA under the BioPreferred® program (7 U.S.C. 8102) (7 CFR Part 4270) (https://www.biopreferred.gov/).

(4) A substance identified in the EPA's Significant New Alternatives Policy (SNAP) program as a safe alternative to an ozone-depleting substance (42 U.S.C. 7671l) (40 CFR part 82, subpart G) (https://www.epa.gov/snap/unacceptable-and-acceptable-substitutes-tables).

(b) *Requirements*. The Government has identified in the statement of work or elsewhere in the contract the sustainable products that are required during the performance of this contract. The Contractor shall ensure that it provides sustainable products as required by this contract, when the products are—

(1) Delivered to the Government;

(2) Furnished for use by the Government;

(3) Incorporated into the construction of a public building or public work; or

(c) Furnished for use in performing services under this contract, where the cost of the products is a direct cost to this contract.

(End of clause)

52.224 [Reserved]

52.224-1 Privacy Act Notification.

As prescribed in 24.104, insert the following clause in solicitations and contracts:

PRIVACY ACT NOTIFICATION (APR 1984)

The Contractor will be required to design, develop, or operate a system of records on individuals, to accomplish an agency function subject to the Privacy Act of1974, Public Law93-579, December 31,1974 (5 U.S.C. 552a) and applicable agency regulations. Violation of the Act may involve the imposition of criminal penalties.

(End of clause)

52.224-2 Privacy Act.

As prescribed in 24.104, insert the following clause in solicitations and contracts:

PRIVACY ACT (APR 1984)

(a) The Contractor agrees to-

(1) Comply with the Privacy Act of1974 (the Act) and the agency rules and regulations issued under the Act in the design, development, or operation of any system of records on individuals to accomplish an agency function when the contract specifically identifies-

(i) The systems of records; and

(ii) The design, development, or operation work that the contractor is to perform;

(2) Include the Privacy Act notification contained in this contract in every solicitation and resulting subcontract and in every subcontract awarded without a solicitation, when the work statement in the proposed subcontract requires the design, development, or operation of a system of records on individuals that is subject to the Act; and

(3) Include this clause, including this paragraph (3), in all subcontracts awarded under this contract which requires the design, development, or operation of such a system of records.

(b) In the event of violations of the Act, a civil action may be brought against the agency involved when the violation concerns the design, development, or operation of a system of records on individuals to accomplish an agency function, and criminal penalties may be imposed upon the officers or employees of the agency when the violation concerns the operation of a system of records on individuals to accomplish an agency function. For purposes of the Act, when the contract is for the operation of a system of records on individuals to accomplish an agency function, the Contractor and any employee of the Contractor is considered to be an employee of the agency.

(c) (1) "Operation of a system of records," as used in this clause, means performance of any of the activities associated with maintaining the system of records, including the collection, use, and dissemination of records.

(2) "Record," as used in this clause, means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, education, financial transactions, medical history, and criminal or employment history and that contains the person's name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a fingerprint or voiceprint or a photograph.

(3) "System of records on individuals," as used in this clause, 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.

(End of clause)

52.224-3 Privacy Training.

As prescribed in 24.302(a), insert the following clause:

PRIVACY TRAINING (JAN 2017)

(a) *Definition*. As used in this clause, "personally identifiable information" means information that can be used to distinguish or trace an individual's identity, either alone or when combined with other information that is linked or linkable to a specific individual. (See Office of Management and Budget (OMB) Circular A-130, Managing Federal Information as a Strategic Resource).

(b) The Contractor shall ensure that initial privacy training, and annual privacy training thereafter, is completed by contractor employees who-

(1) Have access to a system of records;

(2) Create, collect, use, process, store, maintain, disseminate, disclose, dispose, or otherwise handle personally identifiable information on behalf of an agency; or

(3) Design, develop, maintain, or operate a system of records (see also FAR subpart 24.3 and 39.105).

(c) (1) "Privacy training shall address the key elements necessary for ensuring the safeguarding of personally identifiable information or a system of records. The training shall be role-based, provide foundational as well as more advanced levels of training, and have measures in place to test the knowledge level of users. At a minimum, the privacy training shall cover-

(i) The provisions of the Privacy Act of 1974 (5 U.S.C. 552a), including penalties for violations of the Act;

(ii) The appropriate handling and safeguarding of personally identifiable information;

(iii) The authorized and official use of a system of records or any other personally identifiable information;

(iv) The restriction on the use of unauthorized equipment to create, collect, use, process, store, maintain, disseminate, disclose, dispose or otherwise access personally identifiable information;

(v) The prohibition against the unauthorized use of a system of records or unauthorized disclosure, access, handling, or use of personally identifiable information; and

(vi) The procedures to be followed in the event of a suspected or confirmed breach of a system of records or the unauthorized disclosure, access, handling, or use of personally identifiable information (see OMB guidance for Preparing for and Responding to a Breach of Personally Identifiable Information).

(2) Completion of an agency-developed or agency-conducted training course shall be deemed to satisfy these elements.

(d) The Contractor shall maintain and, upon request, provide documentation of completion of privacy training to the Contracting Officer.

(e) The Contractor shall not allow any employee access to a system of records, or permit any employee to create, collect, use, process, store, maintain, disseminate, disclose, dispose or otherwise handle personally identifiable information, or to design, develop, maintain, or operate a system of records unless the employee has completed privacy training, as required by this clause.

(f) The substance of this clause, including this paragraph (f), shall be included in all subcontracts under this contract, when subcontractor employees will-

(1) Have access to a system of records;

(2) Create, collect, use, process, store, maintain, disseminate, disclose, dispose, or otherwise handle personally identifiable information; or

(3) Design, develop, maintain, or operate a system of records.

(End of clause)

Alternate I (JAN 2017). As prescribed in 24.302 (b), if the agency specifies that only its agency-provided training is acceptable, substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) The contracting agency will provide initial privacy training, and annual privacy training thereafter, to Contractor employees for the duration of this contract.

52.225 [Reserved]

52.225-1 Buy American-Supplies

As prescribed in 25.601(a)(1)(i), insert the following clause:

BUY AMERICAN-SUPPLIES (DEVIATION DATE)

(a) *Definitions*. As used in this clause—

Commercially available off-the-shelf (COTS) item—

(1) Means any item of supply (including construction material) that is–

(i) A commercial product (as defined in paragraph (1) of the definition of "commercial product" at Federal Acquisition Regulation (FAR) 2.101);

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

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

Component means an article, material, or supply incorporated directly into an end product.

Cost of components means—

(1) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(2) For components manufactured by the Contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

Critical component means a component that is mined, produced, or manufactured in the United States and deemed critical to the U.S. supply chain. The list of critical components is at FAR 25.105 .

Domestic end product means—

(1) For an end product that does not consist wholly or predominantly of iron or steel or a combination of both-

(i) An unmanufactured end product mined or produced in the United States;

(ii) An end product manufactured in the United States, if-

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 60 percent of the cost of all its components, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029. Components of foreign origin of the same class or kind as those that the agency determines are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities of a satisfactory quality are treated as domestic. Components of unknown origin are treated as foreign. Scrap generated, collected, and prepared for processing in the United States is considered domestic; or

(B) The end product is a COTS item; or

(2) For an end product that consists wholly or predominantly of iron or steel or a combination of both, an end product manufactured in the United States, if the cost of foreign iron and steel constitutes less than 5 percent of the cost of all the components used in the end product. The cost of foreign iron and steel includes but is not limited to the cost of foreign iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the end product and a good faith estimate of the cost of all foreign iron or steel components excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the end product contains multiple components, the cost of all the materials used in such end product is calculated in accordance with the definition of "cost of components".

End product means those articles, materials, and supplies to be acquired under the contract for public use.

Fastener means a hardware device that mechanically joins or affixes two or more objects together. Examples of fasteners are nuts, bolts, pins, rivets, nails, clips, and screws.

Foreign end product means an end product other than a domestic end product.

Foreign iron and steel means iron or steel products not produced in the United States. Produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, from the initial melting stage through the application of coatings, except metallurgical processes involving refinement of steel additives. The origin of the elements of the iron or steel is not relevant to the determination of whether it is domestic or foreign.

Predominantly of iron or steel or a combination of both means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

Steel means an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.

United States means the 50 States, the District of Columbia, and outlying areas.

(b) 41 U.S.C. chapter 83, Buy American, provides a preference for domestic end products for supplies acquired for use in the United States. In accordance with 41 U.S.C. 1907, the domestic content test of the Buy American statute is waived for an end product that is a COTS item, except that for an end product that consists wholly or predominantly of iron or steel or a combination of both, the domestic content test is applied only to the iron and steel content of the end product, excluding COTS fasteners.

(c) Offerors may obtain from the Contracting Officer a list of foreign articles that the Contracting Officer will treat as domestic for this contract.

(d) The Contractor shall deliver only domestic end products except to the extent that it specified delivery of foreign end products in the provision of the solicitation entitled "Buy American Certificate."

(End of clause)

Alternate I (OCT 2022). As prescribed in 25.601(a)(1)(ii) substitute the following sentence for the first sentence of paragraph (1)(ii)(A) of the definition of "domestic end product" in paragraph (a):

(A) The cost of its components mined, produced, or manufactured in the United States exceeds __ percent of the cost of all its components. [*Contracting officer to insert the percentage.*]

52.225-2 Buy American Certificate.

As prescribed in 25.601(a)(2), insert the following provision:

BUY AMERICAN CERTIFICATE (OCT 2022)

(a) (1) The Offeror certifies that each end product, except those listed in paragraph (b) of this provision, is a domestic end product and that each domestic end product listed in paragraph (c) of this provision contains a critical component.

(2) The Offeror shall list as foreign end products those end products manufactured in the United States that do not qualify as domestic end products. For those foreign end products that do not consist wholly or predominantly of iron or steel or a combination of both, the Offeror shall also indicate whether these foreign end products exceed 55 percent domestic content, except for those that are COTS items. If the percentage of the domestic content is unknown, select "no".

(3) The Offeror shall separately list the line item numbers of domestic end products that contain a critical component (see FAR 25.105).

(4) The terms "commercially available off-the-shelf (COTS) item," "critical component," "domestic end product," "end product," and "foreign end product" are defined in the clause of this solicitation entitled "Buy American-Supplies."

(b) Foreign End Products:

LINE ITEM NO.	COUNTRY OF ORIGIN	EXCEEDS 55% DOMESTIC CONTENT (YES/NO)
_____	_____	_____
_____	_____	_____
_____	_____	_____

(b) [*List as necessary*]

(c) Domestic end products containing a critical component:

Line Item No. ___

[*List as necessary*]

(d) The Government will evaluate offers in accordance with the policies and procedures of part 25 of the Federal Acquisition Regulation.

(End of provision)

52.225-3 Buy American-Free Trade Agreements-Israeli Trade Act.

As prescribed in 25.601(b)(1)(i), insert the following clause:

BUY AMERICAN-FREE TRADE AGREEMENTS-ISRAELI TRADE ACT (DEVIATION DATE)

(a) *Definitions*. As used in this clause—

Bahraini, Moroccan, Omani, Panamanian, or Peruvian end product means an article that—

(1) Is wholly the growth, product, or manufacture of Bahrain, Morocco, Oman, Panama, or Peru; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Bahrain, Morocco, Oman, Panama, or Peru into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

Commercially available off-the-shelf (COTS) item—

(1) Means any item of supply (including construction material) that is-

(i) A commercial product (as defined in paragraph (1) of the definition of "commercial product" at Federal Acquisition Regulation (FAR) 2.101);

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

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

Component means an article, material, or supply incorporated directly into an end product.

Cost of components means—

(1) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(2) For components manufactured by the Contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

Critical component means a component that is mined, produced, or manufactured in the United States and deemed critical to the U.S. supply chain. The list of critical components is at FAR 25.105.

Domestic end product means—

(1) For an end product that does not consist wholly or predominantly of iron or steel or a combination of both–

(i) An unmanufactured end product mined or produced in the United States;

(ii) An end product manufactured in the United States, if—

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 60 percent of the cost of all its components, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029. Components of foreign origin of the same class or kind as those that the agency determines are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities of a satisfactory quality are treated as domestic. Components of unknown origin are treated as foreign. Scrap generated, collected, and prepared for processing in the United States is considered domestic; or

(B) The end product is a COTS item; or

(2) For an end product that consists wholly or predominantly of iron or steel or a combination of both, an end product manufactured in the United States, if the cost of foreign iron and steel constitutes less than 5 percent of the cost of all the components used in the end product. The cost of foreign iron and steel includes but is not limited to the cost of foreign iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the

end product and a good faith estimate of the cost of all foreign iron or steel components excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the end product contains multiple components, the cost of all the materials used in such end product is calculated in accordance with the definition of "cost of components".

End product means those articles, materials, and supplies to be acquired under the contract for public use.

Fastener means a hardware device that mechanically joins or affixes two or more objects together. Examples of fasteners are nuts, bolts, pins, rivets, nails, clips, and screws.

Foreign end product means an end product other than a domestic end product.

Foreign iron and steel means iron or steel products not produced in the United States. Produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, from the initial melting stage through the application of coatings, except metallurgical processes involving refinement of steel additives. The origin of the elements of the iron or steel is not relevant to the determination of whether it is domestic or foreign.

Free Trade Agreement country means Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Oman, Panama, Peru, or Singapore.

Free Trade Agreement country end product means an article that-

(1) Is wholly the growth, product, or manufacture of a Free Trade Agreement country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a Free Trade Agreement country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

Israeli end product means an article that—

(1) Is wholly the growth, product, or manufacture of Israel; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Israel into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

Predominantly of iron or steel or a combination of both means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

Steel means an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.

United States means the 50 States, the District of Columbia, and outlying areas.

(b) *Components of foreign origin*. Offerors may obtain from the Contracting Officer a list of foreign articles that the Contracting Officer will treat as domestic for this contract.

(c) *Delivery of end products*. 41 U.S.C. chapter 83, Buy American statute, provides a preference for domestic end products for supplies acquired for use in the United States. In accordance with 41 U.S.C. 1907, the domestic content test of the Buy American statute is waived for an end product that is a COTS item, except that for an end product that consists wholly or predominantly of iron or steel or a combination of both, the domestic content test is applied only to the iron and steel content of the end product, excluding COTS fasteners. In addition, the Contracting Officer has determined that FTAs (except the Bahrain, Morocco, Oman, Panama, and Peru FTAs) and the Israeli Trade Act apply to this acquisition. Unless otherwise specified, these trade agreements apply to all items in the Schedule. The Contractor shall deliver under this contract only domestic end products except to the extent that, in its offer, it specified delivery of foreign end products in the provision entitled “Buy American—Free Trade Agreements—Israeli Trade Act Certificate.” If the Contractor specified in its offer that the Contractor would supply a Free Trade Agreement country end product (other than a Bahraini, Moroccan, Omani, Panamanian, or Peruvian end product) or an Israeli end product, then the Contractor shall supply a Free Trade Agreement country end product (other than a Bahraini, Moroccan, Omani, Panamanian, or Peruvian end product), an Israeli end product or, at the Contractor's option, a domestic end product.

(End of clause)

Alternate I [Reserved]

Alternate II (DEVIATION DATE). As prescribed in 25.601 (b)(1)(ii), substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) *Delivery of end products*. 41 U.S.C. chapter 83 provides a preference for domestic end products for supplies acquired for use in the United States. In accordance with 41 U.S.C. 1907, the domestic content test of the Buy American statute is waived for an end product that is a COTS item (see 12.505(a)(1)), except that for an end product that consists wholly or predominantly of iron or steel or a combination of both, the domestic content test is applied only to the iron and steel content of the end product, excluding COTS fasteners. In addition, the Contracting Officer has determined that the Israeli Trade Act applies to this acquisition. Unless otherwise specified, this trade agreement applies to all items in the Schedule. The Contractor shall deliver under this contract only domestic end products except to the extent that, in its offer, it specified delivery of foreign end products in the provision entitled "Buy American—Free Trade Agreements—Israeli Trade Act Certificate." If the Contractor specified in its offer that the Contractor would supply an Israeli end product, then the Contractor shall supply an Israeli end product or, at the Contractor's option, a domestic end product.

Alternate III (DEVIATION DATE). As prescribed in 25.601 (b)(1)(iii), delete the definition of "Bahraini, Moroccan, Omani, Panamanian, or Peruvian end product" and add in its place the following definition of "Korean end product" in paragraph (a) of the basic clause; and substitute the following paragraph (c) for paragraph (c) of the basic clause:

Korean end product means an article that—

(1) Is wholly the growth, product, or manufacture of Korea (Republic of); or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Korea (Republic of) into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

(c) *Delivery of end products*. 41 U.S.C. chapter 83 provides a preference for domestic end products for supplies acquired for use in the United States. In accordance with 41 U.S.C.1907, the domestic content test of the Buy American statute is waived for an end product that is a COTS item, except that for an end product that consists wholly or predominantly of iron or steel or a combination of both, the domestic content test is applied only to the iron and steel content of the end product, excluding COTS fasteners. In addition, the Contracting Officer has determined that the Korea (Republic of) FTA and the Israeli Trade Act apply to this acquisition. Unless otherwise specified, these trade agreements apply to all items in the Schedule. The Contractor shall deliver under this contract only domestic end products except to the extent that, in its offer, it specified delivery of foreign end products in the provision entitled "Buy American—Free Trade Agreements—Israeli Trade Act Certificate." If the Contractor specified in its offer that the Contractor would supply a Korean end product or an Israeli end product, then the Contractor shall supply a Korean end product, an Israeli end product, or at the Contractor's option, a domestic end product.

Alternate IV (Oct 2022). As prescribed in 25.601(b)(1)(iv) substitute the following sentence for the first sentence of paragraph (1)(ii)(A) of the definition of *domestic end product* in paragraph (a):

(A) The cost of its components mined, produced, or manufactured in the United States exceeds __ percent of the cost of all its components. [*Contracting officer to insert the percentage.*]

52.225-4 Buy American-Free Trade Agreements-Israeli Trade Act Certificate.

As prescribed in 25.601(b)(2)(i), insert the following provision:

BUY AMERICAN-FREE TRADE AGREEMENTS-ISRAELI TRADE ACT CERTIFICATE (DEVIATION DATE)

(a) (1) The Offeror certifies that each end product, except those listed in paragraph (b) or (c)(1) of this provision, is a domestic end product and that each domestic end product listed in paragraph (c)(2) of this provision contains a critical component.

(2) The terms "Bahraini, Moroccan, Omani, Panamanian, or Peruvian end product," "commercially available off-the-shelf (COTS) item," "critical component," "domestic end product," "end product," "foreign end product," "Free Trade Agreement country," "Free Trade Agreement country end product," "Israeli end product," and "United States" are defined in the clause of this solicitation entitled "Buy American-Free Trade Agreements-Israeli Trade Act."

(b) The Offeror certifies that the following supplies are Free Trade Agreement country end products (other than Bahraini, Moroccan, Omani, Panamanian, or Peruvian end products) or Israeli end products as defined in the clause of this solicitation entitled "Buy American-Free Trade Agreements-Israeli Trade Act":

FREE TRADE AGREEMENT COUNTRY END PRODUCTS (OTHER THAN BAHRAINI, MOROCCAN, OMANI, PANAMANIAN, OR PERUVIAN END PRODUCTS) OR ISRAELI END PRODUCTS:

LINE ITEM NO.	COUNTRY OF ORIGIN
_____	_____
_____	_____
_____	_____

[*List as necessary*]

(c) (1) The Offeror shall list those supplies that are foreign end products (other than those listed in paragraph (b) of this provision) as defined in the clause of this solicitation entitled "Buy American-Free Trade Agreements-Israeli Trade Act."

OTHER FOREIGN END PRODUCTS:

LINE ITEM NO.	COUNTRY OF ORIGIN
_____	_____
_____	_____
_____	_____

[*List as necessary*]

(2) The Offeror shall list the line item numbers of domestic end products that contain a critical component (see FAR 25.105).

Line Item No. ___

[*List as necessary*]

(d) The Government will evaluate offers in accordance with the policies and procedures of part 25 of the Federal Acquisition Regulation.

(End of provision)

Alternate I [Reserved]

Alternate II (JAN 2025). As prescribed in 25.601(b)(2)(ii), substitute the following paragraph (b) for paragraph (b) of the basic provision:

(b) The offeror certifies that the following supplies are Israeli end products as defined in the clause of this solicitation entitled “Buy American—Free Trade Agreements—Israeli Trade Act”.

ISRAELI END PRODUCTS:

LINE ITEM NO.
_____
_____
_____

[*List as necessary*]

Alternate III (JAN 2025). As prescribed in 25.601(b)(2)(iii), substitute the following paragraph (b) for paragraph (b) of the basic provision:

(b) The Offeror certifies that the following supplies are Korean end products or Israeli end products as defined in the clause of this solicitation entitled “Buy American—Free Trade Agreements—Israeli Trade Act”.

Korean End Products or Israeli End Products:

LINE ITEM NO.	COUNTRY OF ORIGIN

_____	_____
_____	_____
_____	_____

[List as necessary]

52.225-5 Trade Agreements.

As prescribed in 25.601(c)(1), insert the following clause:

TRADE AGREEMENTS (NOV 2023)

(a) *Definitions*. As used in this clause-

Caribbean Basin country end product—

(1) Means an article that-

(i) (A) Is wholly the growth, product, or manufacture of a Caribbean Basin country; or

(B) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed; and

(ii) Is not excluded from duty-free treatment for Caribbean countries under 19 U.S.C.2703(b).

(A) For this reason, the following articles are not Caribbean Basin country end products:

(1) Tuna, prepared or preserved in any manner in airtight containers;

(2) Petroleum, or any product derived from petroleum;

(3) Watches and watch parts (including cases, bracelets, and straps) of whatever type including, but not limited to, mechanical, quartz digital, or quartz analog, if such watches or watch parts contain any material that is the product of any country to which the Harmonized Tariff Schedule of the United States (HTSUS) column 2 rates of duty apply (*i.e.,* Afghanistan, Cuba, Laos, North Korea, and Vietnam); and

(4) Certain of the following: textiles and apparel articles; footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel; or handloomed, handmade, and folklore articles;

(B) Access to the HTSUS to determine duty-free status of articles of these types is available at https://usitc.gov/tata/hts/index.htm. In particular, see the following:

(1) General Note 3(c), Products Eligible for Special Tariff treatment.

(2) General Note 17, Products of Countries Designated as Beneficiary Countries under the United States-Caribbean Basin Trade Partnership Act of 2000.

(3) Section XXII, Chapter 98, Subchapter II, Articles Exported and Returned, Advanced or Improved Abroad, U.S. Note 7(b).

(4) Section XXII, Chapter 98, Subchapter XX, Goods Eligible for Special Tariff Benefits under the United States-Caribbean Basin Trade Partnership Act; and

(2) Refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the acquisition, includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

Designated country means any of the following countries:

(1) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Armenia, Aruba, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, New Zealand, North Macedonia, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan (known in the World Trade Organization as "the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei)", Ukraine, or United Kingdom);

(2) A Free Trade Agreement (FTA) country (Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Oman, Panama, Peru, or Singapore);

(3) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea,

Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Tanzania, Timor-Leste, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(4) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, or Trinidad and Tobago).

Designated country end product means a WTO GPA country end product, an FTA country end product, a least developed country end product, or a Caribbean Basin country end product.

End product means those articles, materials, and supplies to be acquired under the contract for public use.

Free Trade Agreement country end product means an article that-

(1) Is wholly the growth, product, or manufacture of a Free Trade Agreement (FTA) country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in an FTA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

Least developed country end product means an article that-

(1) Is wholly the growth, product, or manufacture of a least developed country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a least developed country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product, includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

United States means the 50 States, the District of Columbia, and outlying areas.

U.S.-made end product means an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

WTO GPA country end product means an article that-

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services, (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

(b) *Delivery of end products*. The Contracting Officer has determined that the WTO GPA and FTAs apply to this acquisition. Unless otherwise specified, these trade agreements apply to all items in the Schedule. The Contractor shall deliver under this contract only U.S.-made or designated country end products except to the extent that, in its offer, it specified delivery of other end products in the provision entitled "Trade Agreements Certificate."

(End of clause)

52.225-6 Trade Agreements Certificate.

As prescribed in 25.601(c)(2), insert the following provision:

TRADE AGREEMENTS CERTIFICATE (FEB 2021)

(a) The offeror certifies that each end product, except those listed in paragraph (b) of this provision, is a U.S.-made or designated country end product, as defined in the clause of this solicitation entitled "Trade Agreements."

(b) The offeror shall list as other end products those supplies that are not U.S.-made or designated country end products.

Other End Products:

LINE ITEM NO.	COUNTRY OF ORIGIN
_____	_____

_____	_____
_____	_____

[*List as necessary*]

(c) The Government will evaluate offers in accordance with the policies and procedures of part 25 of the Federal Acquisition Regulation. For line items covered by the WTO GPA, the Government will evaluate offers of U.S.-made or designated country end products without regard to the restrictions of the Buy American statute. The Government will consider for award only offers of U.S.-made or designated country end products unless the Contracting Officer determines that there are no offers for such products or that the offers for those products are insufficient to fulfill the requirements of this solicitation.

(End of provision)

52.225-7 Waiver of Buy American Statute for Civil Aircraft and Related Articles.

As prescribed in 25.601(d), insert the following provision:

WAIVER OF BUY AMERICAN STATUTE FOR CIVIL AIRCRAFT AND RELATED ARTICLES (FEB 2016)

(a) *Definition*. "Civil aircraft and related articles," as used in this provision, means-

(1) All aircraft other than aircraft to be purchased for use by the Department of Defense or the U.S. Coast Guard;

(2) The engines (and parts and components for incorporation into the engines) of these aircraft;

(3) Any other parts, components, and subassemblies for incorporation into the aircraft; and

(4) Any ground flight simulators, and parts and components of these simulators, for use with respect to the aircraft, whether to be used as original or replacement equipment in the manufacture, repair, maintenance, rebuilding, modification, or conversion of the aircraft, and without regard to whether the aircraft or articles receive duty-free treatment under section 601(a)(2) of the Trade Agreements Act.

(b) The U.S. Trade Representative has waived the Buy American statute for acquisitions of civil aircraft and related articles from countries that are parties to the Agreement on Trade in Civil Aircraft. Those countries are Albania, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Macao China, Malta, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Taiwan (Chinese Taipei), and the United Kingdom.

(c) For the purpose of this waiver, an article is a product of a country only if-

(1) It is wholly the growth, product, or manufacture of that country; or

(2) In the case of an article that consists in whole or in part of materials from another country, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

(d) The waiver is subject to modification or withdrawal by the U.S. Trade Representative.

(End of provision)

52.225-8 Duty-Free Entry.

As prescribed in 25.904(e), insert the following clause:

DUTY-FREE ENTRY (OCT 2010)

(a) *Definition*. "Customs territory of the United States" means the States, the District of Columbia, and Puerto Rico.

(b) Except as otherwise approved by the Contracting Officer, the Contractor shall not include in the contract price any amount for duties on supplies specifically identified in the Schedule to be accorded duty-free entry.

(c) Except as provided in paragraph (d) of this clause or elsewhere in this contract, the following procedures apply to supplies not identified in the Schedule to be accorded duty-free entry:

(1) The Contractor shall notify the Contracting Officer in writing of any purchase of foreign supplies (including, without limitation, raw materials, components, and intermediate assemblies) in excess of $20,000 that are to be imported into the customs territory of the United States for delivery to the Government under this contract, either as end products or for incorporation into end products. The Contractor shall furnish the notice to the Contracting Officer at least 20 calendar days before the importation. The notice shall identify the-

(i) Foreign supplies;

(ii) Estimated amount of duty; and

(iii) Country of origin.

(2) The Contracting Officer will determine whether any of these supplies should be accorded duty-free entry and will notify the Contractor within 10 calendar days after receipt of the Contractor's notification.

(3) Except as otherwise approved by the Contracting Officer, the contract price shall be reduced by (or the allowable cost shall not include) the amount of duty that would be payable if the supplies were not entered duty-free.

(d) The Contractor is not required to provide the notification under paragraph (c) of this clause for purchases of foreign supplies if-

(1) The supplies are identical in nature to items purchased by the Contractor or any subcontractor in connection with its commercial business; and

(2) Segregation of these supplies to ensure use only on Government contracts containing duty-free entry provisions is not economical or feasible.

(e) The Contractor shall claim duty-free entry only for supplies to be delivered to the Government under this contract, either as end products or incorporated into end products, and shall pay duty on supplies, or any portion of them, other than scrap, salvage, or competitive sale authorized by the Contracting Officer, diverted to nongovernmental use.

(f) The Government will execute any required duty-free entry certificates for supplies to be accorded duty-free entry and will assist the Contractor in obtaining duty-free entry for these supplies.

(g) Shipping documents for supplies to be accorded duty-free entry shall consign the shipments to the contracting agency in care of the Contractor and shall include the-

(1) Delivery address of the Contractor (or contracting agency, if appropriate);

(2) Government prime contract number;

(3) Identification of carrier;

(4) Notation "UNITED STATES GOVERNMENT, _____ *[agency]* _____, Duty-free entry to be claimed pursuant to Item No(s) _____ *[from Tariff Schedules]* _____, Harmonized Tariff Schedules of the United States. Upon arrival of shipment at port of entry, District Director of Customs, please release shipment under 19 CFR part 142 and notify *[cognizant contract administration office]* for execution of Customs Forms 7501 and 7501-A and any required duty-free entry certificates.";

(5) Gross weight in pounds (if freight is based on space tonnage, state cubic feet in addition to gross shipping weight); and

(6) Estimated value in United States dollars.

(h) The Contractor shall instruct the foreign supplier to-

(1) Consign the shipment as specified in paragraph (g) of this clause;

(2) Mark all packages with the words "UNITED STATES GOVERNMENT" and the title of the contracting agency; and

(3) Include with the shipment at least two copies of the bill of lading (or other shipping document) for use by the District Director of Customs at the port of entry.

(i) The Contractor shall provide written notice to the cognizant contract administration office immediately after notification by the Contracting Officer that duty-free entry will be accorded foreign supplies or, for duty-free supplies identified in the Schedule, upon award by the Contractor to the overseas supplier. The notice shall identify the-

(1) Foreign supplies;

(2) Country of origin;

(3) Contract number; and

(4) Scheduled delivery date(s).

(j) The Contractor shall include the substance of this clause in any subcontract if-

(1) Supplies identified in the Schedule to be accorded duty-free entry will be imported into the customs territory of the United States; or

(2) Other foreign supplies in excess of $20,000 may be imported into the customs territory of the United States.

(End of clause)

52.225-9 Buy American-Construction Materials.

As prescribed in 25.602(a), insert the following clause:

BUY AMERICAN-CONSTRUCTION MATERIALS (DEVIATION DATE)

(a) *Definitions*. As used in this clause—

Commercially available off-the-shelf (COTS) item—

(1) Means any item of supply (including construction material) that is–

(i) A commercial product (as defined in paragraph (1) of the definition of "commercial product" at Federal Acquisition Regulation (FAR) 2.101);

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

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

"Construction material" means an article, material, or supply brought to the construction site by the Contractor or a subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

Cost of components means—

(1) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the construction material (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(2) For components manufactured by the Contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the construction material.

Critical component means a component that is mined, produced, or manufactured in the United States and deemed critical to the U.S. supply chain. The list of critical components is at FAR 25.105.

Critical item means a domestic construction material or domestic end product that is deemed critical to U.S. supply chain resiliency. The list of critical items is at FAR 25.105.

Domestic construction material means—

(1) For construction material that does not consist wholly or predominantly of iron or steel or a combination of both-

(i) An unmanufactured construction material mined or produced in the United States; or

(ii) A construction material manufactured in the United States, if–

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 60 percent of the cost of all its components, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic. Components of unknown origin are treated as foreign; or

(B) The construction material is a COTS item; or

(2) For construction material that consists wholly or predominantly of iron or steel or a combination of both, a construction material manufactured in the United States if the cost of foreign iron and steel constitutes less than 5 percent of the cost of all components used in such construction material. The cost of foreign iron and steel includes but is not limited to the cost of foreign iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the construction material and a good faith estimate of the cost of all foreign iron or steel components excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the construction material contains multiple components, the cost of all the materials used in such construction material is calculated in accordance with the definition of "cost of components".

Fastener means a hardware device that mechanically joins or affixes two or more objects together. Examples of fasteners are nuts, bolts, pins, rivets, nails, clips, and screws.

Foreign construction material means a construction material other than a domestic construction material.

Foreign iron and steel means iron or steel products not produced in the United States. Produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, from the initial melting stage through the application of coatings, except metallurgical processes involving refinement of steel additives. The origin of the elements of the iron or steel is not relevant to the determination of whether it is domestic or foreign.

Predominantly of iron or steel or a combination of both means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

Steel means an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.

"United States" means the 50 States, the District of Columbia, and outlying areas.

(b) Domestic preference. (1) This clause implements 41 U.S.C. chapter 83, Buy American, by providing a preference for domestic construction material. In accordance with 41 U.S.C. 1907, the domestic content test of the Buy American statute is waived for construction material that is a COTS item, except that for construction material that consists wholly or predominantly of iron or steel or a combination of both, the domestic content test is applied only to the iron and steel content of the construction materials, excluding COTS fasteners. The Contractor shall use only domestic construction material in performing this contract, except as provided in paragraphs (b)(2) and (b)(3) of this clause.

(2) This requirement does not apply to information technology that is a commercial product or to the construction materials or components listed by the Government as follows:

_____*[Contracting Officer to list applicable excepted materials or indicate "non"e]*

(3) The Contracting Officer may add other foreign construction material to the list in paragraph (b)(2) of this clause if the Government determines that-

(i) The cost of domestic construction material would be unreasonable.

(A) *For domestic construction material that is not a critical item or does not contain critical components*.

(1) The cost of a particular domestic construction material subject to the requirements of the Buy American statute is unreasonable when the cost of such material exceeds the cost of foreign material by more than 20 percent;

(2) For construction material that is not a COTS item and does not consist wholly or predominantly of iron or steel or a combination of both, if the cost of a particular domestic construction material is determined to be unreasonable or there is no domestic offer received, and the low offer is for foreign construction material that is manufactured in the United States and does not exceed 55 percent domestic content, the Contracting Officer will treat the lowest offer of foreign construction material that exceeds 55 percent domestic content as a domestic offer and determine whether the cost of that offer is unreasonable by applying the evaluation factor listed in paragraph (b)(3)(i)(A)*(1)* of this clause.

(3) The procedures in paragraph (b)(3)(i)(A)*(2)* of this clause will no longer apply as of January 1, 2030.

(B) *For domestic construction material that is a critical item or contains critical components*. *(1)* The cost of a particular domestic construction material that is a critical item or contains critical components, subject to the requirements of the Buy American statute, is unreasonable when the cost of such material exceeds the cost of foreign material by more than 20 percent plus the additional preference factor identified for the critical item or construction material containing critical components listed at FAR 25.105.

(2) For construction material that does not consist wholly or predominantly of iron or steel or a combination of both, if the cost of a particular domestic construction material is determined to be unreasonable or there is no domestic offer received, and the low offer is for foreign construction material that does not exceed 55 percent domestic content, the Contracting Officer will treat the lowest foreign offer of construction material that is manufactured in the United States and exceeds 55 percent domestic content as a domestic offer, and determine whether the cost of that offer is unreasonable by applying the evaluation factor listed in paragraph (b)(3)(i)(B)*(1)* of this clause.

(3) The procedures in paragraph (b)(3)(i)(B)*(2)* of this clause will no longer apply as of January 1, 2030.

(ii) The application of the restriction of the Buy American statute to a particular construction material would be impracticable or inconsistent with the public interest; or

(iii) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.

(c) Request for determination of inapplicability of the Buy American statute. (1) (i) Any Contractor request to use foreign construction material in accordance with paragraph (b)(3) of this clause shall include adequate information for Government evaluation of the request, including-

(A) A description of the foreign and domestic construction materials;
(B) Unit of measure;
(C) Quantity;
(D) Price;
(E) Time of delivery or availability;
(F) Location of the construction project;
(G) Name and address of the proposed supplier; and
(H) A detailed justification of the reason for use of foreign construction materials cited in accordance with paragraph (b)(3) of this clause.

(ii) A request based on unreasonable cost shall include a reasonable survey of the market and a completed price comparison table in the format in paragraph (d) of this clause.

(iii) The price of construction material shall include all delivery costs to the construction site and any applicable duty (whether or not a duty-free certificate may be issued).

(iv) Any Contractor request for a determination submitted after contract award shall explain why the Contractor could not reasonably foresee the need for such determination and could not have requested the determination before contract award. If the Contractor does not submit a satisfactory explanation, the Contracting Officer need not make a determination.

(2) If the Government determines after contract award that an exception to the Buy American statute applies and the Contracting Officer and the Contractor negotiate adequate consideration, the Contracting Officer will modify the contract to allow use of the foreign construction material. However, when the basis for the exception is the unreasonable price of a domestic construction material, adequate consideration is not less than the differential established in paragraph (b)(3)(i) of this clause.

(3) Unless the Government determines that an exception to the Buy American statute applies, use of foreign construction material is noncompliant with the Buy American statute or Balance of Payments Program.

(d) *Data*. To permit evaluation of requests under paragraph (c) of this clause based on unreasonable cost, the Contractor shall include the following information and any applicable supporting data based on the survey of suppliers:

Foreign and Domestic Construction Materials Price Comparison

Construction material description	Unit of measure	Quantity	Price (dollars)*
Item 1:			
Foreign construction material.	_____	_____	_____
Domestic construction material.	_____	_____	_____
Item 2:			
Foreign construction material.	_____	_____	_____
Domestic construction material.	_____	_____	_____

[* *Include all delivery costs to the construction site and any applicable duty (whether or not a duty-free entry certificate is issued)*].
[*List name, address, telephone number, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary.*]
[*Include other applicable supporting information.*]

(End of clause)

Alternate I (OCT 2022). As prescribed in 25.602(a)(3) substitute the following sentence for the first sentence in paragraph (1)(ii)(A) of the definition of "domestic construction material" in paragraph (a):

(A) The cost of its components mined, produced, or manufactured in the United States exceeds __ percent of the cost of all its components. [*Contracting officer to insert the percentage.*]

52.225-10 Notice of Buy American Requirement-Construction Materials.

As prescribed in 25.602(b)(1), insert the following provision:

NOTICE OF BUY AMERICAN REQUIREMENT-CONSTRUCTION MATERIALS (MAY 2014)

(a) *Definitions*. "Commercially available off-the-shelf (COTS) item," "construction material," "domestic construction material," and "foreign construction material," as used in this provision, are defined in the clause of this solicitation entitled "Buy American-Construction Materials" (Federal Acquisition Regulation (FAR) clause 52.225-9).

(b) *Requests for determinations of inapplicability*. An offeror requesting a determination regarding the inapplicability of the Buy American statute should submit the request to the Contracting Officer in time to allow a determination before submission of offers. The offeror shall include the information and applicable supporting data required by paragraphs (c) and (d) of the clause at FAR 52.225-9 in the request. If an offeror has not requested a determination regarding the inapplicability of the Buy American statute before submitting its offer, or has not received a response to a previous request, the offeror shall include the information and supporting data in the offer.

(c) Evaluation of offers. (1) The Government will evaluate an offer requesting exception to the requirements of the Buy American statute, based on claimed unreasonable cost of domestic construction material, by adding to the offered price the appropriate percentage of the cost of such foreign construction material, as specified in paragraph (b)(3)(i) of the clause at FAR 52.225-9.

(2) If evaluation results in a tie between an offeror that requested the substitution of foreign construction material based on unreasonable cost and an offeror that did not request an exception, the Contracting Officer will award to the offeror that did not request an exception based on unreasonable cost.

(d) Alternate offers. (1) When an offer includes foreign construction material not listed by the Government in this solicitation in paragraph (b)(2) of the clause at FAR 52.225-9, the offeror also may submit an alternate offer based on use of equivalent domestic construction material.

(2) If an alternate offer is submitted, the offeror shall submit a separate Standard Form 1442 for the alternate offer, and a separate price comparison table prepared in accordance with paragraphs (c) and (d) of the clause at FAR 52.225-9 for the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception applies.

(3) If the Government determines that a particular exception requested in accordance with paragraph (c) of the clause at FAR 52.225-9 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic construction material, and the offeror shall be required to furnish such domestic construction material. An offer based on use of the foreign construction material for which an exception was requested-

(i) Will be rejected as nonresponsive if this acquisition is conducted by sealed bidding; or

(ii) May be accepted if revised during negotiations.

(End of provision)

Alternate I (MAY 2014). As prescribed in 25.602(b)(2), substitute the following paragraph (b) for paragraph (b) of the basic provision:

(b) *Requests for determinations of inapplicability*. An offeror requesting a determination regarding the inapplicability of the Buy American statute shall submit the request with its offer, including the information and applicable supporting data required by paragraphs (c) and (d) of the clause at FAR 52.225-9.

52.225-11 Buy American-Construction Materials under Trade Agreements.

As prescribed in 25.602(c), insert the following clause:

BUY AMERICAN-CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS (DEVIATION DATE)

(a) *Definitions*. As used in this clause—

Caribbean Basin country construction material means a construction material that—

(1) Is wholly the growth, product, or manufacture of a Caribbean Basin country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country into a new and different construction material distinct from the materials from which it was transformed.

Commercially available off-the-shelf (COTS) item—

(1) Means any item of supply (including construction material) that is–

(i) A commercial product (as defined in paragraph (1) of the definition of "commercial product" at Federal Acquisition Regulation (FAR) 2.101);

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

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

Component means an article, material, or supply incorporated directly into a construction material.

Construction material means an article, material, or supply brought to the construction site by the Contractor or subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

Cost of components means—

(1) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the construction material (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(2) For components manufactured by the Contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the construction material.

Critical component means a component that is mined, produced, or manufactured in the United States and deemed critical to the U.S. supply chain. The list of critical components is at FAR 25.105.

Critical item means a domestic construction material or domestic end product that is deemed critical to U.S. supply chain resiliency. The list of critical items is at FAR 25.105.

Designated country means any of the following countries:

(1) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Armenia, Aruba, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, New Zealand, North Macedonia, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan, Ukraine, or United Kingdom);

(2) A Free Trade Agreement (FTA) country (Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Oman, Panama, Peru, or Singapore);

(3) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Tanzania, Timor-Leste, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(4) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, or Trinidad and Tobago).

Designated country construction material means a construction material that is a WTO GPA country construction material, an FTA country construction material, a least developed country construction material, or a Caribbean Basin country construction material.

Domestic construction material means—

(1) For construction material that does not consist wholly or predominantly of iron or steel or a combination of both-

(i) An unmanufactured construction material mined or produced in the United States; or

(ii) A construction material manufactured in the United States, if—

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 60 percent of the cost of all its components, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic. Components of unknown origin are treated as foreign; or

(B) The construction material is a COTS item; or

(2) For construction material that consists wholly or predominantly of iron or steel or a combination of both, a construction material manufactured in the United States if the cost of foreign iron and steel constitutes less than 5 percent of the cost of all components used in such construction material. The cost of foreign iron and steel includes but is not limited to the cost of foreign iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the construction material and a good faith estimate of the cost of all foreign iron or steel components excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the construction material contains multiple components, the cost of all the materials used in such construction material is calculated in accordance with the definition of "cost of components".

Fastener means a hardware device that mechanically joins or affixes two or more objects together. Examples of fasteners are nuts, bolts, pins, rivets, nails, clips, and screws.

Foreign construction material means a construction material other than a domestic construction material.

Foreign iron and steel means iron or steel products not produced in the United States. Produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, from the initial melting stage through the application of coatings, except metallurgical processes involving refinement of steel additives. The origin of the elements of the iron or steel is not relevant to the determination of whether it is domestic or foreign.

Free Trade Agreement country construction material means a construction material that-

(1) Is wholly the growth, product, or manufacture of a Free Trade Agreement (FTA) country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a FTA country into a new and different construction material distinct from the materials from which it was transformed.

Least developed country construction material means a construction material that-

(1) Is wholly the growth, product, or manufacture of a least developed country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a least developed country into a new and different construction material distinct from the materials from which it was transformed.

Predominantly of iron or steel or a combination of both means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

Steel means an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.

United States means the 50 States, the District of Columbia, and outlying areas.

WTO GPA country construction material means a construction material that-

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different construction material distinct from the materials from which it was transformed.

(b) Construction materials. (1) This clause implements 41 U.S.C. chapter 83, Buy American, by providing a preference for domestic construction material. In accordance with 41 U.S.C.1907, the domestic content test of the Buy American statute is waived for construction material that is a COTS item, except that for construction material that consists wholly or predominantly of iron or steel or a combination of both, the domestic content test is applied only to the iron and steel content of the construction material, excluding COTS fasteners. In addition, the Contracting Officer has determined that the WTO GPA and Free Trade Agreements (FTAs) apply to this acquisition. Therefore, the Buy American restrictions are waived for designated country construction materials.

(2) The Contractor shall use only domestic or designated country construction material in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

(3) The requirement in paragraph (b)(2) of this clause does not apply to information technology that is a commercial product or to the construction materials or components listed by the Government as follows:

[Contracting Officer is to list applicable excepted materials or indicate "non"e]

(4) The Contracting Officer may add other foreign construction material to the list in paragraph (b)(3) of this clause if the Government determines that-

(i) The cost of domestic construction material would be unreasonable.

(A) *For domestic construction material that is not a critical item or does not contain critical components*. *(1)* The cost of a particular domestic construction material subject to the restrictions of the Buy American statute is unreasonable when the cost of such material exceeds the cost of foreign material by more than 20 percent;

(2) [Reserved]

(3) [Reserved]

(B) *For domestic construction material that is a critical item or contains critical components*. *(1)* The cost of a particular domestic construction material that is a critical item or contains critical components, subject to the requirements of the Buy American statute, is unreasonable when the cost of such material exceeds the cost of foreign material by more than 20 percent plus the additional preference factor identified for the critical item or construction material containing critical components listed at FAR 25.105.

(2) [Reserved]

(3) [Reserved]

(ii) The application of the restriction of the Buy American statute to a particular construction material would be impracticable or inconsistent with the public interest; or

(iii) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.

(c) Request for determination of inapplicability of the Buy American statute. (1) (i) Any Contractor request to use foreign construction material in accordance with paragraph (b)(4) of this clause shall include adequate information for Government evaluation of the request, including-

(A) A description of the foreign and domestic construction materials;

(B) Unit of measure;

(C) Quantity;

(D) Price;

(E) Time of delivery or availability;

(F) Location of the construction project;

(G) Name and address of the proposed supplier; and

(H) A detailed justification of the reason for use of foreign construction materials cited in accordance with paragraph (b)(3) of this clause.

(ii) A request based on unreasonable cost shall include a reasonable survey of the market and a completed price comparison table in the format in paragraph (d) of this clause.

(iii) The price of construction material shall include all delivery costs to the construction site and any applicable duty (whether or not a duty-free certificate may be issued).

(iv) Any Contractor request for a determination submitted after contract award shall explain why the Contractor could not reasonably foresee the need for such determination and could not have requested the determination before contract award. If the Contractor does not submit a satisfactory explanation, the Contracting Officer need not make a determination.

(2) If the Government determines after contract award that an exception to the Buy American statute applies and the Contracting Officer and the Contractor negotiate adequate consideration, the Contracting Officer will modify the contract to allow use of the foreign construction material. However, when the basis for the exception is the unreasonable price of a domestic construction material, adequate consideration is not less than the differential established in paragraph (b)(4)(i) of this clause.

(3) Unless the Government determines that an exception to the Buy American statute applies, use of foreign construction material is noncompliant with the Buy American statute.

(d) *Data*. To permit evaluation of requests under paragraph (c) of this clause based on unreasonable cost, the Contractor shall include the following information and any applicable supporting data based on the survey of suppliers:

FOREIGN AND DOMESTIC CONSTRUCTION MATERIALS PRICE COMPARISON

Construction material description	Unit of measure	Quantity	Price (dollars)*
Item 1:			
Foreign construction material.	_____	_____	_____
Domestic construction material.	_____	_____	_____
Item 2:			
Foreign construction material.	_____	_____	_____
Domestic construction material.	_____	_____	_____

[* *Include all delivery costs to the construction site and any applicable duty (whether or not a duty-free entry certificate is issued*)].

[*List name, address, telephone number, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary.*]

[*Include other applicable supporting information.*]

(End of clause)

Alternate I (DEVIATION DATE) . As prescribed in 25.602 (c)(3), add the following definition of "Bahraini, Mexican, or Omani construction material" to paragraph (a) of the basic clause, and substitute the following paragraphs (b)(1) and (b)(2) for paragraphs (b)(1) and (b)(2) of the basic clause:

"Bahraini, Mexican, or Omani construction material" means a construction material that-

(1) Is wholly the growth, product, or manufacture of Bahrain, Mexico, or Oman; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in Bahrain, Mexico, or Oman into a new and different construction material distinct from the materials from which it was transformed.

(b) Construction materials. (1) This clause implements 41 U.S.C. chapter 83, Buy American, by providing a preference for domestic construction material. In accordance with 41 U.S.C. 1907, the domestic content test of the Buy American statute is waived for construction material that is a COTS item, except that for construction material that consists wholly or predominantly of iron or steel or a combination of both, the domestic content test is applied only to the iron and steel content of the construction material, excluding COTS fasteners. In addition, the Contracting Officer has determined that the WTO GPA and all the Free Trade Agreements except the Bahrain FTA, United States-Mexico-Canada Agreement, and the Oman FTA apply to this acquisition. Therefore, the Buy American statute restrictions are waived for designated country construction materials other than Bahraini, Mexican, or Omani construction materials.

(2) The Contractor shall use only domestic or designated country construction material other than Bahraini, Mexican, or Omani construction material in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

Alternate II (OCT 2022). As prescribed in 25.602 (c)(4) substitute the following sentence for the first sentence of paragraph (1)(ii)(A) of the definition of *domestic construction material* in paragraph (a):

(A) The cost of its components mined, produced, or manufactured in the United States exceeds __ percent of the cost of all its components. [*Contracting officer to insert the percentage.*]

52.225-12 Notice of Buy American Requirement-Construction Materials Under Trade Agreements.

As prescribed in 25.602(d)(1), insert the following provision:

NOTICE OF BUY AMERICAN REQUIREMENT-CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS (MAY 2014)

(a) *Definitions.* "Commercially available off-the-shelf (COTS) item," "construction material," "designated country construction material," "domestic construction material," and "foreign construction material," as used in this provision, are defined in the clause of this solicitation entitled "Buy American-Construction Materials Under Trade Agreements" (Federal Acquisition Regulation (FAR) clause 52.225-11).

(b) *Requests for determination of inapplicability*. An offeror requesting a determination regarding the inapplicability of the Buy American statute should submit the request to the Contracting Officer in time to allow a determination before submission of offers. The offeror shall include the information and applicable supporting data required by paragraphs (c) and (d) of FAR clause 52.225-11 in the request. If an offeror has not requested a determination regarding the inapplicability of the Buy American statute before submitting its offer, or has not received a response to a previous request, the offeror shall include the information and supporting data in the offer.

(c) Evaluation of offers. (1) The Government will evaluate an offer requesting exception to the requirements of the Buy American statute, based on claimed unreasonable cost of domestic construction materials, by adding to the offered price the appropriate percentage of the cost of such foreign construction material, as specified in paragraph (b)(4)(i) of FAR clause 52.225-11.

(2) If evaluation results in a tie between an offeror that requested the substitution of foreign construction material based on unreasonable cost and an offeror that did not request an exception, the Contracting Officer will award to the offeror that did not request an exception based on unreasonable cost.

(d) Alternate offers. (1) When an offer includes foreign construction material, other than designated country construction material, that is not listed by the Government in this solicitation in paragraph (b)(3) of FAR clause 52.225-11, the offeror also may submit an alternate offer based on use of equivalent domestic or designated country construction material.

(2) If an alternate offer is submitted, the offeror shall submit a separate Standard Form 1442 for the alternate offer, and a separate price comparison table prepared in accordance with paragraphs (c) and (d) of FAR clause 52.225-11 for the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception applies.

(3) If the Government determines that a particular exception requested in accordance with paragraph (c) of FAR clause 52.225-11 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic or designated country construction material, and the offeror shall be required to furnish such domestic or designated country construction material. An offer based on use of the foreign construction material for which an exception was requested-

(i) Will be rejected as nonresponsive if this acquisition is conducted by sealed bidding; or

(ii) May be accepted if revised during negotiations.

(End of provision)

Alternate I (MAY 2014). As prescribed in 25.602(d)(2), substitute the following paragraph (b) for paragraph (b) of the basic provision:

(b) *Requests for determination of inapplicability*. An offeror requesting a determination regarding the inapplicability of the Buy American statute shall submit the request with its offer, including the information and applicable supporting data required by paragraphs (c) and (d) of FAR clause 52.225-11.

Alternate II (NOV 2023). As prescribed in 25.602(d)(3), add the definition of "Bahraini, Mexican, or Omani construction material" to paragraph (a) and substitute the following paragraph (d) for paragraph (d) of the basic provision:

(d) *Alternate offers*. (1) When an offer includes foreign construction material, except foreign construction material from a designated country other than Bahrain, Mexico, or Oman that is not listed by the Government in this solicitation in paragraph (b)(3) of FAR clause 52.225-11, the offeror also may submit an alternate offer based on use of equivalent domestic or designated country construction material other than Bahraini, Mexican, or Omani construction material.

(2) If an alternate offer is submitted, the offeror shall submit a separate Standard Form 1442 for the alternate offer, and a separate price comparison table prepared in accordance with paragraphs (c) and (d) of FAR clause 52.225-11 for the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception applies.

(3) If the Government determines that a particular exception requested in accordance with paragraph (c) of FAR clause 52.225-11 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic or designated country construction material other than Bahraini, Mexican, or Omani construction material. An offer based on use of the foreign construction material for which an exception was requested-

(i) Will be rejected as nonresponsive if this acquisition is conducted by sealed bidding; or

(ii) May be accepted if revised during negotiations.

52.225-13 [Reserved]

(DEVIATION DATE)

52.225-14 Inconsistency between English Version and Translation of Contract.

As prescribed at 25.603, insert the following clause:

INCONSISTENCY BETWEEN ENGLISH VERSION AND TRANSLATION OF CONTRACT (FEB 2000)

In the event of inconsistency between any terms of this contract and any translation into another language, the English language meaning shall control.

(End of clause)

52.225-15 [Reserved]

52.225-16 [Reserved]

52.225-17 Evaluation of Foreign Currency Offers.

As prescribed in 25.1002-2, insert the following provision:

EVALUATION OF FOREIGN CURRENCY OFFERS (FEB 2000)

If the Government receives offers in more than one currency, the Government will evaluate offers by converting the foreign currency to United States currency using *[Contracting Officer to insert source of rate]* in effect as follows:

(a) For acquisitions conducted using sealed bidding procedures, on the date of bid opening.

(b) For acquisitions conducted using negotiation procedures-

(1) On the date specified for receipt of offers, if award is based on initial offers; otherwise

(2) On the date specified for receipt of proposal revisions.

(End of provision)

52.225-18 Place of Manufacture.

As prescribed in 25.601(f), insert the following provision:

PLACE OF MANUFACTURE (AUG 2018)

(a) *Definitions*. As used in this provision—

Manufactured end product means any end product in product and service codes (PSCs) 1000-9999, except-

(1) PSC 5510, Lumber and Related Basic Wood Materials;

(2) Product or Service Group (PSG) 87, Agricultural Supplies;

(3) PSG 88, Live Animals;

(4) PSG 89, Subsistence;

(5) PSC 9410, Crude Grades of Plant Materials;

(6) PSC 9430, Miscellaneous Crude Animal Products, Inedible;

(7) PSC 9440, Miscellaneous Crude Agricultural and Forestry Products;

(8) PSC 9610, Ores;

(9) PSC 9620, Minerals, Natural and Synthetic; and

(10) PSC 9630, Additive Metal Materials.

Place of manufacture means the place where an end product is assembled out of components, or otherwise made or processed from raw materials into the finished product that is to be provided to the Government. If a product is disassembled and reassembled, the place of reassembly is not the place of manufacture.

(b) For statistical purposes only, the offeror shall indicate whether the place of manufacture of the end products it expects to provide in response to this solicitation is predominantly-

(1) □ In the United States (Check this box if the total anticipated price of offered end products manufactured in the United States exceeds the total anticipated price of offered end products manufactured outside the United States); or

(2) □ Outside the United States.

(End of provision)

52.225-19 Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States.

As prescribed in 25.701-4, insert the following clause:

CONTRACTOR PERSONNEL IN A DESIGNATED OPERATIONAL AREA OR SUPPORTING A DIPLOMATIC OR CONSULAR MISSION OUTSIDE THE UNITED STATES (MAY 2020)

(a) *Definitions*. As used in this clause-

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 (Pub. L. 96-465) to be temporarily in charge of such a mission or office.

Combatant commander means the commander of a unified or specified combatant command established in accordance with 10 U.S.C. 161.

Designated operational area means a geographic area designated by the combatant commander or subordinate joint force commander for the conduct or support of specified military operations.

"Supporting a diplomatic or consular mission" means performing outside the United States under a contract administered by Federal agency personnel who are subject to the direction of a chief of mission.

(b) *General*. (1) This clause applies when Contractor personnel are required to perform outside the United States-

(i) In a designated operational area during-

(A) Contingency operations;

(B) Humanitarian or peacekeeping operations; or

(C) Other military operations; or military exercises, when designated by the Combatant Commander; or

(ii) When supporting a diplomatic or consular mission-

(A) That has been designated by the Department of State as a danger pay post (see https://aoprals.state.gov/); or

(B) That the Contracting Officer has indicated is subject to this clause.

(2) Contract performance may require work in dangerous or austere conditions. Except as otherwise provided in the contract, the Contractor accepts the risks associated with required contract performance in such operations.

(3) Contractor personnel are civilians.

(i) Except as provided in paragraph (b)(3)(ii) of this clause, and in accordance with paragraph (i)(3) of this clause, Contractor personnel are only authorized to use deadly force in self-defense.

(ii) Contractor personnel performing security functions are also authorized to use deadly force when use of such force reasonably appears necessary to execute their security mission to protect assets/persons, consistent with the terms and conditions contained in the contract or with their job description and terms of employment.

(4) Service performed by Contractor personnel subject to this clause is not active duty or service under 38 U.S.C. 106 note.

(c) *Support*. Unless specified elsewhere in the contract, the Contractor is responsible for all logistical and security support required for Contractor personnel engaged in this contract.

(d) *Compliance with laws and regulations*. The Contractor shall comply with, and shall ensure that its personnel in the designated operational area or supporting the diplomatic or consular mission are familiar with and comply with, all applicable-

(1) United States, host country, and third country national laws;

(2) Treaties and international agreements;

(3) United States regulations, directives, instructions, policies, and procedures; and

(4) Force protection, security, health, or safety orders, directives, and instructions issued by the Chief of Mission or the Combatant Commander; however, only the Contracting Officer is authorized to modify the terms and conditions of the contract.

(e) *Preliminary personnel requirements*. (1) Specific requirements for paragraphs (e)(2)(i) through (e)(2)(vi) of this clause will be set forth in the statement of work, or elsewhere in the contract.

(2) Before Contractor personnel depart from the United States or a third country, and before Contractor personnel residing in the host country begin contract performance in the designated operational area or supporting the diplomatic or consular mission, the Contractor shall ensure the following:

(i) All required security and background checks are complete and acceptable.

(ii) All personnel are medically and physically fit and have received all required vaccinations.

(iii) All personnel have all necessary passports, visas, entry permits, and other documents required for Contractor personnel to enter and exit the foreign country, including those required for in-transit countries.

(iv) All personnel have received-

(A) A country clearance or special area clearance, if required by the chief of mission; and

(B) Theater clearance, if required by the Combatant Commander.

(v) All personnel have received personal security training. The training must at a minimum-

(A) Cover safety and security issues facing employees overseas;

(B) Identify safety and security contingency planning activities; and

(C) Identify ways to utilize safety and security personnel and other resources appropriately.

(vi) All personnel have received isolated personnel training, if specified in the contract. Isolated personnel are military or civilian personnel separated from their unit or organization in an environment requiring them to survive, evade, or escape while awaiting rescue or recovery.

(vii) All personnel who are U.S. citizens are registered with the U.S. Embassy or Consulate with jurisdiction over the area of operations on-line at http://www.travel.state.gov.

(3) The Contractor shall notify all personnel who are not a host country national or ordinarily resident in the host country that-

(i) If this contract is with the Department of Defense, or the contract relates to supporting the mission of the Department of Defense outside the United States, such employees, and dependents residing with such employees, who engage in conduct outside the United States that would constitute an offense punishable by imprisonment for more than one year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States, may potentially be subject to the criminal jurisdiction of the United States (see the Military Extraterritorial Jurisdiction Act of 2000 (18 U.S.C. 3261 *et seq*.);

(ii) Pursuant to the War Crimes Act, 18 U.S.C. 2441, Federal criminal jurisdiction also extends to conduct that is determined to constitute a war crime when committed by a civilian national of the United States; and

(iii) Other laws may provide for prosecution of U.S. nationals who commit offenses on the premises of United States diplomatic, consular, military or other United States Government missions outside the United States (18 U.S.C. 7(9)).

(f) *Processing and departure points*. The Contractor shall require its personnel who are arriving from outside the area of performance to perform in the designated operational area or supporting the diplomatic or consular mission to-

(1) Process through the departure center designated in the contract or complete another process as directed by the Contracting Officer;

(2) Use a specific point of departure and transportation mode as directed by the Contracting Officer; and

(3) Process through a reception center as designated by the Contracting Officer upon arrival at the place of performance.

(g) *Personnel data*. (1) Unless personnel data requirements are otherwise specified in the contract, the Contractor shall establish and maintain with the designated Government official a current list of all Contractor personnel in the areas of performance. The Contracting Officer will inform the Contractor of the Government official designated to receive this data and the appropriate system to use for this effort.

(2) The Contractor shall ensure that all employees on this list have a current record of emergency data, for notification of next of kin, on file with both the Contractor and the designated Government official.

(h) *Contractor personnel*. The Contracting Officer may direct the Contractor, at its own expense, to remove and replace any Contractor personnel who fail to comply with or violate applicable requirements of this contract. Such action may be taken at the Government's discretion without prejudice to its rights under any other provision of this contract, including termination for default or cause.

(i) *Weapons*. (1) If the Contracting Officer, subject to the approval of the Combatant Commander or the Chief of Mission, authorizes the carrying of weapons-

(i) The Contracting Officer may authorize an approved Contractor to issue Contractor-owned weapons and ammunition to specified employees; or

(ii) The_____ *[Contracting Officer to specify individual, e.g., Contracting Officer Representative, Regional Security Officer, etc,]* may issue Government-furnished weapons and ammunition to the Contractor for issuance to specified Contractor employees.

(2) The Contractor shall provide to the Contracting Officer a specific list of personnel for whom authorization to carry a weapon is requested.

(3) The Contractor shall ensure that its personnel who are authorized to carry weapons-

(i) Are adequately trained to carry and use them-

(A) Safely;

(B) With full understanding of, and adherence to, the rules of the use of force issued by the Combatant Commander or the Chief of Mission; and

(C) In compliance with applicable agency policies, agreements, rules, regulations, and other applicable law;

(ii) Are not barred from possession of a firearm by 18 U.S.C. 922; and

(iii) Adhere to all guidance and orders issued by the Combatant Commander or the Chief of Mission regarding possession, use, safety, and accountability of weapons and ammunition.

(4) Upon revocation by the Contracting Officer of the Contractor's authorization to possess weapons, the Contractor shall ensure that all Government-furnished weapons and unexpended ammunition are returned as directed by the Contracting Officer.

(5) Whether or not weapons are Government-furnished, all liability for the use of any weapon by Contractor personnel rests solely with the Contractor and the Contractor employee using such weapon.

(j) *Vehicle or equipment licenses*. Contractor personnel shall possess the required licenses to operate all vehicles or equipment necessary to perform the contract in the area of performance.

(k) *Military clothing and protective equipment*. (1) Contractor personnel are prohibited from wearing military clothing unless specifically authorized by the Combatant Commander. If authorized to wear military clothing, Contractor personnel must wear distinctive patches, armbands, nametags, or headgear, in order to be distinguishable from military personnel, consistent with force protection measures.

(2) Contractor personnel may wear specific items required for safety and security, such as ballistic, nuclear, biological, or chemical protective equipment.

(l) *Evacuation*. (1) If the Chief of Mission or Combatant Commander orders a mandatory evacuation of some or all personnel, the Government will provide to United States and third country national Contractor personnel the level of assistance provided to private United States citizens.

(2) In the event of a non-mandatory evacuation order, the Contractor shall maintain personnel on location sufficient to meet contractual obligations unless instructed to evacuate by the Contracting Officer.

(m) *Personnel recovery*. (1) In the case of isolated, missing, detained, captured or abducted Contractor personnel, the Government will assist in personnel recovery actions.

(2) Personnel recovery may occur through military action, action by non-governmental organizations, other Government-approved action, diplomatic initiatives, or through any combination of these options.

(3) The Department of Defense has primary responsibility for recovering DoD contract service employees and, when requested, will provide personnel recovery support to other agencies in accordance with DoD Directive 2310.2, Personnel Recovery.

(n) *Notification and return of personal effects*. (1) The Contractor shall be responsible for notification of the employee-designated next of kin, and notification as soon as possible to the U.S. Consul responsible for the area in which the event occurred, if the employee-

(i) Dies;

(ii) Requires evacuation due to an injury; or

(iii) Is isolated, missing, detained, captured, or abducted.

(2) The Contractor shall also be responsible for the return of all personal effects of deceased or missing Contractor personnel, if appropriate, to next of kin.

(o) *Mortuary affairs*. Mortuary affairs for Contractor personnel who die in the area of performance will be handled as follows:

(1) If this contract was awarded by DoD, the remains of Contractor personnel will be handled in accordance with DoD Directive 1300.22, Mortuary Affairs Policy.

(2) (i) If this contract was awarded by an agency other than DoD, the Contractor is responsible for the return of the remains of Contractor personnel from the point of identification of the remains to the location specified by the employee or next of kin, as applicable, except as provided in paragraph (o)(2)(ii) of this clause.

(ii) In accordance with 10 U.S.C. 1486, the Department of Defense may provide, on a reimbursable basis, mortuary support for the disposition of remains and personal effects of all U.S. citizens upon the request of the Department of State.

(p) *Changes*. In addition to the changes otherwise authorized by the Changes clause of this contract, the Contracting Officer may, at any time, by written order identified as a change order, make changes in place of performance or Government-furnished facilities, equipment, material, services, or site. Any change order issued in accordance with this paragraph shall be subject to the provisions of the Changes clause of this contract.

(q) *Subcontracts*. The Contractor shall incorporate the substance of this clause, including this paragraph (q), in all subcontracts that require subcontractor personnel to perform outside the United States-

(1) In a designated operational area during-

(i) Contingency operations;

(ii) Humanitarian or peacekeeping operations; or

(iii) Other military operations; or military exercises, when designated by the Combatant Commander; or

(2) When supporting a diplomatic or consular mission-

(i) That has been designated by the Department of State as a danger pay post (see https://aoprals.state.gov/); or

(ii) That the Contracting Officer has indicated is subject to this clause.

(End of clause)

52.225-20 [Reserved]

(DEVIATION DATE)

52.225-21 [Reserved]

(DEVIATION DATE)

52.225-22 [Reserved]

(DEVIATION DATE)

52.225-23 [Reserved]

(DEVIATION DATE)

52.225-24 [Reserved]

(DEVIATION DATE)

52.225-25 [Reserved]

(DEVIATION DATE)

52.225-26 Contractors Performing Private Security Functions Outside the United States.

As prescribed in 25.702-6, insert the following clause:

CONTRACTORS PERFORMING PRIVATE SECURITY FUNCTIONS OUTSIDE THE UNITED STATES (OCT 2016)

(a) *Definitions*. As used in this clause-

Area of combat operations means an area of operations designated as such by the Secretary of Defense when enhanced coordination of contractors performing private security functions working for Government agencies is required

Full cooperation–

(1) Means disclosure to the Government of the information sufficient to identify the nature and extent of the incident and the individuals responsible for the conduct. It includes providing timely and complete responses to Government auditors' and investigators' requests for documents and access to employees with information;

(2) Does not foreclose any Contractor rights arising in law, the FAR, or the terms of the contract. It does not require–

(i) The Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine; or

(ii) Any officer, director, owner, or employee of the Contractor, including a sole proprietor, to waive his or her attorney-client privilege or Fifth Amendment rights; and

(3) Does not restrict the Contractor from–

(i) Conducting an internal investigation; or

(ii) Defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation.

Other significant military operations means activities, other than combat operations, as part of a contingency operation outside the United States that is carried out by United States Armed Forces in an uncontrolled or unpredictable high-threat environment where personnel performing security functions may be called upon to use deadly force.

Private security functions means activities engaged in by a Contractor, as follows:

(1) Guarding of personnel, facilities, designated sites, or property of a Federal agency, the Contractor or subcontractor, or a third party.

(2) Any other activity for which personnel are required to carry weapons in the performance of their duties in accordance with the terms of this contract.

(b) *Applicability.* If this contract is performed both in a designated area and in an area that is not designated, the clause only applies to performance in the following designated areas-

(1) Combat operations, as designated by the Secretary of Defense; or

(2) Other significant military operations, as designated by the Secretary of Defense, and only upon agreement of the Secretary of Defense and the Secretary of State.

(c) Requirements. The Contractor is required to-

(1) Ensure that all employees of the Contractor who are responsible for performing private security functions under this contract comply with 32 CFR part 159, and with any orders, directives, and instructions to Contractors performing private security functions that are identified in the contract for--

(i) Registering, processing, accounting for, managing, overseeing, and keeping appropriate records of personnel performing private security functions;

(ii) Authorizing and accounting for weapons to be carried by or available to be used by personnel performing private security functions;

(iii) Registering and identifying armored vehicles, helicopters, and other military vehicles operated by Contractors performing private security functions; and

(iv) Reporting incidents in which-

(A) A weapon is discharged by personnel performing private security functions;

(B) Personnel performing private security functions are attacked, killed, or injured;

(C) Persons are killed or injured or property is destroyed as a result of conduct by Contractor personnel;

(D) A weapon is discharged against personnel performing private security functions or personnel performing such functions believe a weapon was so discharged; or

(E) Active, non-lethal countermeasures (other than the discharge of a weapon) are employed by personnel performing private security functions in response to a perceived immediate threat;

(2) Ensure that the Contractor and all employees of the Contractor who are responsible for performing private security functions under this contract are briefed on and understand their obligation to comply with-

(i) Qualification, training, screening (including, if applicable, thorough background checks), and security requirements established by 32 CFR part 159, Private Security Contractors Operating in Contingency Operations;

(ii) Applicable laws and regulations of the United States and the host country and applicable treaties and international agreements regarding performance of private security functions;

(iii) Orders, directives, and instructions issued by the applicable commander of a combatant command or relevant Chief of Mission relating to weapons, equipment, force protection, security, health, safety, or relations and interaction with locals; and

(iv) Rules on the use of force issued by the applicable commander of a combatant command or relevant Chief of Mission for personnel performing private security functions; and

(3) Provide full cooperation with any Government-authorized investigation of incidents reported pursuant to paragraph (c)(1)(iv) of this clause and incidents of alleged misconduct by personnel performing private security functions under this contract by providing-

(i) Access to employees performing private security functions; and

(ii) Relevant information in the possession of the Contractor regarding the incident concerned.

(d) Remedies. In addition to other remedies available to the Government-

(1) The Contracting Officer may direct the Contractor, at its own expense, to remove and replace any Contractor or subcontractor personnel performing private security functions who fail to comply with or violate applicable requirements of this clause or 32 CFR part 159. Such action may be taken at the Government's discretion without prejudice to its rights under any other provision of this contract.

(2) The Contractor’s failure to comply with the requirements of this clause will be included in appropriate databases of past performance and considered in any responsibility determination or evaluation of past performance; and

(3) If this is an award-fee contract, the Contractor's failure to comply with the requirements of this clause shall be considered in the evaluation of the Contractor's performance during the relevant evaluation period, and the Contracting Officer may treat such failure to comply as a basis for reducing or denying award fees for such period or for recovering all or part of award fees previously paid for such period.

(e) Rule of construction. The duty of the Contractor to comply with the requirements of this clause shall not be reduced or diminished by the failure of a higher- or lower-tier Contractor or subcontractor to comply with the clause requirements or by a failure of the contracting activity to provide required oversight.

(f) *Subcontracts*. The Contractor shall include the substance of this clause, including this paragraph (f), in all subcontracts that will be performed outside the United States in areas of-

(1) Combat operations, as designated by the Secretary of Defense; or

(2) Other significant military operations, upon agreement of the Secretaries of Defense and State that the clause applies in that area.

(End of clause)

52.226 [Reserved]

52.226-1 Utilization of Indian Organizations and Indian-Owned Economic Enterprises.

As prescribed in 26.102-2 , insert the following clause:

UTILIZATION OF INDIAN ORGANIZATIONS AND INDIAN-OWNED ECONOMIC ENTERPRISES (DEVIATION DATE)

(a) *Definitions*. As used in this clause:

Indian means any person who is a member of any Indian tribe, band, group, pueblo, or community that is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs (BIA) (see 25 U.S.C. 1452) and any "Native" as defined in the Alaska Native Claims Settlement Act (see 43 U.S.C. 1602).

Indian organization means the governing body of any Indian tribe or entity established or recognized by the governing body of an Indian tribe for the purposes of 25 U.S.C., chapter 17.

Indian-owned economic enterprise means any Indian-owned (as determined by the Secretary of the Interior) commercial, industrial, or business activity established or organized for the purpose of profit, provided that Indian ownership constitutes not less than 51 percent of the enterprise.

Indian tribe means any Indian tribe, band, group, pueblo, or community, including native villages and native groups (including corporations organized by Kenai, Juneau, Sitka, and Kodiak) as defined in the Alaska Native Claims Settlement Act, that is recognized by the Federal Government as eligible for services from BIA. See 25 U.S.C. 1452.

Interested party means a prime contractor or an actual or prospective offeror whose direct economic interest would be affected by the award of a subcontract or by the failure to receive a subcontract.

(b) *Opportunity to participate in subcontracts*. The Contractor shall use its best efforts to give Indian organizations and Indian-owned economic enterprises maximum practicable opportunity to participate in the subcontracts it awards, while still efficiently performing its contract.

(1) The Contracting Officer and the Contractor may rely on the representation of an Indian organization or Indian-owned economic enterprise as to its own eligibility, unless an interested party challenges its status or the Contracting Officer has independent reason to question that status.

(2) If the representation of a subcontractor is challenged, the Contracting Officer will refer the matter to the U.S. Department of the Interior, Bureau of Indian Affairs (BIA), Acquisition Management Director (https://www.bia.gov/as-%20ia/ocfo/acquisitions).

(3) BIA will determine the eligibility and notify the Contracting Officer. The Contractor shall not make an incentive payment within 50 working days of subcontract award or while a challenge is pending. If a subcontractor is determined to be ineligible, the Contractor shall not make an incentive payment under the Indian Incentive Program.

(4) The Contractor may request an adjustment under the Indian Incentive Program to the following:

(i) The estimated cost of a cost-type prime contract.

(ii) The target cost of a cost-plus-incentive-fee prime contract.

(iii) The target cost and ceiling price of a fixed-price incentive prime contract.

(iv) The price of a firm-fixed-price prime contract.

(5) The amount of the adjustment to the prime contract is 5 percent of the estimated cost, target cost, or firm-fixed-price included in the subcontract first awarded to the Indian organization or Indian-owned economic enterprise.

(6) The Contractor must prove the amount claimed. They must request an adjustment before completing contract performance.

(c) *Incentive payment*. The Contracting Officer, subject to the terms and conditions of the contract and the availability of funds, will authorize an incentive payment of 5 percent of the amount paid to the subcontractor.

(End of clause)

52.226-2 Historically Black College or University and Minority Institution Representation.

As prescribed in 26.301-2, insert the following provision:

HISTORICALLY BLACK COLLEGE OR UNIVERSITY AND MINORITY INSTITUTION REPRESENTATION (OCT 2014)

(a) *Definitions*. As used in this provision—

Historically black college or university means an institution determined by the Secretary of Education to meet the requirements of 34 CFR 608.2.

Minority institution means an institution of higher education meeting the requirements of Section 365(3) of the Higher Education Act of1965 (20 U.S.C. 1067k), including a Hispanic-serving institution of higher education, as defined in Section502(a) of the Act (20 U.S.C. 1101a).

(b) *Representation*. The offeror represents that it—

□ is □ is not a historically black college or university;

□ is □ is not a minority institution.

(End of provision)

52.226-3 Disaster or Emergency Area Representation.

As prescribed in 26.202-3(a), insert the following provision:

DISASTER OR EMERGENCY AREA REPRESENTATION (NOV 2007)

(a) *Set-aside area.* The area covered in this contract is: _____ *[Contracting Officer to fill in with definite geographic boundaries.]*

(b) *Representations.* The offeror represents that it □ does □ does not reside or primarily do business in the set-aside area.

(c) An offeror is considered to be residing or primarily doing business in the set-aside area if, during the last twelve months-

(1) The offeror had its main operating office in the area; and

(2) That office generated at least half of the offeror's gross revenues and employed at least half of the offeror's permanent employees.

(d) If the offeror does not meet the criteria in paragraph (c) of this provision, factors to be considered in determining whether an offeror resides or primarily does business in the set-aside area include-

(1) Physical location(s) of the offeror's permanent office(s) and date any office in the set-aside area(s) was established;

(2) Current state licenses;

(3) Record of past work in the set-aside area(s) (*e.g.*, how much and for how long);

(4) Contractual history the offeror has had with subcontractors and/or suppliers in the set-aside area;

(5) Percentage of the offeror's gross revenues attributable to work performed in the set-aside area;

(6) Number of permanent employees the offeror employs in the set-aside area;

(7) Membership in local and state organizations in the set-aside area; and

(8) Other evidence that establishes the offeror resides or primarily does business in the set-aside area. For example, sole proprietorships may submit utility bills and bank statements.

(e) If the offeror represents it resides or primarily does business in the set-aside area, the offeror shall furnish documentation to support its representation if requested by the Contracting Officer. The solicitation may require the offeror to submit with its offer documentation to support the representation.

(End of provision)

52.226-4 Notice of Disaster or Emergency Area Set-Aside.

As prescribed in 26.202-3(b), insert the following clause:

NOTICE OF DISASTER OR EMERGENCY AREA SET-ASIDE (NOV 2007)

(a) *Set-aside area.* Offers are solicited only from businesses residing or primarily doing business in _____ *[Contracting Officer to fill in with definite geographic boundaries.]* Offers received from other businesses shall not be considered.

(b) This set-aside is in addition to any small business set-aside contained in this contract.

(End of clause)

52.226-5 Restrictions on Subcontracting Outside Disaster or Emergency Area.

As prescribed in 26.202-3(c), insert the following clause:

RESTRICTIONS ON SUBCONTRACTING OUTSIDE DISASTER OR EMERGENCY AREA (DEVIATION DATE)

(a) *Definitions.* The definitions of the following terms used in this clause are found in the Small Business Administration regulations at 13 CFR 125.6(e): cost of the contract, cost of contract performance incurred for personnel, cost of manufacturing, cost of materials, personnel, and subcontracting.

(b) The Contractor agrees that in performance of the contract in the case of a contract for-

(1) *Services (except construction)*. At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the Contractor or employees of other businesses residing or primarily doing business in the area designated in the clause at FAR 52.226—4, Notice of Disaster or Emergency Area Set-Aside;

(2) *Supplies (other than procurement from a nonmanufacturer of such supplies)*. The Contractor or employees of other businesses residing or primarily doing business in the set-aside area shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials;

(3) *General construction*. The Contractor will perform at least 15 percent of the cost of the contract, not including the cost of materials, with its own employees or employees of other businesses residing or primarily doing business in the set-aside area; or

(4) *Construction by special trade Contractors*. The Contractor will perform at least 25 percent of the cost of the contract, not including the cost of materials, with its own employees or employees of other businesses residing or primarily doing business in the set-aside area.

(End of clause)

52.226-6 Promoting Excess Food Donation to Nonprofit Organizations.

As prescribed in 26.402-2 , insert the following clause:

PROMOTING EXCESS FOOD DONATION TO NONPROFIT ORGANIZATIONS (DEVIATION DATE)

(a) *Definitions*. As used in this clause-

Apparently wholesome food means food that meets all quality and labeling standards imposed by Federal, State, and local laws and regulations even though the food may not be readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.

Excess food means food that-

(1) Is not required to meet the needs of the agencies; and

(2) Would otherwise be discarded.

Food-insecure means inconsistent access to sufficient, safe, and nutritious food.

Nonprofit organization means any organization that is—

(1) Described in section 501(c) of the Internal Revenue Code of 1986; and

(2) Exempt from tax under section 501(a) of that Code.

(b) *Food donation*. The Contractor is encouraged to donate excess apparently wholesome food to nonprofit organizations that help food-insecure people in the United States, where practical and safe.

(c) *Costs*. (1) The Contractor, including any subcontractors, shall assume the responsibility for all the costs and logistics of collecting, transporting, maintaining the safety of, or distributing the excess, apparently wholesome food to the nonprofit organization(s) helping food-insecure people.

(2) Costs incurred for excess food donations are unallowable and, as such, the Contractor will not be reimbursed for any associated costs.

(d) *Liability*. The Government and the Contractor, including any subcontractors, shall be exempt from civil and criminal liability to the extent provided under the Bill Emerson Good Samaritan Food Donation Act (42 U.S.C. 1791). Nothing in this clause shall supersede State or local health regulations (subsection (f) of 42 U.S.C. 1791).

(End of clause)

52.226-7 Drug-Free Workplace.

As prescribed in 26.503-1, insert the following clause:

DRUG-FREE WORKPLACE (MAY 2024)

(a) *Definitions*. As used in this clause-

Controlled substance means a controlled substance in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812) and as further defined in regulation at 21 CFR 1308.11 - 1308.15.

Conviction means a finding of guilt (including a plea of *nolo contendere*) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes.

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, possession, or use of any controlled substance.

Drug-free workplace means the site(s) for the performance of work done by the Contractor in connection with a specific contract where employees of the Contractor are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

Employee means an employee of a Contractor directly engaged in the performance of work under a Government contract. "Directly engaged" is defined to include all direct cost employees and any other Contractor employee who has other than a minimal impact or involvement in contract performance.

Individual means an offeror/contractor that has no more than one employee including the offeror/contractor.

(b) The Contractor, if other than an individual, shall-within 30 days after award (unless a longer period is agreed to in writing for contracts of 30 days or more performance duration), or as soon as possible for contracts of less than 30 days performance duration-

(1) Publish a statement notifying its employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the Contractor's workplace and specifying the actions that will be taken against employees for violations of such prohibition;

(2) Establish an ongoing drug-free awareness program to inform such employees about-

(i) The dangers of drug abuse in the workplace;

(ii) The Contractor's policy of maintaining a drug-free workplace;

(iii) Any available drug counseling, rehabilitation, and employee assistance programs; and

(iv) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(3) Provide all employees engaged in performance of the contract with a copy of the statement required by subparagraph (b)(1) of this clause;

(4) Notify such employees in writing in the statement required by subparagraph (b)(1) of this clause that, as a condition of continued employment on this contract, the employee will-

(i) Abide by the terms of the statement; and

(ii) Notify the employer in writing of the employee's conviction under a criminal drug statute for a violation occurring in the workplace no later than 5 days after such conviction;

(5) Notify the Contracting Officer in writing within 10 days after receiving notice under subdivision (b)(4)(ii) of this clause, from an employee or otherwise receiving actual notice of such conviction. The notice shall include the position title of the employee;

(6) Within 30 days after receiving notice under subdivision (b)(4)(ii) of this clause of a conviction, take one of the following actions with respect to any employee who is convicted of a drug abuse violation occurring in the workplace:

(i) Taking appropriate personnel action against such employee, up to and including termination; or

(ii) Require such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency; and

(7) Make a good faith effort to maintain a drug-free workplace through implementation of subparagraphs (b)(1) through (b)(6) of this clause.

(c) The Contractor, if an individual, agrees by award of the contract or acceptance of a purchase order, not to engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance while performing this contract.

(d) In addition to other remedies available to the Government, the Contractor's failure to comply with the requirements of paragraph (b) or (c) of this clause may, pursuant to FAR 26.505, render the Contractor subject to suspension of contract payments, termination of the contract for default, and suspension or debarment.

(End of clause)

52.226-8 Encouraging Contractor Policies to Ban Text Messaging While Driving.

As prescribed in 26.601-2, insert the following clause:

ENCOURAGING CONTRACTOR POLICIES TO BAN TEXT MESSAGING WHILE DRIVING (MAY 2024)

(a) *Definitions*. As used in this clause-

"Drivin"g–

(1) Means operating a motor vehicle on an active roadway with the motor running, including while temporarily stationary because of traffic, a traffic light, stop sign, or otherwise.

(2) Does not include operating a motor vehicle with or without the motor running when one has pulled over to the side of, or off, an active roadway and has halted in a location where one can safely remain stationary.

Text messaging means reading from or entering data into any handheld or other electronic device, including for the purpose of short message service texting, e-mailing, instant messaging, obtaining navigational information, or engaging in any other form of electronic data retrieval or electronic data communication. The term does not include glancing at or listening to a navigational device that is secured in a commercially designed holder affixed to the vehicle, provided that the destination and route are programmed into the device either before driving or while stopped in a location off the roadway where it is safe and legal to park.

(b) This clause implements Executive Order 13513, Federal Leadership on Reducing Text Messaging While Driving, dated October 1, 2009.

(c) The Contractor is encouraged to-

(1) Adopt and enforce policies that ban text messaging while driving-

(i) Company-owned or rented vehicles or Government-owned vehicles; or

(ii) Privately-owned vehicles when on official Government business or when performing any work for or on behalf of the Government.

(2) Conduct initiatives in a manner commensurate with the size of the business, such as-

(i) Establishment of new rules and programs or re-evaluation of existing programs to prohibit text messaging while driving; and

(ii) Education, awareness, and other outreach to employees about the safety risks associated with texting while driving.

(d) *Subcontracts*. The Contractor shall insert the substance of this clause, including this paragraph (d), in all subcontracts that exceed the micro-purchase threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award.

(End of clause)

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52.227 [Reserved]

52.227-1 Authorization and Consent.

As prescribed in 27.201-2(a)(1), insert the following clause:

AUTHORIZATION AND CONSENT (JUN 2020)

(a) The Government authorizes and consents to all use and manufacture, in performing this contract or any subcontract at any tier, of any invention described in and covered by a United States patent-

(1) Embodied in the structure or composition of any article the delivery of which is accepted by the Government under this contract; or

(2) Used in machinery, tools, or methods whose use necessarily results from compliance by the Contractor or a subcontractor with (i) specifications or written provisions forming a part of this contract or (ii) specific written instructions given by the Contracting Officer directing the manner of performance. The entire liability to the Government for infringement of a United States patent shall be determined solely by the provisions of the indemnity clause, if any, included in this contract or any subcontract hereunder (including any lower-tier subcontract), and the Government assumes liability for all other infringement to the extent of the authorization and consent herein above granted.

(b) The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts that are expected to exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation (FAR) 2.101 on the date of subcontract award. However, omission of this clause from any subcontract, including those at or below the simplified acquisition threshold, as defined in FAR 2.101 on the date of subcontract award, does not affect this authorization and consent.

(End of clause)

Alternate I (APR 1984). As prescribed in 27.201-2 (a)(2), substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) The Government authorizes and consents to all use and manufacture of any invention described in and covered by a United States patent in the performance of this contract or any subcontract at any tier.

Alternate II (APR 1984). As prescribed in 27.201-2 (a)(3), substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) The Government authorizes and consents to all use and manufacture in the performance of any order at any tier or subcontract at any tier placed under this contract for communication services and facilities for which rates, charges, and tariffs are *not* established by a government regulatory body, of any invention described in and covered by a United States patent-

(1) Embodied in the structure or composition of any article the delivery of which is accepted by the Government under this contract; or

(2) Used in machinery, tools, or methods whose use necessarily results from compliance by the Contractor or a subcontractor with specifications or written provisions forming a part of this contract or with specific written instructions given by the Contracting Officer directing the manner of performance.

52.227-2 Notice and Assistance Regarding Patent and Copyright Infringement.

As prescribed in 27.201-2(b), insert the following clause:

NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT (JUN 2020)

(a) The Contractor shall report to the Contracting Officer, promptly and in reasonable written detail, each notice or claim of patent or copyright infringement based on the performance of this contract of which the Contractor has knowledge.

(b) In the event of any claim or suit against the Government on account of any alleged patent or copyright infringement arising out of the performance of this contract or out of the use of any supplies furnished or work or services performed under this contract, the Contractor shall furnish to the Government, when requested by the Contracting Officer, all evidence and information in the Contractor's possession pertaining to such claim or suit. Such evidence and information shall be furnished at the expense of the Government except where the Contractor has agreed to indemnify the Government.

(c) The Contractor shall include the substance of this clause, including this paragraph (c), in all subcontracts that are expected to exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation (FAR) 2.101 on the date of subcontract award.

(End of clause)

52.227-3 Patent Indemnity.

As prescribed in 27.201-2(c)(1), insert the following clause:

PATENT INDEMNITY (APR 1984)

(a) The Contractor shall indemnify the Government and its officers, agents, and employees against liability, including costs, for infringement of any United States patent (except a patent issued upon an application that is now or may hereafter be withheld from issue pursuant to a Secrecy Order under 35 U.S.C. 181) arising out of the manufacture or delivery of supplies, the performance of services, or the construction, alteration, modification, or repair of real property (hereinafter referred to as "construction work") under this contract, or out of the use or disposal by or for the account of the Government of such supplies or construction work.

(b) This indemnity shall not apply unless the Contractor shall have been informed as soon as practicable by the Government of the suit or action alleging such infringement and shall have been given such opportunity as is afforded by applicable laws, rules, or regulations to participate in its defense. Further, this indemnity shall not apply to—

(1) An infringement resulting from compliance with specific written instructions of the Contracting Officer directing a change in the supplies to be delivered or in the materials or equipment to be used, or directing a manner of performance of the contract not normally used by the Contractor;

(2) An infringement resulting from addition to or change in supplies or components furnished or construction work performed that was made subsequent to delivery or performance; or

(3) A claimed infringement that is unreasonably settled without the consent of the Contractor, unless required by final decree of a court of competent jurisdiction.

(End of clause)

Alternate I (APR 1984). As prescribed in 27.201-2 (c)(2), add the following paragraph (c) to the basic clause:

(c) This patent indemnification shall not apply to the following items:

_____ *[Contracting Officer list and/or identify the items to be excluded from this indemnity.]*

Alternate II (APR 1984). As prescribed in 27.201-2 (c)(2), add the following paragraph (c) to the basic clause:

(c) This patent indemnification shall cover the following items:

_____ *[List or identify the items to be included under this indemnity.]*

Alternate III (JUN 2020). As prescribed in 27.201-2 (c)(3), add the following paragraph to the basic clause:

As to subcontracts at any tier for communication service, this clause shall apply only to individual communication service authorizations over the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, issued under this contract and covering those communications services and facilities-

(1) That are or have been sold or offered for sale by the Contractor to the public,

(2) That can be provided over commercially available equipment, or

(3) That involve relatively minor modifications.

52.227-4 Patent Indemnity-Construction Contracts.

As prescribed in 27.201-2(d)(1), insert the following clause:

PATENT INDEMNITY-CONSTRUCTION CONTRACTS (DEC 2007)

Except as otherwise provided, the Contractor shall indemnify the Government and its officers, agents, and employees against liability, including costs and expenses, for infringement of any United States patent (except a patent issued upon an application that is now or may hereafter be withheld from issue pursuant to a Secrecy Order under 35 U.S.C. 181) arising out of performing this contract or out of the use or disposal by or for the account of the Government of supplies furnished or work performed under this contract.

(End of clause)

Alternate I (DEC 2007). As prescribed in 27.201-2 (d)(2), designate the first paragraph of the basic clause as paragraph (a) and add the following paragraph (b) to the basic clause:

(b) This patent indemnification shall not apply to the following items:

_____ *[Contracting Officer list the items to be excluded.]*

52.227-5 Waiver of Indemnity.

As prescribed in 27.201-2(e), insert the following clause:

WAIVER OF INDEMNITY (APR 1984)

Any provision or clause of this contract to the contrary notwithstanding, the Government hereby authorizes and consents to the use and manufacture, solely in performing this contract, of any invention covered by the United States patents identified below and waives indemnification by the Contractor with respect to such patents:

_____ *[Contracting Officer identify the patents by number or by other means if more appropriate.]*

(End of clause)

52.227-6 Royalty Information.

As prescribed in 27.202-5(a)(1), insert the following provision:

ROYALTY INFORMATION (APR 1984)

(a) *Cost or charges for royalties*. When the response to this solicitation contains costs or charges for royalties totaling more than $250, the following information shall be included in the response relating to each separate item of royalty or license fee:

(1) Name and address of licensor.

(2) Date of license agreement.

(3) Patent numbers, patent application serial numbers, or other basis on which the royalty is payable.

(4) Brief description, including any part or model numbers of each contract item or component on which the royalty is payable.

(5) Percentage or dollar rate of royalty per unit.

(6) Unit price of contract item.

(7) Number of units.

(8) Total dollar amount of royalties.

(b) *Copies of current licenses*. In addition, if specifically requested by the Contracting Officer before execution of the contract, the offeror shall furnish a copy of the current license agreement and an identification of applicable claims of specific patents.

(End of provision)

Alternate I (APR 1984). As prescribed in 27.202-5 (a)(2), substitute the following for the introductory portion of paragraph (a) of the basic provision:

When the response to this solicitation covers charges for special construction or special assembly that contain costs or charges for royalties totaling more than $250, the following information shall be included in the response relating to each separate item of royalty or license fee:

52.227-7 [Reserved]

(DEVIATION DATE)

52.227-8 [Reserved]

52.227-9 Refund of Royalties.

As prescribed in 27.202-5(c), insert the following clause:

REFUND OF ROYALTIES (APR 1984)

(a) The contract price includes certain amounts for royalties payable by the Contractor or subcontractors or both, which amounts have been reported to the Contracting Officer.

(b) The term "royalties" as used in this clause refers to any costs or charges in the nature of royalties, license fees, patent or license amortization costs, or the like, for the use of or for rights in patents and patent applications in connection with performing this contract or any subcontract hereunder.

(c) The Contractor shall furnish to the Contracting Officer, before final payment under this contract, a statement of royalties paid or required to be paid in connection with performing this contract and subcontracts hereunder together with the reasons.

(d) The Contractor will be compensated for royalties reported under paragraph (c) of this clause, only to the extent that such royalties were included in the contract price and are determined by the Contracting Officer to be properly chargeable to the Government and allocable to the contract. To the extent that any royalties that are included in the contract price are not in fact paid by the Contractor or are determined by the Contracting Officer not to be properly chargeable to the Government and allocable to the contract, the contract price shall be reduced. Repayment or credit to the Government shall be made as the Contracting Officer directs.

(e) If, at any time within 3 years after final payment under this contract, the Contractor for any reason is relieved in whole or in part from the payment of the royalties included in the final contract price as adjusted pursuant to paragraph (d) of this clause, the Contractor shall promptly notify the Contracting Officer of that fact and shall reimburse the Government in a corresponding amount.

(f) The substance of this clause, including this paragraph (f), shall be included in any subcontract in which the amount of royalties reported during negotiation of the subcontract exceeds $250.

(End of clause)

52.227-10 Filing of Patent Applications-Classified Subject Matter.

As prescribed at 27.203-2 , insert the following clause:

FILING OF PATENT APPLICATIONS-CLASSIFIED SUBJECT MATTER (DEC 2007)

(a) Before filing or causing to be filed a patent application in the United States disclosing any subject matter of this contract classified "Secret" or higher, the Contractor shall, citing the 30-day provision below, transmit the proposed application to the Contracting Officer. The Government shall determine whether, for reasons of national security, the application should be placed under an order of secrecy, sealed in accordance with the provision of 35 U.S.C. 181-188, or the issuance of a patent otherwise delayed under pertinent United States statutes or regulations. The Contractor shall observe any instructions of the Contracting Officer regarding the manner of delivery of the patent application to the United States Patent Office, but the Contractor shall not be denied the right to file the application. If the Contracting Officer shall not have given any such instructions within 30 days from the date of mailing or other transmittal of the proposed application, the Contractor may file the application.

(b) Before filing a patent application in the United States disclosing any subject matter of this contract classified "Confidential," the Contractor shall furnish to the Contracting Officer a copy of the application for Government determination whether, for reasons of national security, the application should be placed under an order of secrecy or the issuance of a patent should be otherwise delayed under pertinent United States statutes or regulations.

(c) Where the subject matter of this contract is classified for reasons of security, the Contractor shall not file, or cause to be filed, in any country other than in the United States as provided in paragraphs (a) and (b) of this clause, an application or registration for a patent containing any of the subject matter of this contract without first obtaining written approval of the Contracting Officer.

(d) When filing any patent application coming within the scope of this clause, the Contractor shall observe all applicable security regulations covering the transmission of classified subject matter and shall promptly furnish to the Contracting Officer the serial number, filing date, and name of the country of any such application. When transmitting the application to the United States Patent Office, the Contractor shall by separate letter identify by agency and number the contract or contracts that require security classification markings to be placed on the application.

(e) The Contractor shall include the substance of this clause, including this paragraph (e), in all subcontracts that cover or are likely to cover classified subject matter.

(End of clause)

52.227-11 Patent Rights-Ownership by the Contractor.

As prescribed in 27.303(b)(1), insert the following clause:

PATENT RIGHTS-OWNERSHIP BY THE CONTRACTOR (MAY 2014)

(a) As used in this clause-

Invention means any invention or discovery that is or may be patentable or otherwise protectable under title 35 of the U.S. Code, or any variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq*.)

Made means-

(1) When used in relation to any invention other than a plant variety, the conception or first actual reduction to practice of the invention; or

(2) When used in relation to a plant variety, that the Contractor has at least tentatively determined that the variety has been reproduced with recognized characteristics.

Nonprofit organization means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)), or any nonprofit scientific or educational organization qualified under a State nonprofit organization statute.

"Practical application" means to manufacture, in the case of a composition of product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

Subject invention means any invention of the Contractor made in the performance of work under this contract.

(b) *Contractor's rights.* (1) *Ownership*. The Contractor may retain ownership of each subject invention throughout the world in accordance with the provisions of this clause.

(2) *License.* (i) The Contractor shall retain a nonexclusive royalty-free license throughout the world in each subject invention to which the Government obtains title, unless the Contractor fails to disclose the invention within the times specified in paragraph (c) of this clause. The Contractor's license extends to any domestic subsidiaries and affiliates within the corporate structure of which the Contractor is a part, and includes the right to grant sublicenses to the extent the Contractor was legally obligated to do so at contract award. The license is transferable only with the written approval of the agency, except when transferred to the successor of that part of the Contractor's business to which the invention pertains.

(ii) The Contractor's license may be revoked or modified by the agency to the extent necessary to achieve expeditious practical application of the subject invention in a particular country in accordance with the procedures in FAR 27.302(i)(2) and 27.304-1(f).

(c) *Contractor's obligations.* (1) The Contractor shall disclose in writing each subject invention to the Contracting Officer within 2 months after the inventor discloses it in writing to Contractor personnel responsible for patent matters. The

disclosure shall identify the inventor(s) and this contract under which the subject invention was made. It shall be sufficiently complete in technical detail to convey a clear understanding of the subject invention. The disclosure shall also identify any publication, on sale (*i.e.*, sale or offer for sale), or public use of the subject invention, or whether a manuscript describing the subject invention has been submitted for publication and, if so, whether it has been accepted for publication. In addition, after disclosure to the agency, the Contractor shall promptly notify the Contracting Officer of the acceptance of any manuscript describing the subject invention for publication and any on sale or public use.

(2) The Contractor shall elect in writing whether or not to retain ownership of any subject invention by notifying the Contracting Officer within 2 years of disclosure to the agency. However, in any case where publication, on sale, or public use has initiated the 1-year statutory period during which valid patent protection can be obtained in the United States, the period for election of title may be shortened by the agency to a date that is no more than 60 days prior to the end of the statutory period.

(3) The Contractor shall file either a provisional or a nonprovisional patent application or a Plant Variety Protection Application on an elected subject invention within 1 year after election. However, in any case where a publication, on sale, or public use has initiated the 1-year statutory period during which valid patent protection can be obtained in the United States, the Contractor shall file the application prior to the end of that statutory period. If the Contractor files a provisional application, it shall file a nonprovisional application within 10 months of the filing of the provisional application. The Contractor shall file patent applications in additional countries or international patent offices within either 10 months of the first filed patent application (whether provisional or nonprovisional) or 6 months from the date permission is granted by the Commissioner of Patents to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(4) The Contractor may request extensions of time for disclosure, election, or filing under paragraphs (c)(1), (c)(2), and (c)(3) of this clause.

(d) *Government's rights*- (1) *Ownership.* The Contractor shall assign to the agency, on written request, title to any subject invention-

(i) If the Contractor fails to disclose or elect ownership to the subject invention within the times specified in paragraph (c) of this clause, or elects not to retain ownership; provided, that the agency may request title only within 60 days after learning of the Contractor's failure to disclose or elect within the specified times.

(ii) In those countries in which the Contractor fails to file patent applications within the times specified in paragraph (c) of this clause; provided, however, that if the Contractor has filed a patent application in a country after the times specified in paragraph (c) of this clause, but prior to its receipt of the written request of the agency, the Contractor shall continue to retain ownership in that country.

(iii) In any country in which the Contractor decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in reexamination or opposition proceeding on, a patent on a subject invention.

(2) *License.* If the Contractor retains ownership of any subject invention, the Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on its behalf, the subject invention throughout the world.

(e) *Contractor action to protect the Government's interest.* (1) The Contractor shall execute or have executed and promptly deliver to the agency all instruments necessary to-

(i) Establish or confirm the rights the Government has throughout the world in those subject inventions in which the Contractor elects to retain ownership; and

(ii) Assign title to the agency when requested under paragraph (d) of this clause and to enable the Government to obtain patent protection and plant variety protection for that subject invention in any country.

(2) The Contractor shall require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in the Contractor's format, each subject invention in order that the Contractor can comply with the disclosure provisions of paragraph (c) of this clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. The disclosure format should require, as a minimum, the information required by paragraph (c)(1) of this clause. The Contractor shall instruct such employees, through employee agreements or other suitable educational programs, as to the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(3) The Contractor shall notify the Contracting Officer of any decisions not to file a nonprovisional patent application, continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than 30 days before the expiration of the response or filing period required by the relevant patent office.

(4) The Contractor shall include, within the specification of any United States nonprovisional patent or plant variety protection application and any patent or plant variety protection certificate issuing thereon covering a subject invention, the following statement, "This invention was made with Government support under (identify the contract) awarded by (identify the agency). The Government has certain rights in the invention."

(f) *Reporting on utilization of subject inventions*. The Contractor shall submit, on request, periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining utilization of the subject invention that are being made by the Contractor or its licensees or assignees. The reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and other data and information as the agency may reasonably specify. The Contractor also shall provide additional reports as may be requested by the agency in connection with any march-in proceeding undertaken by the agency in accordance with paragraph (h) of this clause. The Contractor also shall mark any utilization report as confidential/proprietary to help prevent inadvertent release outside the Government. As required by 35 U.S.C. 202(c)(5), the agency will not disclose that information to persons outside the Government without the Contractor's permission.

(g) *Preference for United States industry.* Notwithstanding any other provision of this clause, neither the Contractor nor any assignee shall grant to any person the exclusive right to use or sell any subject invention in the United States unless the person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for an agreement may be waived by the agency upon a showing by the Contractor or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States, or that under the circumstances domestic manufacture is not commercially feasible.

(h) *March-in rights.* The Contractor acknowledges that, with respect to any subject invention in which it has retained ownership, the agency has the right to require licensing pursuant to 35 U.S.C. 203 and 210(c), and in accordance with the procedures in 37 CFR 401.6 and any supplemental regulations of the agency in effect on the date of contract award.

(i) Special provisions for contracts with nonprofit organizations. If the Contractor is a nonprofit organization, it shall-

(1) Not assign rights to a subject invention in the United States without the written approval of the agency, except where an assignment is made to an organization that has as one of its primary functions the management of inventions, *provided*, that the assignee shall be subject to the same provisions as the Contractor;

(2) Share royalties collected on a subject invention with the inventor, including Federal employee co-inventors (but through their agency if the agency deems it appropriate) when the subject invention is assigned in accordance with 35 U.S.C. 202(e) and 37 CFR 401.10;

(3) Use the balance of any royalties or income earned by the Contractor with respect to subject inventions, after payment of expenses (including payments to inventors) incidental to the administration of subject inventions for the support of scientific research or education; and

(4) Make efforts that are reasonable under the circumstances to attract licensees of subject inventions that are small business concerns, and give a preference to a small business concern when licensing a subject invention if the Contractor determines that the small business concern has a plan or proposal for marketing the invention which, if executed, is equally as likely to bring the invention to practical application as any plans or proposals from applicants that are not small business concerns; *provided*, that the Contractor is also satisfied that the small business concern has the capability and resources to carry out its plan or proposal. The decision whether to give a preference in any specific case will be at the discretion of the Contractor.

(5) Allow the Secretary of Commerce to review the Contractor's licensing program and decisions regarding small business applicants, and negotiate changes to its licensing policies, procedures, or practices with the Secretary of Commerce when the Secretary's review discloses that the Contractor could take reasonable steps to more effectively implement the requirements of paragraph (i)(4) of this clause.

(j) *Communications. [Complete according to agency instructions.]*

(k) *Subcontracts.* (1) The Contractor shall include the substance of this clause, including this paragraph (k), in all subcontracts for experimental, developmental, or research work to be performed by a small business concern or nonprofit organization.

(2) The Contractor shall include in all other subcontracts for experimental, developmental, or research work the substance of the patent rights clause required by FAR subpart 27.3.

(3) At all tiers, the patent rights clause must be modified to identify the parties as follows: references to the Government are not changed, and the subcontractor has all rights and obligations of the Contractor in the clause. The

Contractor shall not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.

(4) In subcontracts, at any tier, the agency, the subcontractor, and the Contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and the agency with respect to the matters covered by the clause; provided, however, that nothing in this paragraph is intended to confer any jurisdiction under the Contract Disputes statute in connection with proceedings under paragraph (h) of this clause.

(End of clause)

Alternate I (JUN 1989). As prescribed in 27.303 (b)(3), add the following sentence at the end of paragraph (d)(2) of the basic clause:

The license shall include the right of the Government to sublicense foreign governments, their nationals and international organizations pursuant to the following treaties or international agreements: _____*

[**Contracting Officer complete with the names of applicable existing treaties or international agreements. The above language is not intended to apply to treaties or agreements that are in effect on the date of the award but are not listed.*]

Alternate II (DEC 2007). As prescribed in 27.303 (b)(4), add the following sentence at the end of paragraph (d)(2) of the basic clause:

The agency reserves the right to unilaterally amend this contract to identify specific treaties or international agreements entered into by the Government before or after the effective date of the contract and effectuate those license or other rights that are necessary for the Government to meet its obligations to foreign governments, their nationals, and international organizations under the treaties or international agreements with respect to subject inventions made after the date of the amendment.

Alternate III (JUN 1989). As prescribed in 27.303 (b)(5), substitute the following paragraph (i)(3) in place of paragraph (i)(3) of the basic clause:

(3) After payment of patenting costs, licensing costs, payments to inventors, and other expenses incidental to the administration of subject inventions, the balance of any royalties or income earned and retained by the Contractor during any fiscal year on subject inventions under this or any successor contract containing the same requirement, up to any amount equal to 5 percent of the budget of the facility for that fiscal year, shall be used by the Contractor for the scientific research, development, and education consistent with the research and development mission and objectives of the facility, including activities that increase the licensing potential of other inventions of the facility. If the balance exceeds 5 percent, 75 percent of the excess above 5 percent shall be paid by the Contractor to the Treasury of the United States and the remaining 25 percent shall be used by the Contractor only for the same purposes as described above. To the extent it provides the most effective technology transfer, the licensing of subject inventions shall be administered by Contractor employees on location at the facility.

Alternate IV (JUN 1989). As prescribed in 27.303 (b)(6), include the following paragraph (e)(5) in paragraph (e) of the basic clause:

(5) The Contractor shall establish and maintain active and effective procedures to ensure that subject inventions are promptly identified and timely disclosed, and shall submit a description of the procedures to the Contracting Officer so that the Contracting Officer may evaluate and determine their effectiveness.

Alternate V (DEC 2007). As prescribed in 27.303 (b)(7), include the following paragraph (d)(3) in paragraph (d) of the basic clause:

(d)(3) *CRADA licensing.* If the Contractor performs services at a Government owned and operated laboratory or at a Government owned and Contractor operated laboratory directed by the Government to fulfill the Government's obligations under a Cooperative Research and Development Agreement (CRADA) authorized by 15 U.S.C. 3710a, the Government may require the Contractor to negotiate an agreement with the CRADA collaborating party or parties regarding the allocation of rights to any subject invention the Contractor makes, solely or jointly, under the CRADA. The agreement shall be negotiated prior to the Contractor undertaking the CRADA work or, with the permission of the Government, upon the identification of a subject invention. In the absence of such an agreement, the Contractor agrees to grant the collaborating party or parties an option for a license in its inventions of the same scope and terms set forth in the CRADA for inventions made by the Government.

52.227-12 [Reserved]

52.227-13 Patent Rights-Ownership by the Government.

As prescribed at 27.303(e), insert the following clause:

PATENT RIGHTS-OWNERSHIP BY THE GOVERNMENT (DEC 2007)

(a) *Definitions.* As used in this clause-

Invention means any invention or discovery that is or may be patentable or otherwise protectable under title 35 of the U.S. Code or any variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*)

Made means-

(1) When used in relation to any invention other than a plant variety, means the conception or first actual reduction to practice of the invention; or

(2) When used in relation to a plant variety, means that the Contractor has at least tentatively determined that the variety has been reproduced with recognized characteristics.

Practical application means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

Subject invention means any invention of the Contractor made in the performance of work under this contract.

(b) *Ownership.* (1) *Assignment to the Government.* The Contractor shall assign to the Government title throughout the world to each subject invention, except to the extent that rights are retained under paragraphs (b)(2) and (d) of this clause.

(2) *Greater rights determinations.* (i) The Contractor, or an employee-inventor after consultation with the Contractor, may request greater rights than the nonexclusive license provided in paragraph (d) of this clause. The request for a greater rights must be submitted to the Contracting Officer at the time of the first disclosure of the subject invention pursuant to paragraph (e)(2) of this clause, or not later than 8 months thereafter, unless a longer period is authorized in writing by the Contracting Officer for good cause shown in writing by the Contractor. Each determination of greater rights under this contract normally shall be subject to paragraph (c) of this clause, and to the reservations and conditions deemed to be appropriate by the agency.

(ii) Upon request, the Contractor shall provide the filing date, serial number and title, a copy of the patent application (including an English-language version if filed in a language other than English), and patent number and issue date for any subject invention in any country for which the Contractor has retained title.

(iii) Upon request, the Contractor shall furnish the agency an irrevocable power to inspect and make copies of the patent application file.

(c) *Minimum rights acquired by the Government.* (1) Regarding each subject invention to which the Contractor retains ownership, the Contractor agrees as follows:

(i) The Government will have a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on its behalf, the subject invention throughout the world.

(ii) The agency has the right to require licensing pursuant to 35 U.S.C. 203 and 210(c) and in accordance with the procedures set forth in 37 CFR 401.6 and any supplemental regulations of the agency in effect on the date of the contract award.

(iii) Upon request, the Contractor shall submit periodic reports no more frequently than annually on the utilization, or efforts to obtain utilization, of a subject invention by the Contractor or its licensees or assignees. The reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and any other data and information as the agency may reasonably specify. The Contractor also shall provide additional reports as may be requested by the agency in connection with any march-in proceedings undertaken by the agency in accordance with paragraph (c)(1)(ii) of this clause. To the extent data or information supplied under this section is considered by the Contractor, or its licensees, or assignees to be privileged and confidential and is so marked, the agency, to the extent permitted by law, will not disclose such information to persons outside the Government.

(iv) When licensing a subject invention, the Contractor shall-

(A) Ensure that no royalties are charged on acquisitions involving Government funds, including funds derived through a Military Assistance Program of the Government or otherwise derived through the Government;

(B) Refund any amounts received as royalty charges on a subject invention in acquisitions for, or on behalf of, the Government;

(C) Provide for this refund in any instrument transferring rights in the subject invention to any party.

(v) When transferring rights in a subject invention, the Contractor shall provide for the Government's rights set forth in paragraphs (c)(1)(i) through (c)(1)(iv) of this clause.

(2) Nothing contained in paragraph (c) of this clause shall be deemed to grant to the Government rights in any invention other than a subject invention.

(d) Minimum rights to the Contractor. (1) The Contractor is hereby granted a revocable, nonexclusive, paid-up license in each patent application filed in any country on a subject invention and any resulting patent in which the Government obtains title, unless the Contractor fails to disclose the subject invention within the times specified in paragraph (e)(2) of this clause. The Contractor's license extends to any of its domestic subsidiaries and affiliates within the corporate structure of which the Contractor is a part, and includes the right to grant sublicenses to the extent the Contractor was legally obligated to do so at contract award. The license is transferable only with the written approval of the agency except when transferred to the successor of that part of the Contractor's business to which the subject invention pertains.

(2) The Contractor's license may be revoked or modified by the agency to the extent necessary to achieve expeditious practical application of the subject invention in a particular country in accordance with the procedures in FAR 27.302(i)(2) and 27.304-1(f).

(3) When the Government elects not to apply for a patent in any foreign country, the Contractor retains rights in that foreign country to apply for a patent, subject to the Government's rights in paragraph (c)(1) of this clause.

(e) *Invention identification, disclosures, and reports.* (1) The Contractor shall establish and maintain active and effective procedures to educate its employees in order to assure that subject inventions are promptly identified and disclosed to Contractor personnel responsible for patent matters. The procedures shall include the maintenance of laboratory notebooks or equivalent records and other records as are reasonably necessary to document the conception and/or the first actual reduction to practice of subject inventions, and records that show the procedures for identifying and disclosing subject inventions are followed. Upon request, the Contractor shall furnish the Contracting Officer a description of these procedures for evaluation and for a determination as to their effectiveness.

(2) The Contractor shall disclose in writing each subject invention to the Contracting Officer within 2 months after the inventor discloses it in writing to Contractor personnel responsible for patent matters or, if earlier, within 6 months after the Contractor becomes aware that a subject invention has been made, but in any event before any on sale (*i.e.*, sale or offer for sale), public use, or publication of the subject invention known to the Contractor. The disclosure shall identify the contract under which the subject invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding of the subject invention. The disclosure shall also identify any publication, on sale, or public use of the subject invention and whether a manuscript describing the subject invention has been submitted for publication and, if so, whether it has been accepted for publication. In addition, after disclosure to the agency, the Contractor shall promptly notify the Contracting Officer of the acceptance of any manuscript describing the subject invention for publication and any on sale or public use.

(3) The Contractor shall furnish the Contracting Officer the following:

(i) Interim reports every 12 months (or a longer period as may be specified by the Contracting Officer) from the date of the contract, listing subject inventions during that period, and stating that all subject inventions have been disclosed (or that there are none) and that the procedures required by paragraph (e)(1) of this clause have been followed.

(ii) A final report, within 3 months after completion of the contracted work, listing all subject inventions or stating that there were none, and listing all subcontracts at any tier containing a patent rights clause or stating that there were none.

(4) The Contractor shall require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in the Contractor's format each subject invention in order that the Contractor can comply with the disclosure provisions of paragraph (c) of this clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by paragraph (e)(2) of this clause. The Contractor shall instruct such employees, through employee agreements or other suitable educational programs, as to the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(5) Subject to FAR 27.302(i), the Contractor agrees that the Government may duplicate and disclose subject invention disclosures and all other reports and papers furnished or required to be furnished pursuant to this clause.

(f) Examination of records relating to inventions. (1) The Contracting Officer or any authorized representative shall, until 3 years after final payment under this contract, have the right to examine any books (including laboratory notebooks), records, and documents of the Contractor relating to the conception or first actual reduction to practice of inventions in the same field of technology as the work under this contract to determine whether-

(i) Any inventions are subject inventions;

(ii) The Contractor has established and maintains the procedures required by paragraphs (e)(1) and (e)(4) of this clause; and

(iii) The Contractor and its inventors have complied with the procedures.

(2) The Contractor shall disclose to the Contracting Officer, for the determination of ownership rights, any unreported invention that the Contracting Officer believes may be a subject invention.

(3) Any examination of records under paragraph (f) of this clause will be subject to appropriate conditions to protect the confidentiality of the information involved.

(g) Withholding of payment. (This paragraph does not apply to subcontracts.) (1) Any time before final payment under this contract, the Contracting Officer may, in the Government's interest, withhold payment until a reserve not exceeding $50,000 or 5 percent of the amount of this contract, whichever is less, shall have been set aside if, in the Contracting Officer's opinion, the Contractor fails to-

(i) Establish, maintain, and follow effective procedures for identifying and disclosing subject inventions pursuant to paragraph (e)(1) of this clause;

(ii) Disclose any subject invention pursuant to paragraph (e)(2) of this clause;

(iii) Deliver acceptable interim reports pursuant to paragraph (e)(3)(i) of this clause; or

(iv) Provide the information regarding subcontracts pursuant to paragraph (i)(4) of this clause.

(2) The Contracting Officer will withhold the reserve or balance until the Contracting Officer has determined that the Contractor has rectified whatever deficiencies exist and has delivered all reports, disclosures, and other information required by this clause.

(3) The Contracting Officer will not make final payment under this contract before the Contractor delivers to the Contracting Officer, as required by this clause, all disclosures of subject inventions, an acceptable final report, and all due confirmatory instruments.

(4) The Contracting Officer may decrease or increase the sums withheld up to the maximum authorized. The Contracting Officer will not withhold any amount under this paragraph while the amount specified by this paragraph is being withheld under other provisions of the contract. The withholding of any amount or the subsequent payment shall not be construed as a waiver of any Government rights.

(h) *Preference for United States industry*. Unless provided otherwise, neither the Contractor nor any assignee shall grant to any person the exclusive right to use or sell any subject invention in the United States unless the person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement may be waived by the agency upon a showing by the Contractor or assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that, under the circumstances, domestic manufacture is not commercially feasible.

(i) Subcontracts. (1) The Contractor shall include the substance of the patent rights clause required by FAR subpart 27.3 in all subcontracts for experimental, developmental, or research work. The prescribed patent rights clause must be modified to identify the parties as follows: references to the Government are not changed, and the subcontractor has all rights and obligations of the Contractor in the clause. The Contractor shall not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.

(2) In the event of a refusal by a prospective subcontractor to accept the clause, the Contractor-

(i) Shall promptly submit a written notice to the Contracting Officer setting forth the subcontractor's reasons for such refusal and other pertinent information that may expedite disposition of the matter; and

(ii) Shall not proceed with such subcontract without the written authorization of the Contracting Officer.

(3) In subcontracts at any tier, the agency, the subcontractor, and the Contractor agree that the mutual obligations of the parties created by the patent rights clause constitute a contract between the subcontractor and the agency with respect to those matters covered by this clause.

(4) The Contractor shall promptly notify the Contracting Officer in writing upon the award of any subcontract at any tier containing a patent rights clause by identifying the subcontractor, the applicable patent rights clause, the work to be performed under the subcontract, and the dates of award and estimated completion. Upon request of the Contracting Officer,

the Contractor shall furnish a copy of such subcontract, and, no more frequently than annually, a listing of the subcontracts that have been awarded.

(End of clause)

Alternate I (JUN 1989). As prescribed in 27.303 (e) (4), add the following sentence at the end of paragraph (c)(1)(i) of the basic clause:

The license will include the right of the Government to sublicense foreign governments, their nationals, and international organizations pursuant to the following treaties or international agreements: _____* [**Contracting Officer complete with the names of applicable existing treaties or international agreements. The above language is not intended to apply to treaties or agreements that are in effect on the date of the award but are not listed.*]

Alternate II (DEC 2007). As prescribed in 27.303 (e)(5), add the following sentence at the end of paragraph (c)(1)(i) of the basic clause:

The agency reserves the right to unilaterally amend this contract to identify specific treaties or international agreements entered into by the Government before or after the effective date of this contract, and effectuate those license or other rights that are necessary for the Government to meet its obligations to foreign governments, their nationals, and international organizations under treaties or international agreements with respect to subject inventions made after the date of the amendment.

52.227-14 Rights in Data-General.

As prescribed in 27.409(b)(1), insert the following clause with any appropriate alternates:

RIGHTS IN DATA-GENERAL (MAY 2014)

(a) *Definitions.* As used in this clause-

Computer database or "database means" a collection of recorded information in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

Computer software-

(1) Means (i) Computer programs that comprise a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations; and

(ii) Recorded information comprising source code listings, design details, algorithms, processes, flow charts, formulas, and related material that would enable the computer program to be produced, created, or compiled.

(2) Does not include computer databases or computer software documentation.

Computer software documentation means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

Data means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information.

Form, fit, and function data means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, and data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements. For computer software it means data identifying source, functional characteristics, and performance requirements but specifically excludes the source code, algorithms, processes, formulas, and flow charts of the software.

Limited rights means the rights of the Government in limited rights data as set forth in the Limited Rights Notice of paragraph (g)(3) if included in this clause.

Limited rights data means data, other than computer software, that embody trade secrets or are commercial or financial and confidential or privileged, to the extent that such data pertain to items, components, or processes developed at private expense, including minor modifications.

Restricted computer software means computer software developed at private expense and that is a trade secret, is commercial or financial and confidential or privileged, or is copyrighted computer software, including minor modifications of the computer software.

Restricted rights, as used in this clause, means the rights of the Government in restricted computer software, as set forth in a Restricted Rights Notice of paragraph (g) if included in this clause, or as otherwise may be provided in a collateral agreement incorporated in and made part of this contract, including minor modifications of such computer software.

Technical data means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). This term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. The term includes recorded information of a scientific or technical nature that is included in computer databases (See 41 U.S.C. 116).

Unlimited rights means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

(b) Allocation of rights. (1) Except as provided in paragraph (c) of this clause, the Government shall have unlimited rights in-

(i) Data first produced in the performance of this contract;

(ii) Form, fit, and function data delivered under this contract;

(iii) Data delivered under this contract (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under this contract; and

(iv) All other data delivered under this contract unless provided otherwise for limited rights data or restricted computer software in accordance with paragraph (g) of this clause.

(2) The Contractor shall have the right to-

(i) Assert copyright in data first produced in the performance of this contract to the extent provided in paragraph (c)(1) of this clause;

(ii) Use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Contractor in the performance of this contract, unless provided otherwise in paragraph (d) of this clause;

(iii) Substantiate the use of, add, or correct limited rights, restricted rights, or copyright notices and to take other appropriate action, in accordance with paragraphs (e) and (f) of this clause; and

(iv) Protect from unauthorized disclosure and use those data that are limited rights data or restricted computer software to the extent provided in paragraph (g) of this clause.

(c) Copyright- (1) Data first produced in the performance of this contract. (i) Unless provided otherwise in paragraph (d) of this clause, the Contractor may, without prior approval of the Contracting Officer, assert copyright in scientific and technical articles based on or containing data first produced in the performance of this contract and published in academic, technical or professional journals, symposia proceedings, or similar works. The prior, express written permission of the Contracting Officer is required to assert copyright in all other data first produced in the performance of this contract.

(ii) When authorized to assert copyright to the data, the Contractor shall affix the applicable copyright notices of 17 U.S.C. 401 or 402, and an acknowledgment of Government sponsorship (including contract number).

(iii) For data other than computer software, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license in such copyrighted data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly by or on behalf of the Government. For computer software, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license in such copyrighted computer software to reproduce, prepare derivative works, and perform publicly and display publicly (but not to distribute copies to the public) by or on behalf of the Government.

(2) *Data not first produced in the performance of this contract.* The Contractor shall not, without the prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data not first produced in the performance of this contract unless the Contractor-

(i) Identifies the data; and

(ii) Grants to the Government, or acquires on its behalf, a license of the same scope as set forth in paragraph (c)(1) of this clause or, if such data are restricted computer software, the Government shall acquire a copyright license as set forth in paragraph (g)(4) of this clause (if included in this contract) or as otherwise provided in a collateral agreement incorporated in or made part of this contract.

(3) *Removal of copyright notices.* The Government will not remove any authorized copyright notices placed on data pursuant to this paragraph (c), and will include such notices on all reproductions of the data.

(d) *Release, publication, and use of data.* The Contractor shall have the right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Contractor in the performance of this contract, except-

(1) As prohibited by Federal law or regulation (*e.g.*, export control or national security laws or regulations);

(2) As expressly set forth in this contract; or

(3) If the Contractor receives or is given access to data necessary for the performance of this contract that contain restrictive markings, the Contractor shall treat the data in accordance with such markings unless specifically authorized otherwise in writing by the Contracting Officer.

(e) Unauthorized marking of data. (1) Notwithstanding any other provisions of this contract concerning inspection or acceptance, if any data delivered under this contract are marked with the notices specified in paragraph (g)(3) or (g) (4) if included in this clause, and use of the notices is not authorized by this clause, or if the data bears any other restrictive or limiting markings not authorized by this contract, the Contracting Officer may at any time either return the data to the Contractor, or cancel or ignore the markings. However, pursuant to 41 U.S.C. 4703, the following procedures shall apply prior to canceling or ignoring the markings.

(i) The Contracting Officer will make written inquiry to the Contractor affording the Contractor 60 days from receipt of the inquiry to provide written justification to substantiate the propriety of the markings;

(ii) If the Contractor fails to respond or fails to provide written justification to substantiate the propriety of the markings within the 60-day period (or a longer time approved in writing by the Contracting Officer for good cause shown), the Government shall have the right to cancel or ignore the markings at any time after said period and the data will no longer be made subject to any disclosure prohibitions.

(iii) If the Contractor provides written justification to substantiate the propriety of the markings within the period set in paragraph (e)(1)(i) of this clause, the Contracting Officer will consider such written justification and determine whether or not the markings are to be cancelled or ignored. If the Contracting Officer determines that the markings are authorized, the Contractor will be so notified in writing. If the Contracting Officer determines, with concurrence of the head of the contracting activity, that the markings are not authorized, the Contracting Officer will furnish the Contractor a written determination, which determination will become the final agency decision regarding the appropriateness of the markings unless the Contractor files suit in a court of competent jurisdiction within 90 days of receipt of the Contracting Officer's decision. The Government will continue to abide by the markings under this paragraph (e)(1)(iii) until final resolution of the matter either by the Contracting Officer's determination becoming final (in which instance the Government will thereafter have the right to cancel or ignore the markings at any time and the data will no longer be made subject to any disclosure prohibitions), or by final disposition of the matter by court decision if suit is filed.

(2) The time limits in the procedures set forth in paragraph (e)(1) of this clause may be modified in accordance with agency regulations implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request thereunder.

(3) Except to the extent the Government's action occurs as the result of final disposition of the matter by a court of competent jurisdiction, the Contractor is not precluded by paragraph (e) of the clause from bringing a claim, in accordance with the Disputes clause of this contract, that may arise as the result of the Government removing or ignoring authorized markings on data delivered under this contract.

(f) Omitted or incorrect markings. (1) Data delivered to the Government without any restrictive markings shall be deemed to have been furnished with unlimited rights. The Government is not liable for the disclosure, use, or reproduction of such data.

(2) If the unmarked data has not been disclosed without restriction outside the Government, the Contractor may request, within 6 months (or a longer time approved by the Contracting Officer in writing for good cause shown) after delivery of the data, permission to have authorized notices placed on the data at the Contractor's expense. The Contracting Officer may agree to do so if the Contractor-

(i) Identifies the data to which the omitted notice is to be applied;

(ii) Demonstrates that the omission of the notice was inadvertent;

(iii) Establishes that the proposed notice is authorized; and

(iv) Acknowledges that the Government has no liability for the disclosure, use, or reproduction of any data made prior to the addition of the notice or resulting from the omission of the notice.

(3) If data has been marked with an incorrect notice, the Contracting Officer may-

(i) Permit correction of the notice at the Contractor's expense if the Contractor identifies the data and demonstrates that the correct notice is authorized; or

(ii) Correct any incorrect notices.

(g) Protection of limited rights data and restricted computer software. (1) The Contractor may withhold from delivery qualifying limited rights data or restricted computer software that are not data identified in paragraphs (b)(1)(i), (ii), and (iii) of this clause. As a condition to this withholding, the Contractor shall-

(i) Identify the data being withheld; and

(ii) Furnish form, fit, and function data instead.

(2) Limited rights data that are formatted as a computer database for delivery to the Government shall be treated as limited rights data and not restricted computer software.

(3) [Reserved]

(h) *Subcontracting.* The Contractor shall obtain from its subcontractors all data and rights therein necessary to fulfill the Contractor's obligations to the Government under this contract. If a subcontractor refuses to accept terms affording the Government those rights, the Contractor shall promptly notify the Contracting Officer of the refusal and shall not proceed with the subcontract award without authorization in writing from the Contracting Officer.

(i) *Relationship to patents or other rights.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government.

(End of clause)

Alternate I (DEC 2007). As prescribed in 27.409 (b)(2), substitute the following definition for "limited rights data" in paragraph (a) of the basic clause:

Limited rights data means data, other than computer software, developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.

Alternate II (DEC 2007). As prescribed in 27.409 (b)(3), insert the following paragraph (g)(3) in the basic clause:

(g)(3) Notwithstanding paragraph (g)(1) of this clause, the contract may identify and specify the delivery of limited rights data, or the Contracting Officer may require by written request the delivery of limited rights data that has been withheld or would otherwise be entitled to be withheld. If delivery of that data is required, the Contractor shall affix the following "Limited Rights Notice" to the data and the Government will treat the data, subject to the provisions of paragraphs (e) and (f) of this clause, in accordance with the notice:

LIMITED RIGHTS NOTICE (DEC 2007)

(a) These data are submitted with limited rights under *Government Contract No.* _____ (and *subcontract* _____, if appropriate). These data may be reproduced and used by the Government with the express limitation that they will not, without written permission of the Contractor, be used for purposes of manufacture nor disclosed outside the Government; except that the Government may disclose these data outside the Government for the following purposes, if any; provided that the Government makes such disclosure subject to prohibition against further use and disclosure: *[Agencies may list additional purposes as set forth in 27.404-2(c)(1) or if none, so state.]*

(b) This notice shall be marked on any reproduction of these data, in whole or in part.

(End of notice)

Alternate III (DEC 2007). As prescribed in 27.409 (b)(4), insert the following paragraph (g)(4) in the basic clause:

(g)(4)(i) Notwithstanding paragraph (g)(1) of this clause, the contract may identify and specify the delivery of restricted computer software, or the Contracting Officer may require by written request the delivery of restricted computer software that has been withheld or would otherwise be entitled to be withheld. If delivery of that computer software is required, the Contractor shall affix the following "Restricted Rights Notice" to the computer software and the Government will treat the computer software, subject to paragraphs (e) and (f) of this clause, in accordance with the notice:

Restricted Rights Notice (DEC 2007)

(a) This computer software is submitted with restricted rights under *Government Contract No.* _____ (and *subcontract* _____, if appropriate). It may not be used, reproduced, or disclosed by the Government except as provided in paragraph (b) of this notice or as otherwise expressly stated in the contract.

(b) This computer software may be-

(1) Used or copied for use with the computer(s) for which it was acquired, including use at any Government installation to which the computer(s) may be transferred;

(2) Used or copied for use with a backup computer if any computer for which it was acquired is inoperative;

(3) Reproduced for safekeeping (archives) or backup purposes;

(4) Modified, adapted, or combined with other computer software, *provided* that the modified, adapted, or combined portions of the derivative software incorporating any of the delivered, restricted computer software shall be subject to the same restricted rights;

(5) Disclosed to and reproduced for use by support service Contractors or their subcontractors in accordance with paragraphs (b)(1) through (4) of this notice; and

(6) Used or copied for use with a replacement computer.

(c) Notwithstanding the foregoing, if this computer software is copyrighted computer software, it is licensed to the Government with the minimum rights set forth in paragraph (b) of this notice.

(d) Any other rights or limitations regarding the use, duplication, or disclosure of this computer software are to be expressly stated in, or incorporated in, the contract.

(e) This notice shall be marked on any reproduction of this computer software, in whole or in part.

(End of notice)

(ii) Where it is impractical to include the Restricted Rights Notice on restricted computer software, the following short-form notice may be used instead:

Restricted Rights Notice Short Form (JUN 1987)

Use, reproduction, or disclosure is subject to restrictions set forth in *Contract No.* _____ *(and subcontract, if appropriate) with* _____ (name of Contractor and subcontractor).

(End of notice)

(iii) If restricted computer software is delivered with the copyright notice of 17 U.S.C. 401, it will be presumed to be licensed to the Government without disclosure prohibitions, with the minimum rights set forth in paragraph (b) of this clause.

Alternate IV (DEC 2007). As prescribed in 27.409 (b)(5), substitute the following paragraph (c)(1) for paragraph (c)(1) of the basic clause:

(c) *Copyright*-(1) *Data first produced in the performance of the contract.* Except as otherwise specifically provided in this contract, the Contractor may assert copyright in any data first produced in the performance of this contract. When asserting copyright, the Contractor shall affix the applicable copyright notice of 17 U.S.C. 401 or 402, and an acknowledgment of Government sponsorship (including contract number), to the data when such data are delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. For data other than computer software, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license for all such data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government. For computer software, the Contractor grants to the Government and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license for all such computer software to reproduce, prepare derivative works, and perform publicly and display publicly (but not to distribute copies to the public), by or on behalf of the Government.

Alternate V (DEC 2007). As prescribed in 27.409 (b)(6), add the following paragraph (j) to the basic clause:

(j) The Contractor agrees, except as may be otherwise specified in this contract for specific data deliverables listed as not subject to this paragraph, that the Contracting Officer may, up to three years after acceptance of all deliverables under this contract, inspect at the Contractor's facility any data withheld pursuant to paragraph (g)(1) of this clause, for purposes of verifying the Contractor's assertion of limited rights or restricted rights status of the data or for evaluating work performance. When the Contractor whose data are to be inspected demonstrates to the Contracting Officer that there would be a possible conflict of interest if a particular representative made the inspection, the Contracting Officer shall designate an alternate inspector.

52.227-15 Representation of Limited Rights Data and Restricted Computer Software.

As prescribed in 27.409(c), insert the following provision:

REPRESENTATION OF LIMITED RIGHTS DATA AND RESTRICTED COMPUTER SOFTWARE (DEC 2007)

(a) This solicitation sets forth the Government's known delivery requirements for data (as defined in the clause at 52.227-14, Rights in Data-General). Any resulting contract may also provide the Government the option to order additional data under the Additional Data Requirements clause at 52.227-16, if included in the contract. Any data delivered under the resulting contract will be subject to the Rights in Data-General clause at 52.227-14 included in this contract. Under the latter clause, a Contractor may withhold from delivery data that qualify as limited rights data or restricted computer software,

and deliver form, fit, and function data instead. The latter clause also may be used with its Alternates II and/or III to obtain delivery of limited rights data or restricted computer software, marked with limited rights or restricted rights notices, as appropriate. In addition, use of Alternate V with this latter clause provides the Government the right to inspect such data at the Contractor's facility.

(b) By completing the remainder of this paragraph, the offeror represents that it has reviewed the requirements for the delivery of technical data or computer software and states [*offeror check appropriate block*]-

□ None of the data proposed for fulfilling the data delivery requirements qualifies as limited rights data or restricted computer software; or

□ Data proposed for fulfilling the data delivery requirements qualify as limited rights data or restricted computer software and are identified as follows:

_____

_____

_____

(c) Any identification of limited rights data or restricted computer software in the offeror's response is not determinative of the status of the data should a contract be awarded to the offeror.

(End of provision)

52.227-16 Additional Data Requirements.

As prescribed in 27.409(d), insert the following clause:

ADDITIONAL DATA REQUIREMENTS (JUNE 1987)

(a) In addition to the data (as defined in the clause at 52.227-14, Rights in Data-General clause or other equivalent included in this contract) specified elsewhere in this contract to be delivered, the Contracting Officer may, at any time during contract performance or within a period of 3 years after acceptance of all items to be delivered under this contract, order any data first produced or specifically used in the performance of this contract.

(b) The Rights in Data-General clause or other equivalent included in this contract is applicable to all data ordered under this Additional Data Requirements clause. Nothing contained in this clause shall require the Contractor to deliver any data the withholding of which is authorized by the Rights in Data-General or other equivalent clause of this contract, or data which are specifically identified in this contract as not subject to this clause.

(c) When data are to be delivered under this clause, the Contractor will be compensated for converting the data into the prescribed form, for reproduction, and for delivery.

(d) The Contracting Officer may release the Contractor from the requirements of this clause for specifically identified data items at any time during the 3-year period set forth in paragraph (a) of this clause.

(End of clause)

52.227-17 Rights in Data-Special Works.

As prescribed in 27.409(e), insert the following clause:

RIGHTS IN DATA-SPECIAL WORKS (DEC 2007)

(a) *Definitions*. As used in this clause-

Data means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information.

Unlimited rights means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

(b) *Allocation of Rights*. (1) The Government shall have-

(i) Unlimited rights in all data delivered under this contract, and in all data first produced in the performance of this contract, except as provided in paragraph (c) of this clause.

(ii) The right to limit assertion of copyright in data first produced in the performance of this contract, and to obtain assignment of copyright in that data, in accordance with paragraph (c)(1) of this clause.

(iii) The right to limit the release and use of certain data in accordance with paragraph (d) of this clause.

(2) The Contractor shall have, to the extent permission is granted in accordance with paragraph (c)(1) of this clause, the right to assert claim to copyright subsisting in data first produced in the performance of this contract.

(c) *Copyright*- (1) Data first produced in the performance of this contract. (i) The Contractor shall not assert or authorize others to assert any claim to copyright subsisting in any data first produced in the performance of this contract without prior written permission of the Contracting Officer. When copyright is asserted, the Contractor shall affix the appropriate copyright notice of 17 U.S.C. 401 or 402 and acknowledgment of Government sponsorship (including contract number) to the data when delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. The Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license for all delivered data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government.

(ii) If the Government desires to obtain copyright in data first produced in the performance of this contract and permission has not been granted as set forth in paragraph (c)(1)(i) of this clause, the Contracting Officer shall direct the Contractor to assign (with or without registration), or obtain the assignment of, the copyright to the Government or its designated assignee.

(2) *Data not first produced in the performance of this contract.* The Contractor shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data not first produced in the performance of this contract and that contain the copyright notice of 17 U.S.C. 401 or 402, unless the Contractor identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in paragraph (c)(1) of this clause.

(d) *Release and use restrictions.* Except as otherwise specifically provided for in this contract, the Contractor shall not use, release, reproduce, distribute, or publish any data first produced in the performance of this contract, nor authorize others to do so, without written permission of the Contracting Officer.

(e) *Indemnity*. The Contractor shall indemnify the Government and its officers, agents, and employees acting for the Government against any liability, including costs and expenses, incurred as the result of the violation of trade secrets, copyrights, or right of privacy or publicity, arising out of the creation, delivery, publication, or use of any data furnished under this contract; or any libelous or other unlawful matter contained in such data. The provisions of this paragraph do not apply unless the Government provides notice to the Contractor as soon as practicable of any claim or suit, affords the Contractor an opportunity under applicable laws, rules, or regulations to participate in the defense of the claim or suit, and obtains the Contractor's consent to the settlement of any claim or suit other than as required by final decree of a court of competent jurisdiction; and these provisions do not apply to material furnished to the Contractor by the Government and incorporated in data to which this clause applies.

(End of clause)

52.227-18 [Reserved]

(DEVIATION DATE)

52.227-19 [Reserved]

(DEVIATION DATE)

52.227-20 Rights in Data-SBIR Program.

As prescribed in 27.409(h), insert the following clause:

RIGHTS IN DATA-SBIR PROGRAM (MAY 2014)

(a) *Definitions*. As used in this clause-

Computer database or "database" means a collection of recorded information in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

Computer software-

(1) Means. (i) Computer programs that comprise a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations; and

(ii) Recorded information comprising source code listings, design details, algorithms, processes, flow charts, formulas, and related material that would enable the computer program to be produced, created, or compiled.

(2) Does not include computer databases or computer software documentation.

Computer software documentation means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

Data means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing or management information.

Form, fit, and function data means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, and data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements. For computer software it means data identifying source, functional characteristics, and performance requirements but specifically excludes the source code, algorithms, processes, formulas, and flow charts of the software.

Limited rights data means data (other than computer software) developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.

Restricted computer software means computer software developed at private expense and that is a trade secret, is commercial or financial and confidential or privileged, or is copyrighted computer software, including minor modifications of the computer software.

SBIR data means data first produced by a Contractor that is a small business concern in performance of a small business innovation research contract issued under the authority of 15 U.S.C. 638, which data are not generally known, and which data without obligation as to its confidentiality have not been made available to others by the Contractor or are not already available to the Government.

SBIR rights means the rights in SBIR data set forth in the SBIR Rights Notice of paragraph (d) of this clause.

Technical data means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). This term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. The term includes recorded information of a scientific or technical nature that is included in computer databases. (See 41 U.S.C. 116.)

Unlimited rights means the right of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose whatsoever, and to have or permit others to do so.

(b) Allocation of rights. (1) Except as provided in paragraph (c) of this clause regarding copyright, the Government shall have unlimited rights in-

(i) Data specifically identified in this contract as data to be delivered without restriction;

(ii) Form, fit, and function data delivered under this contract;

(iii) Data delivered under this contract (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under this contract; and

(iv) All other data delivered under this contract unless provided otherwise for SBIR data in accordance with paragraph (d) of this clause or for limited rights data or restricted computer software in accordance with paragraph (f) of this clause.

(2) The Contractor shall have the right to-

(i) Assert copyright in data first produced in the performance of this contract to the extent provided in paragraph (c)(1) of this clause;

(ii) Protect SBIR rights in SBIR data delivered under this contract in the manner and to the extent provided in paragraph (d) of this clause;

(iii) Substantiate use of, add, or correct SBIR rights or copyright notices and to take other appropriate action, in accordance with paragraph (e) of this clause; and

(iv) Withhold from delivery those data which are limited rights data or restricted computer software to the extent provided in paragraph (f) of this clause.

(c) Copyright- (1) Data first produced in the performance of this contract. (i) Except as otherwise specifically provided in this contract, the Contractor may assert copyright subsisting in any data first produced in the performance of this contract.

(ii) When asserting copyright, the Contractor shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 and an acknowledgment of Government sponsorship (including contract number).

(iii) For data other than computer software, the Contractor grants to the Government, and others acting on its behalf, a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government. For computer software, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license in such copyrighted computer software to reproduce, prepare derivative works, and perform publicly and display publicly, by or on behalf of the Government.

(2) *Data not first produced in the performance of this contract.* The Contractor shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data that are not first produced in the performance of this contract unless the Contractor (i) identifies such data and (ii) grants to the Government, or acquires on its behalf, a license of the same scope as set forth in paragraph (c)(1) of this clause.

(3) *Removal of copyright notices.* The Government will not remove any copyright notices placed on data pursuant to this paragraph (c), and will include such notices on all reproductions of the data.

(d) Rights to SBIR data. (1) The Contractor is authorized to affix the following "SBIR Rights Notice" to SBIR data delivered under this contract and the Government will treat the data, subject to the provisions of paragraphs (e) and (f) of this clause, in accordance with the notice:

SBIR RIGHTS NOTICE (DEC 2007)

These SBIR data are furnished with SBIR rights under Contract No._____ (and subcontract _____, if appropriate). For a period of 4 years, unless extended in accordance with FAR 27.409(h), after acceptance of all items to be delivered under this contract, the Government will use these data for Government purposes only, and they shall not be disclosed outside the Government (including disclosure for procurement purposes) during such period without permission of the Contractor, except that, subject to the foregoing use and disclosure prohibitions, these data may be disclosed for use by support Contractors. After the protection period, the Government has a paid-up license to use, and to authorize others to use on its behalf, these data for Government purposes, but is relieved of all disclosure prohibitions and assumes no liability for unauthorized use of these data by third parties. This notice shall be affixed to any reproductions of these data, in whole or in part.

(End of notice)

(2) The Government's sole obligation with respect to any SBIR data shall be as set forth in this paragraph (d).

(e) Omitted or incorrect markings. (1) Data delivered to the Government without any notice authorized by paragraph (d) of this clause shall be deemed to have been furnished with unlimited rights. The Government assumes no liability for the disclosure, use, or reproduction of such data.

(2) If the unmarked data has not been disclosed without restriction outside the Government, the Contractor may request, within 6 months (or a longer time approved by the Contracting Officer in writing for good cause shown) after delivery of the data, permission to have authorized notices placed on the data at the Contractor's expense, and the Contracting Officer may agree to do so if the Contractor-

(i) Identifies the data to which the omitted notice is to be applied;

(ii) Demonstrates that the omission of the notice was inadvertent;

(iii) Establishes that the use of the proposed notice is authorized; and

(iv) Acknowledges that the Government has no liability with respect to the disclosure or use of any such data made prior to the addition of the notice or resulting from the omission of the notice.

(3) If the data has been marked with an incorrect notice, the Contracting Officer may-

(i) Permit correction of the notice at the Contractor's expense, if the Contractor identifies the data and demonstrates that the correct notice is authorized; or

(ii) Correct any incorrect notices.

(f) *Protection of limited rights data and restricted computer software.* The Contractor may withhold from delivery qualifying limited rights data and restricted computer software that are not identified in paragraphs (b)(1)(i), (ii), and (iii) of

this clause. As a condition to this withholding, the Contractor shall identify the data being withheld, and furnish form, fit, and function data instead.

(g) *Subcontracting.* The Contractor shall obtain from its subcontractors all data and rights therein necessary to fulfill the Contractor's obligations to the Government under this contract. If a subcontractor refuses to accept terms affording the Government those rights, the Contractor shall promptly notify the Contracting Officer of the refusal and not proceed with the subcontract award without further authorization in writing from the Contracting Officer.

(h) *Relationship to patents.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government.

(End of clause)

52.227-21 Technical Data Declaration, Revision, and Withholding of Payment-Major Systems.

As prescribed in 27.409(j), insert the following clause:

TECHNICAL DATA DECLARATION, REVISION, AND WITHHOLDING OF PAYMENT-MAJOR SYSTEMS (MAY 2014)

(a) *Scope of declaration.* The Contractor shall provide, in accordance with 41 U.S.C. 2302(e)(7), the following declaration with respect to all technical data that relate to a major system and that are delivered or required to be delivered under this contract or that are delivered within 3 years after acceptance of all items (other than technical data) delivered under this contract unless a different period is set forth in the contract. The Contracting Officer may release the Contractor from all or part of the requirements of this clause for specifically identified technical data items at any time during the period covered by this clause.

(b) Technical data declaration. (1) All technical data that are subject to this clause shall be accompanied by the following declaration upon delivery:

TECHNICAL DATA DECLARATION (JAN 1997)

The Contractor, _____, hereby declares that, to the best of its knowledge and belief, the technical data delivered herewith under Government contract No. _____ (and subcontract _____, if appropriate) are complete, accurate, and comply with the requirements of the contract concerning such technical data.

(End of declaration)

(2) The Government may, at any time during the period covered by this clause, direct correction of any deficiencies that are not in compliance with contract requirements. The corrections shall be made at the expense of the Contractor. Unauthorized markings on data shall not be considered a deficiency for the purpose of this clause, but will be treated in accordance with paragraph (e) of the Rights in Data-General clause included in this contract.

(c) *Technical data revision.* The Contractor also shall, at the request of the Contracting Officer, revise technical data that are subject to this clause to reflect engineering design changes made during the performance of this contract and affecting the form, fit, and function of any item (other than technical data) delivered under this contract. The Contractor may submit a request for an equitable adjustment to the terms and conditions of this contract for any revisions to technical data made pursuant to this paragraph.

(d) Withholding of payment. (1) At any time before final payment under this contract the Contracting Officer may withhold payment as a reserve up to an amount not exceeding $100,000 or 5 percent of the amount of this contract, whichever is less, if the Contractor fails to-

(i) Make timely delivery of the technical data;

(ii) Provide the declaration required by paragraph (b)(1) of this clause;

(iii) Make the corrections required by paragraph (b)(2) of this clause; or

(iv) Make revisions requested under paragraph (c) of this clause.

(2) The Contracting Officer may withhold the reserve until the Contractor has complied with the direction or requests of the Contracting Officer or determines that the deficiencies relating to delivered data, arose out of causes beyond the control of the Contractor and without the fault or negligence of the Contractor.

(3) The withholding of any reserve under this clause, or the subsequent payment of the reserve, shall not be construed as a waiver of any Government rights.

(End of clause)

52.227-22 Major System-Minimum Rights.

As prescribed in 27.409(k), insert the following clause:

MAJOR SYSTEM-MINIMUM RIGHTS (JUNE 1987)

Notwithstanding any other provision of this contract, the Government shall have unlimited rights in any technical data, other than computer software, developed in the performance of this contract and relating to a major system or supplies for a major system procured or to be procured by the Government, to the extent that delivery of such technical data is required as an element of performance under this contract. The rights of the Government under this clause are in addition to and not in lieu of its rights under the other provisions of this contract.

(End of clause)

52.227-23 [Reserved]

(DEVIATION DATE)

52.228 [Reserved]

52.228-1 Bid Guarantee.

As prescribed in 28.101-2 , insert a provision or clause substantially as follows:

BID GUARANTEE (SEPT 1996)

(a) Failure to furnish a bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid.

(b) The bidder shall furnish a bid guarantee in the form of a firm commitment, *e.g.,* bid bond supported by good and sufficient surety or sureties acceptable to the Government, postal money order, certified check, cashier's check, irrevocable letter of credit, or, under Treasury Department regulations, certain bonds or notes of the United States. The Contracting Officer will return bid guarantees, other than bid bonds-

(1) To unsuccessful bidders as soon as practicable after the opening of bids; and

(2) To the successful bidder upon execution of contractual documents and bonds (including any necessary coinsurance or reinsurance agreements), as required by the bid as accepted.

(c) The amount of the bid guarantee shall be _____ percent of the bid price or $_____, whichever is less.

(d) If the successful bidder, upon acceptance of its bid by the Government within the period specified for acceptance, fails to execute all contractual documents or furnish executed bond(s) within 10 days after receipt of the forms by the bidder, the Contracting Officer may terminate the contract for default.

(e) In the event the contract is terminated for default, the bidder is liable for any cost of acquiring the work that exceeds the amount of its bid, and the bid guarantee is available to offset the difference.

(End of provision)

52.228-2 Additional Bond Security.

As prescribed in 28.106-4(a), insert the following clause:

ADDITIONAL BOND SECURITY (OCT 1997)

The Contractor shall promptly furnish additional security required to protect the Government and persons supplying labor or materials under this contract if-

(a) Any surety upon any bond, or issuing financial institution for other security, furnished with this contract becomes unacceptable to the Government;

(b) Any surety fails to furnish reports on its financial condition as required by the Government;

(c) The contract price is increased so that the penal sum of any bond becomes inadequate in the opinion of the Contracting Officer; or

(d) An irrevocable letter of credit (ILC) used as security will expire before the end of the period of required security. If the Contractor does not furnish an acceptable extension or replacement ILC, or other acceptable substitute, at least 30 days before an ILC's scheduled expiration, the Contracting officer has the right to immediately draw on the ILC.

(End of clause)

52.228-3 Workers' Compensation Insurance (Defense Base Act).

As prescribed in 28.309(a), insert the following clause:

WORKERS' COMPENSATION INSURANCE (DEFENSE BASE ACT) (JUL 2014)

(a) The Contractor shall

(1) Before commencing performance under this contract, establish provisions to provide for the payment of disability compensation and medical benefits to covered employees and death benefits to their eligible survivors, by purchasing workers' compensation insurance or qualifying as a self-insurer under the Longshore and Harbor Workers' Compensation

Act (33 U.S.C. 932) as extended by the Defense Base Act (42 U.S.C.1651, *et seq.*), and continue to maintain provisions to provide such Defense Base Act benefits until contract performance is completed;

(2) Within ten days of an employee's injury or death or from the date the Contractor has knowledge of the injury or death, submit Form LS-202 (Employee's First Report of Injury or Occupational Illness) to the Department of Labor in accordance with the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 930(a), 20 CFR 702.201 to 702.203);

(3) Pay all compensation due for disability or death within the time frames required by the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 914, 20 CFR 702.231 and 703.232);

(4) Provide for medical care as required by the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 907, 20 CFR 702.402 and 702.419);

(5) If controverting the right to compensation, submit Form LS-207 (Notice of Controversion of Right to Compensation) to the Department of Labor in accordance with the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 914(d), 20 CFR 702.251);

(6) Immediately upon making the first payment of compensation in any case, submit Form LS-206 (Payment Of Compensation Without Award) to the Department of Labor in accordance with the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 914(c), 20 CFR 702.234);

(7) When payments are suspended or when making the final payment, submit Form LS-208 (Notice of Final Payment or Suspension of Compensation Payments) to the Department of Labor in accordance with the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 914(c) and (g), 20 CFR 702.234 and 702.235); and

(8) Adhere to all other provisions of the Longshore and Harbor Workers' Compensation Act as extended by the Defense Base Act, and Department of Labor regulations at 20 CFR Parts 701 to 704.

(b) For additional information on the Longshore and Harbor Workers' Compensation Act requirements see http://www.dol.gov/owcp/dlhwc/lsdba.htm.

(c) The Contractor shall insert the substance of this clause, including this paragraph (c), in all subcontracts to which the Defense Base Act applies.

(End of clause)

52.228-4 Workers' Compensation and War-Hazard Insurance Overseas.

As prescribed in 28.309(b), insert the following clause:

WORKERS' COMPENSATION AND WAR-HAZARD INSURANCE OVERSEAS (APR 1984)

(a) This paragraph applies if the Contractor employs any person who, but for a waiver granted by the Secretary of Labor, would be subject to workers' compensation insurance under the Defense Base Act (42 U.S.C.1651, *et seq.*). On behalf of employees for whom the applicability of the Defense Base Act has been waived, the Contractor shall (1) provide, before commencing performance under this contract, at least that workers' compensation insurance or the equivalent as the laws of the country of which these employees are nationals may require, and (2) continue to maintain it until performance is completed. The Contractor shall insert, in all subcontracts under this contract to which the Defense Base Act would apply but for the waiver, a clause similar to this paragraph (a) (including this sentence) imposing upon those subcontractors this requirement to provide such workers' compensation insurance coverage.

(b) This paragraph applies if the Contractor or any subcontractor under this contract employs any person who, but for a waiver granted by the Secretary of Labor, would be subject to the War Hazards Compensation Act (42 U.S.C.1701, *et seq.*). On behalf of employees for whom the applicability of the Defense Base Act (and hence that of the War Hazards Compensation Act) has been waived, the Contractor shall, subject to reimbursement as provided elsewhere in this contract, afford the same protection as that provided in the War Hazards Compensation Act, except that the level of benefits shall conform to any law or international agreement controlling the benefits to which the employees may be entitled. In all other respects, the standards of the War Hazards Compensation Act shall apply; *e.g.,* the definition of war-hazard risks (injury, death, capture, or detention as the result of a war hazard as defined in the Act), proof of loss, and exclusion of benefits otherwise covered by workers' compensation insurance or the equivalent. Unless the Contractor elects to assume directly the liability to subcontractor employees created by this clause, the Contractor shall insert, in all subcontracts under this contract

to which the War Hazards Compensation Act would apply but for the waiver, a clause similar to this paragraph (b) (including this sentence) imposing upon those subcontractors this requirement to provide war-hazard benefits.

(End of clause)

52.228-5 Insurance-Work on a Government Installation.

As prescribed in 28.310 , insert the following clause:

INSURANCE-WORK ON A GOVERNMENT INSTALLATION (JAN 1997)

(a) The Contractor shall, at its own expense, provide and maintain during the entire performance of this contract, at least the kinds and minimum amounts of insurance required in the Schedule or elsewhere in the contract.

(b) Before commencing work under this contract, the Contractor shall notify the Contracting Officer in writing that the required insurance has been obtained. The policies evidencing required insurance shall contain an endorsement to the effect that any cancellation or any material change adversely affecting the Government's interest shall not be effective-

(1) For such period as the laws of the State in which this contract is to be performed prescribe; or

(2) Until 30 days after the insurer or the Contractor gives written notice to the Contracting Officer, whichever period is longer.

(c) The Contractor shall insert the substance of this clause, including this paragraph (c), in subcontracts under this contract that require work on a Government installation and shall require subcontractors to provide and maintain the insurance required in the Schedule or elsewhere in the contract. The Contractor shall maintain a copy of all subcontractors' proofs of required insurance, and shall make copies available to the Contracting Officer upon request.

(End of clause)

52.228-6 [Reserved]

52.228-7 Insurance-Liability to Third Persons.

As prescribed in 28.311-1 , insert the following clause:

INSURANCE-LIABILITY TO THIRD PERSONS (MAR 1996)

(a) (1) Except as provided in paragraph (a)(2) of this clause, 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 a 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 the performance of this contract and for which the Contractor seeks reimbursement.

(c) The Contractor shall be reimbursed-

(1) For that portion-

(i) Of the reasonable cost of insurance allocable to this contract; and

(ii) 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 without regard to and as an exception to 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 of 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 subject to the availability of appropriated funds at the time a contingency occurs. Nothing in this contract shall be construed as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies.

(e) The Contractor shall not be reimbursed 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 any 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 bond. The Contractor may, at its own expense, be associated with the Government representatives in any such claim or litigation.

(End of clause)

52.228-8 Liability and Insurance-Leased Motor Vehicles.

As prescribed in 28.312 , insert the following clause:

LIABILITY AND INSURANCE-LEASED MOTOR VEHICLES (MAY 1999)

(a) The Government shall be responsible for loss of or damage to-

(1) Leased vehicles, except for-

(i) Normal wear and tear; and

(ii) Loss or damage caused by the negligence of the Contractor, its agents, or employees; and

(2) Property of third persons, or the injury or death of third persons, if the Government is liable for such loss, damage, injury, or death under the Federal Tort Claims Act (28 U.S.C. 2671-2680).

(b) The Contractor shall be liable for, and shall indemnify and hold harmless the Government against, all actions or claims for loss of or damage to property or the injury or death of persons, resulting from the fault, negligence, or wrongful act or omission of the Contractor, its agents, or employees.

(c) The Contractor shall provide and maintain insurance covering its liabilities under paragraph (b) of this clause, in amounts of at least $200,000 per person and $500,000 per occurrence for death or bodily injury and $20,000 per occurrence for property damage or loss.

(d) Before commencing work under this contract, the Contractor shall notify the Contracting Officer in writing that the required insurance has been obtained. The policies evidencing required insurance shall contain an endorsement to the effect that any cancellation or any material change adversely affecting the interests of the Government shall not be effective (1) for such period as the laws of the State in which this contract is to be performed prescribe or (2) until 30 days after written notice

to the Contracting Officer, whichever period is longer. The policies shall exclude any claim by the insurer for subrogation against the Government by reason of any payment under the policies.

(e) The contract price shall not include any costs for insurance or contingency to cover losses, damage, injury, or death for which the Government is responsible under paragraph (a) of this clause.

(End of clause)

52.228-9 Cargo Insurance.

As prescribed in 28.313(a), insert the following clause:

CARGO INSURANCE (MAY 1999)

(a) The Contractor, at the Contractor's expense, shall provide and maintain, during the continuance of this contract, cargo insurance of $_____ per vehicle to cover the value of property on each vehicle and of $_____ to cover the total value of the property in the shipment.

(b) All insurance shall be written on companies acceptable to _____ *[insert name of contracting agency]*, and policies shall include such terms and conditions as required by _____ *[insert name of contracting agency]*. The Contractor shall provide evidence of acceptable cargo insurance to _____ *[insert name of contracting agency]* before commencing operations under this contract.

(c) Each cargo insurance policy shall include the following statement:

"It is a condition of this policy that the Company shall furnish-

(1) Written notice to _____ *[insert name and address of contracting agency]*, 30 days in advance of the effective date of any reduction in, or cancellation of, this policy; and

(2) Evidence of any renewal policy to the address specified in paragraph (1) of this statement, not less than 15 days prior to the expiration of any current policy on file with _____ *[insert name of contracting agency]*."

(End of clause)

52.228-10 Vehicular and General Public Liability Insurance.

As prescribed in 28.313(b), insert a clause substantially the same as the following in solicitations and contracts for transportation or for transportation-related services when the contracting officer determines that vehicular liability or general public liability insurance required by law is not sufficient:

VEHICULAR AND GENERAL PUBLIC LIABILITY INSURANCE (APR 1984)

(a) The Contractor, at the Contractor's expense, agrees to maintain, during the continuance of this contract, vehicular liability and general public liability insurance with limits of liability for-

(1) Bodily injury of not less than $_____ for each person and $_____ for each occurrence; and

(2) Property damage of not less than $_____ for each accident and $_____ in the aggregate.

(b) The Contractor also agrees to maintain workers' compensation and other legally required insurance with respect to the Contractor's own employees and agents.

(End of clause)

52.228-11 Individual Surety—Pledge of Assets.

As prescribed in 28.203-4 (b), insert the following clause:

INDIVIDUAL SURETY—PLEDGE OF ASSETS (FEB 2021)

(a) The Contractor shall obtain from each person acting as an individual surety on a performance bond or a payment bond —

(1) A pledge of assets that meets the eligibility, valuation, and security requirements described in the Federal Acquisition Regulation (FAR) 28.203-1; and

(2) Standard Form 28, Affidavit of Individual Surety.

(b) The Contracting Officer may release a portion of the security interest on the individual surety's assets based upon substantial performance of the Contractor's obligations under its performance bond. The security interest in support of a performance bond shall be maintained—

(1) *Contracts for the construction, alteration, or repair of any public building or public work of the Federal Government exceeding $150,000 (40 U.S.C. 3131)*. Until completion of any warranty period, or for 1 year following final payment, whichever is later.

(2) *Contracts subject to alternative payment protection (see FAR 28.102-1(b)(1))*. For the full contract performance period plus 1 year.

(3) *Other contracts not subject to the requirements of paragraph (b)(1) of this clause*. Until completion of any warranty period, or for 90 days following final payment, whichever is later.

(c) A surety's assets pledged in support of a payment bond may be released to a subcontractor or supplier upon Government receipt of a Federal district court judgment, or a sworn statement by the subcontractor or supplier that the claim is correct along with a notarized authorization of the release by the surety stating that it approves of such release. The security interest on the individual surety's assets in support of a payment bond shall be maintained—

(1) *Contracts for the construction, alteration, or repair of any public building or public work of the Federal Government exceeding $150,000 which require performance and payment bonds (40 U.S.C. 3131)*. For 1 year following final payment, or until resolution of all pending claims filed against the payment bond during the 1-year period following final payment, whichever is later.

(2) *Contracts subject to alternative payment protection (see FAR 28.102-1(b)(1))*. For the full contract performance period plus 1 year.

(3) Other contracts not subject to the requirements of paragraph (c)(1) of this clause. For 90 days following final payment.

(d) The Contracting Officer may allow the Contractor to substitute an individual surety, for a performance or payment bond, after contract award. The Contractor shall comply with the requirements of paragraph (a) of this clause within the timeframe established by the Contracting Officer.

(End of clause)

52.228-12 Prospective Subcontractor Requests for Bonds.

As prescribed in 28.106-4(b), use the following clause:

PROSPECTIVE SUBCONTRACTOR REQUESTS FOR BONDS (DEC 2022)

In accordance with section 806(a)(3) of Pub. L. 102-190, as amended by sections 2091 and 8105 of Pub. L. 103-355 (10 U.S.C. 4601 note prec.), upon the request of a prospective subcontractor or supplier offering to furnish labor or material for the performance of this contract for which a payment bond has been furnished to the Government pursuant to 40 U.S.C. chapter 31, subchapter III, Bonds, the Contractor shall promptly provide a copy of such payment bond to the requester.

(End of clause)

52.228-13 Alternative Payment Protections.

As prescribed in 28.102-3(b), insert the following clause:

ALTERNATIVE PAYMENT PROTECTIONS (JULY 2000)

(a) The Contractor shall submit one of the following payment protections:

_____

(b) The amount of the payment protection shall be 100 percent of the contract price.

(c) The submission of the payment protection is required within _____ days of contract award.

(d) The payment protection shall provide protection for the full contract performance period plus a one-year period.

(e) Except for escrow agreements and payment bonds, which provide their own protection procedures, the Contracting Officer is authorized to access funds under the payment protection when it has been alleged in writing by a supplier of labor

or material that a nonpayment has occurred, and to withhold such funds pending resolution by administrative or judicial proceedings or mutual agreement of the parties.

(f) When a tripartite escrow agreement is used, the Contractor shall utilize only suppliers of labor and material that signed the escrow agreement.

(End of clause)

52.228-14 Irrevocable Letter of Credit.

As prescribed in 28.204-4 , insert the following clause:

IRREVOCABLE LETTER OF CREDIT (NOV 2014)

(a) "Irrevocable letter of credit" (ILC), as used in this clause, means a written commitment by a federally insured financial institution to pay all or part of a stated amount of money, until the expiration date of the letter, upon presentation by the Government (the beneficiary) of a written demand therefor. Neither the financial institution nor the offeror/Contractor can revoke or condition the letter of credit.

(b) If the offeror intends to use an ILC in lieu of a bid bond, or to secure other types of bonds such as performance and payment bonds, the letter of credit and letter of confirmation formats in paragraphs (e) and (f) of this clause shall be used.

(c) The letter of credit shall be irrevocable, shall require presentation of no document other than a written demand and the ILC (including confirming letter, if any), shall be issued/confirmed by an acceptable federally insured financial institution as provided in paragraph (d) of this clause, and-

(1) If used as a bid guarantee, the ILC shall expire no earlier than 60 days after the close of the bid acceptance period;

(2) If used as an alternative to corporate or individual sureties as security for a performance or payment bond, the offeror/Contractor may submit an ILC with an initial expiration date estimated to cover the entire period for which financial security is required or may submit an ILC with an initial expiration date that is a minimum period of one year from the date of issuance. The ILC shall provide that, unless the issuer provides the beneficiary written notice of non-renewal at least 60 days in advance of the current expiration date, the ILC is automatically extended without amendment for one year from the expiration date, or any future expiration date, until the period of required coverage is completed and the Contracting Officer provides the financial institution with a written statement waiving the right to payment. The period of required coverage shall be:

(i) For contracts subject to 40 U.S.C. chapter 31, subchapter III, Bonds, the later of-

(A) One year following the expected date of final payment;

(B) For performance bonds only, until completion of any warranty period; or

(C) For payment bonds only, until resolution of all claims filed against the payment bond during the one-year period following final payment.

(ii) For contracts not subject to 40 U.S.C. chapter 31, subchapter III, Bonds, the later of-

(A) 90 days following final payment; or

(B) For performance bonds only, until completion of any warranty period.

(d) (1) Only federally insured financial institutions rated investment grade by a commercial rating service shall issue or confirm the ILC.

(2) Unless the financial institution issuing the ILC had letter of credit business of at least $25 million in the past year, ILCs over $5 million must be confirmed by another acceptable financial institution that had letter of credit business of at least $25 million in the past year.

(3) The Offeror/Contractor shall provide the Contracting Officer a credit rating that indicates the financial institutions have the required credit rating as of the date of issuance of the ILC.

(4) The current rating for a financial institution is available through any of the following rating services registered with the U.S. Securities and Exchange Commission (SEC) as a Nationally Recognized Statistical Rating Organization (NRSRO). NRSRO's can be located at the website http://www.sec.gov/answers/nrsro.htm maintained by the SEC.

(e) The following format shall be used by the issuing financial institution to create an ILC:

_____

[*Issuing Financial Institution's Letterhead or Name and Address*]

Issue Date _____

Irrevocable Letter of Credit No. _____

Account party's name _____

Account party's address _____

For Solicitation No. _____ (*for reference only*)

To: [*U.S. Government agency*]

[*U.S. Government agency's address*]

1. We hereby establish this irrevocable and transferable Letter of Credit in your favor for one or more drawings up to United States $_____. This Letter of Credit is payable at [*issuing financial institution's and, if any, confirming financial institution's*] office at [*issuing financial institution's address and, if any, confirming financial institution's address*] and expires with our close of business on _____, or any automatically extended expiration date.

2. We hereby undertake to honor your or the transferee's sight draft(s) drawn on the issuing or, if any, the confirming financial institution, for all or any part of this credit if presented with this Letter of Credit and confirmation, if any, at the office specified in paragraph 1 of this Letter of Credit on or before the expiration date or any automatically extended expiration date.

3. [*This paragraph is omitted if used as a bid guarantee, and subsequent paragraphs are renumbered*.] It is a condition of this Letter of Credit that it is deemed to be automatically extended without amendment for one year from the expiration date hereof, or any future expiration date, unless at least 60 days prior to any expiration date, we notify you or the transferee by registered mail, or other receipted means of delivery, that we elect not to consider this Letter of Credit renewed for any such additional period. At the time we notify you, we also agree to notify the account party (and confirming financial institution, if any) by the same means of delivery.

4. This Letter of Credit is transferable. Transfers and assignments of proceeds are to be effected without charge to either the beneficiary or the transferee/assignee of proceeds. Such transfer or assignment shall be only at the written direction of the Government (the beneficiary) in a form satisfactory to the issuing financial institution and the confirming financial institution, if any.

5. This Letter of Credit is subject to the Uniform Customs and Practice (UCP) for Documentary Credits, International Chamber of Commerce Publication No. _____ (Insert version in effect at the time of ILC issuance, e.g., "Publication 600, 2006 edition") and to the extent not inconsistent therewith, to the laws of _____ [State of confirming financial institution, if any, otherwise State of issuing financial institution].

6. If this credit expires during an interruption of business of this financial institution as described in Article 17 of the UCP, the financial institution specifically agrees to effect payment if this credit is drawn against within 30 days after the resumption of our business.

Sincerely,

_____ [*Issuing financial institution*]

(f) The following format shall be used by the financial institution to confirm an ILC:

[Confirming Financial Institution's Letterhead or Name and Address] _____

(Date) _____

Our Letter of Credit Advice Number _____

Beneficiary: _____ [*U.S. Government agency*]

Issuing Financial Institution: _____

Issuing Financial Institution's LC No.: _____

Gentlemen:

1. We hereby confirm the above indicated Letter of Credit, the original of which is attached, issued by _____ [*name of issuing financial institution*] for drawings of up to United States dollars _____/U.S. $_____ and expiring with our close of business on _____ [*the expiration date*], or any automatically extended expiration date.

2. Draft(s) drawn under the Letter of Credit and this Confirmation are payable at our office located at _____.

3. We hereby undertake to honor sight draft(s) drawn under and presented with the Letter of Credit and this Confirmation at our offices as specified herein.

4. [*This paragraph is omitted if used as a bid guarantee, and subsequent paragraphs are renumbered*.] It is a condition of this confirmation that it be deemed automatically extended without amendment for one year from the expiration date hereof, or any automatically extended expiration date, unless:

(a) At least 60 days prior to any such expiration date, we shall notify the Contracting Officer, or the transferee and the issuing financial institution, by registered mail or other receipted means of delivery, that we elect not to consider this confirmation extended for any such additional period; or

(b) The issuing financial institution shall have exercised its right to notify you or the transferee, the account party, and ourselves, of its election not to extend the expiration date of the Letter of Credit.

5. This confirmation is subject to the Uniform Customs and Practice (UCP) for Documentary Credits, International Chamber of Commerce Publication No. _____ (Insert version in effect at the time of ILC issuance, e.g., "Publication 600, 2006 edition") and to the extent not inconsistent therewith, to the laws of _____ [State of confirming financial institution].

6. If this confirmation expires during an interruption of business of this financial institution as described in Article 17 of the UCP, we specifically agree to effect payment if this credit is drawn against within 30 days after the resumption of our business.

Sincerely,

_____ [*Confirming financial institution*]

(g) The following format shall be used by the Contracting Officer for a sight draft to draw on the Letter of Credit:

Sight Draft

_____ [*City, State*]

(Date) _____

_____[*Name and address of financial institution*]

Pay to the order of _____ [*Beneficiary Agency*]

the sum of United States $_____←

This draft is drawn under Irrevocable Letter of Credit No. _____.

_____ [*Beneficiary Agency*]

_____ [*By*]

(End of clause)

52.228-15 Performance and Payment Bonds-Construction.

As prescribed in 28.102-3(a), insert a clause substantially as follows:

PERFORMANCE AND PAYMENT BONDS-CONSTRUCTION (JUN 2020)

(a) *Definitions*. As used in this clause-

Original contract price means the award price of the contract; or, for requirements contracts, the price payable for the estimated total quantity; or, for indefinite-quantity contracts, the price payable for the specified minimum quantity. Original contract price does not include the price of any options, except those options exercised at the time of contract award.

(b) *Amount of required bonds*. Unless the resulting contract price is valued at or below the threshold specified in Federal Acquisition Regulation 28.102-1(a) on the date of award of this contract, the successful offeror shall furnish performance and payment bonds to the Contracting Officer as follows:

(1) *Performance bonds (Standard Form 25)*. The penal amount of performance bonds at the time of contract award shall be 100 percent of the original contract price.

(2) *Payment Bonds (Standard Form 25A)*. The penal amount of payment bonds at the time of contract award shall be 100 percent of the original contract price.

(3) Additional bond protection. (i) The Government may require additional performance and payment bond protection if the contract price is increased. The increase in protection generally will equal 100 percent of the increase in contract price.

(ii) The Government may secure the additional protection by directing the Contractor to increase the penal amount of the existing bond or to obtain an additional bond.

(c) *Furnishing executed bonds*. The Contractor shall furnish all executed bonds, including any necessary reinsurance agreements, to the Contracting Officer, within the time period specified in the Bid Guarantee provision of the solicitation, or otherwise specified by the Contracting Officer, but in any event, before starting work.

(d) *Surety or other security for bonds*. The bonds shall be in the form of firm commitment, supported by corporate sureties whose names appear on the list contained in Treasury Department Circular 570, individual sureties, or by other acceptable security such as postal money order, certified check, cashier's check, irrevocable letter of credit, or, in accordance with Treasury Department regulations, certain bonds or notes of the United States. Treasury Circular 570 is published in the *Federal Register* or may be obtained from the:

U.S. Department of the Treasury,
Financial Management Service,
Surety Bond Branch,
3700 East West Highway,
Room 6F01,
Hyattsville, MD 20782.
Or via the internet at http://www.fms.treas.gov/c570/.

(e) *Notice of subcontractor waiver of protection* (40 U.S.C. 3133(c)). Any waiver of the right to sue on the payment bond is void unless it is in writing, signed by the person whose right is waived, and executed after such person has first furnished labor or material for use in the performance of the contract.

(End of clause)

52.228-16 Performance and Payment Bonds-Other Than Construction.

As prescribed in 28.103-4 , insert a clause substantially as follows:

PERFORMANCE AND PAYMENT BONDS-OTHER THAN CONSTRUCTION (NOV 2006)

(a) *Definitions*. As used in this clause-

"Original contract price" means the award price of the contract or, for requirements contracts, the price payable for the estimated quantity; or, for indefinite-quantity contracts, the price payable for the specified minimum quantity. Original contract price does not include the price of any options, except those options exercised at the time of contract award.

(b) The Contractor shall furnish a performance bond (Standard Form 1418) for the protection of the Government in an amount equal to _____ percent of the original contract price and a payment bond Standard Form 1416) in an amount equal to _____ percent of the original contract price.

(c) The Contractor shall furnish all executed bonds, including any necessary reinsurance agreements, to the Contracting Officer, within _____ days, but in any event, before starting work.

(d) The Government may require additional performance and payment bond protection if the contract price is increased. The Government may secure the additional protection by directing the Contractor to increase the penal amount of the existing bonds or to obtain additional bonds.

(e) The bonds shall be in the form of firm commitment, supported by corporate sureties whose names appear on the list contained in Treasury Department Circular 570, individual sureties, or by other acceptable security such as postal money order, certified check, cashier's check, irrevocable letter of credit, or, in accordance with Treasury Department regulations,

certain bonds or notes of the United States. Treasury Circular 570 is published in the *Federal Register*, or may be obtained from the:

U.S. Department of the Treasury,
Financial Management Service,
Surety Bond Branch,
3700 East West Highway,
Room 6F01
Hyattsville, MD 20782.
Or via the internet at http://www.fms.treas.gov/c570/.

(End of clause)

Alternate I (July2000). As prescribed in 28.103-4 , substitute the following paragraphs (b) and (d) for paragraphs (b) and (d) of the basic clause:

(b) The Contractor shall furnish a performance bond (Standard Form 1418) for the protection of the Government in an amount equal to _____ percent of the original contract price.

(d) The Government may require additional performance bond protection if the contract price is increased. The Government may secure the additional protection by directing the Contractor to increase the penal amount of the existing bond or to obtain an additional bond.

52.228-17 Individual Surety—Pledge of Assets (Bid Guarantee).

As prescribed in 28.203-4 (a), insert the following provision:

INDIVIDUAL SURETY—PLEDGE OF ASSETS (FEB 2021)

(a) Offerors shall obtain from each person acting as an individual surety on a bid guarantee—

(1) A pledge of assets that meets the eligibility, valuation, and security requirements described in the Federal Acquisition Regulation (FAR) 28.203-1; and

(2) Standard Form 28, Affidavit of Individual Surety.

(b) The Offeror shall include with its offer the information required at paragraph (a) of this provision within the timeframe specified in the provision at FAR 52.228-1, Bid Guarantee, or as otherwise established by the Contracting Officer.

(c) The Contracting Officer may release the security interest on the individual surety's assets in support of a bid guarantee based upon evidence that the offer supported by the individual surety will not result in contract award.

(End of provision)

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52.229 [Reserved]

52.229-1 State and Local Taxes.

As prescribed in 29.401-1 , insert the following clause:

STATE AND LOCAL TAXES (APR 1984)

Notwithstanding the terms of the Federal, State, and Local Taxes clause, the contract price excludes all State and local taxes levied on or measured by the contract or sales price of the services or completed supplies furnished under this contract. The Contractor shall state separately on its invoices taxes excluded from the contract price, and the Government agrees either to pay the amount of the taxes to the Contractor or provide evidence necessary to sustain an exemption.

(End of clause)

52.229-2 North Carolina State and Local Sales and Use Tax.

As prescribed in 29.401-2, insert the following clause:

NORTH CAROLINA STATE AND LOCAL SALES AND USE TAX (DATE)

(a) "Materials," as used in this clause, means building materials, supplies, fixtures, and equipment that become a part of or are annexed to any building or structure erected, altered, or repaired under this contract.

(b) If this is a fixed-price contract, the contract price includes North Carolina State and local sales and use taxes to be paid on materials, notwithstanding any other provision of this contract. If this is a cost-reimbursement contract, any North Carolina State and local sales and use taxes paid by the Contractor on materials shall constitute an allowable cost under this contract.

(c) At the time specified in paragraph (d) of this clause, the Contractor shall furnish the Contracting Officer certified statements setting forth the cost of the materials purchased from each vendor and the amount of North Carolina State and local sales and use taxes paid. In the event the Contractor makes several purchases from the same vendor, the certified statement shall indicate the invoice numbers, the inclusive dates of the invoices, the total amount of the invoices, and the North Carolina State and local sales and use taxes paid. The statement shall also include the cost of any tangible personal property withdrawn from the Contractor's warehouse stock and the amount of North Carolina State and local sales or use tax paid on this property by the Contractor. The Contractor must show any local sales or use taxes included in the Contractor's statements separately from the State sales or use taxes. The Contractor shall furnish any additional information the Commissioner of Revenue of the State of North Carolina may require to substantiate a refund claim for sales or use taxes. The Contractor shall also obtain and furnish to the Contracting Officer similar certified statements by its subcontractors.

(d) If this contract is completed before the next October 1, the Contractor shall submit certified statements to be furnished pursuant to paragraph (c) of this clause within 60 days after completion. If this contract is not completed before the next October 1, the Contractor shall submit certified statements on or before November 30 of each year that include taxes paid during the 12-month period that ended the preceding September 30.

(e) The Contractor shall use the following format for the certified statements to be furnished pursuant to paragraph (c) of this clause:

I hereby certify that during the period _____ to _____ [*insert dates*], ____ [*insert name of Contractor or subcontractor*] paid North Carolina State and local sales and use taxes aggregating $_____ (State) and $_____ (local), with respect to building materials, supplies, fixtures, and equipment that have become a part of or annexed to a building or structure erected, altered, or repaired by _____ [*insert name of Contractor or subcontractor*] for the United States of America, and that the vendors from whom the property was purchased, the dates and numbers of the invoices covering the purchases, the total amount of the invoices of each vendor, the North Carolina State and local sales and use taxes paid on the property (shown separately), and the cost of property withdrawn from warehouse stock and North Carolina State and local sales or use taxes paid on this property are as set forth in the attachments.

Alternate I (APR 1984). If the requirement is for vessel repair to be performed in North Carolina, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) "Materials," as used in this clause, means materials, supplies, fixtures, and equipment that become a part of or are annexed to any vessel altered or repaired under this contract.

(End of clause)

52.229-3 Federal, State, and Local Taxes.

As prescribed in 29.401-3 , insert the following clause:

FEDERAL, STATE, AND LOCAL TAXES (DATE)

(a) As used in this clause-

After-imposed Federal tax means any new or increased Federal excise tax or duty, or tax that was exempted or excluded on the contract date but whose exemption was later revoked or reduced during the contract period, on the transactions or property covered by this contract that the Contractor is required to pay or bear as the result of legislative, judicial, or administrative action taking effect after the contract date. It does not include social security tax or other employment taxes.

After-relieved Federal tax means any amount of Federal excise tax or duty, except social security or other employment taxes, that would otherwise have been payable on the transactions or property covered by this contract, but which the Contractor is not required to pay or bear, or for which the Contractor obtains a refund or drawback, as the result of legislative, judicial, or administrative action taking effect after the contract date.

All applicable Federal, State, and local taxes and duties means all taxes and duties, in effect on the contract date, that the taxing authority is imposing and collecting on the transactions or property covered by this contract.

Contract date means the date set for bid opening or, if this is a negotiated contract or a modification, the effective date of this contract or modification.

Local taxes includes taxes imposed by a possession or territory of the United States, Puerto Rico, or the Northern Mariana Islands, if the contract is performed wholly or partly in any of those areas.

(b) (1) The contract price includes all applicable Federal, State, and local taxes and duties, except as provided in subparagraph (b)(2)(i) of this clause.

(2) Taxes imposed under 26 U.S.C. 5000C may not be-

(i) Included in the contract price; nor

(ii) Reimbursed.

(c) The Government will increase the contract price by the amount of any after-imposed Federal tax, provided the Contractor warrants in writing that no amount for such newly imposed Federal excise tax or duty or rate increase was included in the contract price, as a contingency reserve or otherwise.

(d) The Government will decrease the contract price by the amount of any after-relieved Federal tax.

(e) The Government will decrease the contract price by the amount of any Federal excise tax or duty, except social security or other employment taxes, that the Contractor is required to pay or bear, or does not obtain a refund of, through the Contractor's fault, negligence, or failure to follow instructions of the Contracting Officer.

(f) The Government will not adjust the contract price under this clause unless the amount of the adjustment exceeds $250.

(g) The Contractor shall promptly notify the Contracting Officer of all matters relating to any Federal excise tax or duty that reasonably may be expected to result in either an increase or decrease in the contract price and shall take appropriate action as the Contracting Officer directs.

(h) The Government will, without liability, furnish evidence appropriate to establish exemption from any Federal, State, or local tax when the Contractor requests such evidence and a reasonable basis exists to sustain the exemption.

(End of clause)

52.229-4 Federal, State, and Local Taxes (State and Local Adjustments).

As prescribed in 29.401-3, insert the following clause:

FEDERAL, STATE, AND LOCAL TAXES (STATE AND LOCAL ADJUSTMENTS) (DATE)

(a) As used in this clause-

After-imposed tax means any new or increased Federal, State, or local tax or duty, or tax that was excluded on the contract date but whose exclusion was later revoked or amount of exemption reduced during the contract period, other than an excepted tax, on the transactions or property covered by this contract that the Contractor is required to pay or bear as the result of legislative, judicial, or administrative action taking effect after the contract date.

After-relieved tax means any amount of Federal, State, or local tax or duty, other than an excepted tax, that would otherwise have been payable on the transactions or property covered by this contract, but which the Contractor is not required to pay or bear, or for which the Contractor obtains a refund or drawback, as the result of legislative, judicial, or administrative action taking effect after the contract date.

All applicable Federal, State, and local taxes and duties means all taxes and duties, in effect on the contract date, that the taxing authority is imposing and collecting on the transactions or property covered by this contract.

Contract date means the effective date of this contract and, for any modification to this contract, the effective date of the modification.

Excepted tax means social security or other employment taxes, net income and franchise taxes, excess profits taxes, capital stock taxes, transportation taxes, unemployment compensation taxes, and property taxes. "Excepted tax" does not include gross income taxes levied on or measured by sales or receipts from sales, property taxes assessed on completed supplies covered by this contract, or any tax assessed on the Contractor's possession of, interest in, or use of property, title to which is in the Government.

Local taxes includes taxes imposed by a possession or territory of the United States, Puerto Rico, or the Northern Mariana Islands, if the contract is performed wholly or partly in any of those areas.

(b) (1) Unless otherwise provided in this contract, the contract price includes all applicable Federal, State, and local taxes and duties, except as provided in subparagraph (b)(2)(i) of this clause.

(2) Taxes imposed under 26 U.S.C. 5000C may not be-

(i) Included in the contract price; nor

(ii) Reimbursed.

(c) The Government will increase the contract price by the amount of any after-imposed tax, or of any tax or duty specifically excluded from the contract price by a term or condition of this contract that the Contractor is required to pay or bear, including any interest or penalty, if the Contractor states in writing that the contract price does not include any contingency for such tax and if liability for such tax, interest, or penalty was not incurred through the Contractor's fault, negligence, or failure to follow instructions of the Contracting Officer.

(d) The Government will decrease the contract price by the amount of any after-relieved tax. The Government shall be entitled to interest received by the Contractor incident to a refund of taxes to the extent that such interest was earned after the Contractor was paid by the Government for such taxes. The Government will be entitled to repayment of any penalty refunded to the Contractor to the extent that the penalty was paid by the Government.

(e) The Government will decrease the contract price by the amount of any Federal, State, or local tax, other than an excepted tax, that was included in the contract price and that the Contractor is required to pay or bear, or does not obtain a refund of, through the Contractor's fault, negligence, or failure to follow instructions of the Contracting Officer.

(f) The Government will not adjust the contract price under this clause unless the amount of the adjustment exceeds $250.

(g) The Contractor shall promptly notify the Contracting Officer of all matters relating to Federal, State, and local taxes and duties that reasonably may be expected to result in either an increase or decrease in the contract price and shall take appropriate action as the Contracting Officer directs. The contract price shall be equitably adjusted to cover the costs of action taken by the Contractor at the direction of the Contracting Officer, including any interest, penalty, and reasonable attorneys' fees.

(h) The Government will furnish evidence appropriate to establish exemption from any Federal, State, or local tax when-

(1) The Contractor requests such exemption and states in writing that it applies to a tax excluded from the contract price; and

(2) A reasonable basis exists to sustain the exemption.

(End of clause)

52.229-5 [Reserved]

52.229-6 Taxes-Foreign Fixed-Price Contracts.

As prescribed in 29.402-1(a), insert the following clause:

TAXES-FOREIGN FIXED-PRICE CONTRACTS (DATE)

(a) To the extent that this contract provides for furnishing supplies or performing services outside the United States and its outlying areas, this clause applies in lieu of any Federal, State, and local taxes clause of the contract.

(b) *Definitions*. As used in this clause-

Contract date means the date set for bid opening or, if this is a negotiated contract or a modification, the effective date of this contract or modification.

Country concerned means any country, other than the United States and its outlying areas, in which expenditures under this contract are made.

Tax and "taxes" include fees and charges for doing business that are levied by the government of the country concerned or by its political subdivisions.

All applicable taxes and duties means all taxes and duties, in effect on the contract date, that the taxing authority is imposing and collecting on the transactions or property covered by this contract, pursuant to written ruling or regulation in effect on the contract date.

After-imposed tax means any new or increased tax or duty, or tax that was exempted or excluded on the contract date but whose exemption was later revoked or reduced during the contract period, other than excepted tax, on the transactions or property covered by this contract that the Contractor is required to pay or bear as the result of legislative, judicial, or administrative action taking effect after the contract date.

After-relieved tax means any amount of tax or duty, other than an excepted tax, that would otherwise have been payable on the transactions or property covered by this contract, but which the Contractor is not required to pay or bear, or for which the Contractor obtains a refund, as the result of legislative, judicial, or administrative action taking effect after the contract date.

Excepted tax means social security or other employment taxes, net income and franchise taxes, excess profits taxes, capital stock taxes, transportation taxes, unemployment compensation taxes, and property taxes. "Excepted tax" does not include gross income taxes levied on or measured by sales or receipts from sales, property taxes assessed on completed supplies covered by this contract, or any tax assessed on the Contractor's possession of, interest in, or use of property, title to which is in the U.S. Government.

(c) (1) Unless otherwise provided in this contract, the contract price includes all applicable taxes and duties, except taxes and duties that the Government of the United States and the government of the country concerned have agreed shall not be applicable to expenditures in such country by or on behalf of the United States, except as provided in paragraph (c)(2) of this clause.

(2) Taxes imposed under 26 U.S.C. 5000C may not be-

(i) Included in the contract price; nor

(ii) Reimbursed.

(d) (1) Except as provided in paragraph (d)(2) of this clause, the Government will increase the contract price by the amount of any after-imposed tax or of any tax or duty specifically excluded from the contract price by a provision of this contract that the Contractor is required to pay or bear, including any interest or penalty, if the Contractor states in writing that the contract price does not include any contingency for such tax and if liability for such tax, interest, or penalty was not incurred through the Contractor's fault, negligence, or failure to follow instructions of the Contracting Officer or to comply with the requirements of paragraph (i) of this clause.

(2) The Government will not increase the contract price to offset taxes imposed under 26 U.S.C. 5000C.

(e) The Government will decrease the contract price by the amount of any after-relieved tax, including any interest or penalty. The Government of the United States will be entitled to interest received by the Contractor incident to a refund of taxes to the extent that such interest was earned after the Contractor was paid by the Government of the United States for such taxes. The Government of the United States will be entitled to repayment of any penalty refunded to the Contractor to the extent that the penalty was paid by the Government.

(f) The Government will decrease the contract price by the amount of any tax or duty, other than an excepted tax, that was included in the contract and that the Contractor is required to pay or bear, or does not obtain a refund of, through the Contractor's fault, negligence, or failure to follow instructions of the Contracting Officer or to comply with the requisements of paragraph (i) of this clause.

(g) The Government will not adjust the contract price under this clause unless the amount of the adjustment exceeds $250.

(h) If the Contractor obtains a reduction in tax liability under the United States Internal Revenue Code (Title26, U.S. Code) because of the payment of any tax or duty that either was included in the contract price or was the basis of an increase

in the contract price, the Contractor shall pay or credit the amount of the reduction to the Government of the United States as the Contracting Officer directs.

(i) The Contractor shall take all reasonable action to obtain exemption from or refund of any taxes or duties, including interest or penalty, from which the United States Government, the Contractor, any subcontractor, or the transactions or property covered by this contract are exempt under the laws of the country concerned or its political subdivisions or which the governments of the United States and of the country concerned have agreed shall not be applicable to expenditures in such country by or on behalf of the United States.

(j) The Contractor shall promptly notify the Contracting Officer of all matters relating to taxes or duties that reasonably may be expected to result in either an increase or decrease in the contract price and shall take appropriate action as the Contracting Officer directs. The Government will equitably adjust the contract price to cover the costs of action taken by the Contractor at the direction of the Contracting Officer, including any interest, penalty, and reasonable attorneys' fees.

(End of clause)

52.229-7 Taxes-Fixed-Price Contracts with Foreign Governments.

As prescribed in 29.402-1(b), insert the following clause:

TAXES-FIXED-PRICE CONTRACTS WITH FOREIGN GOVERNMENTS (DATE)

(a) "Contract date," as used in this clause, means the date set for bid opening or, if this is a negotiated contract or a modification, the effective date of this contract or modification.

(b) (1) The contract price, including the prices in any subcontracts under this contract, does not include any tax or duty that the Government of the United States and the Government of _____ *[insert name of the foreign government]* have agreed shall not apply to expenditures made by the United States in _____ *[insert name of country]*, or any tax or duty not applicable to this contract or any subcontracts under this contract, pursuant to the laws of _____ *[insert name of country]*. If any such tax or duty has been included in the contract price, through error or otherwise, the contract price shall be correspondingly reduced.

(2) Taxes imposed under 26 U.S.C. 5000C may not be included in the contract price.

(c) If, after the contract date, the Government of the United States and the Government of _____ *[insert name of the foreign government]* agree that any tax or duty included in the contract price shall not apply to expenditures by the United States in _____ *[insert name of country]*, the Government of the United States will reduce the contract price accordingly.

(d) The Government of the United States will not adjust the contract price under this clause unless the amount of the adjustment exceeds $250.

(End of clause)

52.229-8 Taxes-Foreign Cost-Reimbursement Contracts.

As prescribed in 29.402-2(a), insert the following clause:

TAXES-FOREIGN COST-REIMBURSEMENT CONTRACTS (DATE)

(a) Any tax or duty from which the United States Government is exempt by agreement with the Government of _____ *[insert name of the foreign government]*, or from which the Contractor or any subcontractor under this contract is exempt under the laws of _____ *[insert name of country]*, shall not constitute an allowable cost under this contract.

(b) If the Contractor or subcontractor under this contract obtains a foreign tax credit that reduces its Federal income tax liability under the United States Internal Revenue Code (Title 26, U.S. Code) because of the payment of any tax or duty that was reimbursed under this contract, the Contractor shall pay or credit the amount of the reduction at the time of such offset to the Government of the United States as the Contracting Officer directs.

(End of clause)

52.229-9 Taxes-Cost-Reimbursement Contracts with Foreign Governments.

As prescribed in 29.402-2(b), insert the following clause:

TAXES-COST-REIMBURSEMENT CONTRACTS WITH FOREIGN GOVERNMENTS (DATE)

(a) Any tax or duty from which the United States Government is exempt by agreement with the Government of _____ *[insert name of the foreign government]*, or from which any subcontractor under this contract is exempt under the laws of _____ *[insert name of country]*, shall not constitute an allowable cost under this contract.

(b) If any subcontractor obtains a foreign tax credit that reduces its Federal income tax liability under the United States Internal Revenue Code (Title 26, U.S. Code) because of the payment of any tax or duty that was reimbursed under this contract, the subcontractor shall pay (not credit to the contract) the amount of the reduction to the Treasurer of the United States at the time the Federal income tax return is filed.

(End of clause)

52.229-10 State of New Mexico Gross Receipts and Compensating Tax.

As prescribed in 29.401-4(b), insert the following clause:

STATE OF NEW MEXICO GROSS RECEIPTS AND COMPENSATING TAX (DATE)

(a) Within 30 days after award of this contract, the Contractor shall register the contract, including the contract number, with the State of New Mexico, Taxation and Revenue Department, Revenue Division, pursuant to the Tax Administration Act of the State of New Mexico.

(b) The Contractor shall pay the New Mexico gross receipts taxes, required by the Gross Receipts and Compensating Tax Act of New Mexico, assessed against the contract fee and costs paid for performance of this contract, or of any part or portion thereof, within the State of New Mexico. The allowability of any gross receipts taxes or local option taxes lawfully paid to the State of New Mexico by the Contractor or its subcontractors will be determined by the contracting officer in accordance with the Allowable Cost and Payment clause of this contract except as provided in paragraph (d) of this clause.

(c) (1) The Contractor shall submit applications for Nontaxable Transaction Certificates, FormCSR-3 C, to the:

State of New Mexico Taxation and Revenue Dept. Revenue Division PO Box 630 Santa Fe, New Mexico 87509

(2) When the Type 15 Nontaxable Transaction Certificate is issued by the Revenue Division, the Contractor shall use these certificates strictly in accordance with this contract, and the agreement between the (*_____) and the New Mexico Taxation and Revenue Department.

(d) The Contractor shall provide Type 15 Nontaxable Transaction Certificates to each vendor in New Mexico selling tangible personal property to the Contractor for use in the performance of this contract. If the Contractor does not provide a Type 15 Nontaxable Transaction Certificate to a vendor, the vendor will be liable for the gross receipt taxes, which the vendor will pass on to the Contractor. Those taxes are not an allowable cost under the contract, and the Government will not reimburse the Contractor for the taxes.

(e) The Contractor shall pay the New Mexico compensating user tax for any tangible personal property which is purchased pursuant to a Nontaxable Transaction Certificate if such property is not used for Federal purposes.

(f) The Contractor's out-of-state purchase of tangible personal property, which would be otherwise subject to compensation tax, is subject to the principles of this clause. Accordingly, Contractors shall pay compensating tax if such property is not used for Federal purposes.

(g) The (*_____) may receive information regarding the Contractor from the Revenue Division of the New Mexico Taxation and Revenue Department and, at the discretion of the (*_____), may participate in any matters or proceedings pertaining to this clause or the Agreement mentioned in paragraph (c)(2) of this clause. This shall not preclude the Contractor from having its own representative nor does it obligate the (*_____) to represent its Contractor.

(h) The Contractor agrees to insert the substance of this clause, including this paragraph (h), in each subcontract which meets the criteria in 29.401-4(b)(1) through (3) of the Federal Acquisition Regulation.

(i) Paragraphs (a) through (h) of this clause shall be null and void should the Agreement referred to in paragraph (c)(2) of this clause be terminated; provided, however, that such termination shall not nullify obligations already incurred prior to the date of termination.

[*Insert appropriate agency name in blanks.]

(End of clause)

52.229-11 Tax on Certain Foreign Procurements—Notice and Representation.

As prescribed in 29.402-3(a), insert the following provision:

TAX ON CERTAIN FOREIGN PROCUREMENTS—NOTICE AND REPRESENTATION (DATE)

(a) *Definitions*. As used in this provision—

Foreign person means any person other than a United States person.

Specified Federal procurement payment means any payment made pursuant to a contract with a foreign contracting party that is for goods, manufactured or produced, or services provided in a foreign country that is not a party to an international procurement agreement with the United States. For purposes of the prior sentence, a foreign country does not include an outlying area of the United States.

United States person as defined in 26 U.S.C. 7701(a)(30) means

(1) A citizen or resident of the United States;

(2) A domestic partnership;

(3) A domestic corporation;

(4) Any estate (other than a foreign estate, within the meaning of 26 U.S.C. 701(a)(31)); and

(5) Any trust if–

(i) A court within the United States is able to exercise primary supervision over the administration of the trust; and

(ii) One or more United States persons have the authority to control all substantial decisions of the trust.

(b) Unless exempted, there is a 2 percent tax of the amount of a specified Federal procurement payment on any foreign person receiving such payment. See 26 U.S.C. 5000C and its implementing regulations at 26 CFR 1.5000C-1 through 1.5000C-7.

(c) Exemptions from withholding under this provision are described at 26 CFR 1.5000C-1(d)(5) through (7). The Offeror may claim an exemption from the withholding by using the Department of the Treasury Internal Revenue Service (IRS) Form W-14, Certificate of Foreign Contracting Party Receiving Federal Procurement Payments, available at www.irs.gov/w14. Any exemption claimed and self-certified on the IRS Form W-14 is subject to audit by the IRS. Any disputes regarding the imposition and collection of the 26 U.S.C. 5000C tax are adjudicated by the IRS as the 26 U.S.C. 5000C tax is a tax matter, not a contract issue. The IRS Form W-14 is provided to the acquiring agency rather than to the IRS.

(d) For purposes of withholding under 26 U.S.C. 5000C, the Offeror represents that

(1) It □ is □ is not a foreign person; and

(2) If the Offeror indicates "is" in paragraph (d)(1) of this provision, then the Offeror represents that—I am claiming on the IRS Form W-14 □ a full exemption, or □ partial or no exemption [*Offeror must select one*] from the excise tax.

(e) If the Offeror represents it is a foreign person in paragraph (d)(1) of this provision, then—

(1) The clause at FAR 52.229-12, Tax on Certain Foreign Procurements, will be included in any resulting contract; and

(2) The Offeror shall submit with its offer the IRS Form W-14. If the IRS Form W-14 is not submitted with the offer, exemptions will not be applied to any resulting contract and the Government will withhold a full 2 percent of each payment.

(f) If the Offeror selects "is" in paragraph (d)(1) and "partial or no exemption" in paragraph (d)(2) of this provision, the Offeror will be subject to withholding in accordance with the clause at FAR 52.229-12, Tax on Certain Foreign Procurements, in any resulting contract.

(g) A taxpayer may, for a fee, seek advice from the IRS as to the proper tax treatment of a transaction. This is called a private letter ruling. Also, the IRS may publish a revenue ruling, which is an official interpretation by the IRS of the Internal Revenue Code, related statutes, tax treaties, and regulations. A revenue ruling is the conclusion of the IRS on how the law is applied to a specific set of facts. For questions relating to the interpretation of the IRS regulations go to https://www.irs.gov/help/tax-law-questions.

(End of provision)

52.229-12 Tax on Certain Foreign Procurements.

As prescribed in 29.402-3(b), insert the following clause:

TAX ON CERTAIN FOREIGN PROCUREMENTS (DATE)

(a) *Definitions.* As used in this clause—

Foreign person means any person other than a United States person.

United States person, as defined in 26 U.S.C. 7701(a)(30), means–

(1) A citizen or resident of the United States;

(2) A domestic partnership;

(3) A domestic corporation;

(4) Any estate (other than a foreign estate, within the meaning of 26 U.S.C. 7701(a)(31)); and

(5) Any trust if-

(i) A court within the United States is able to exercise primary supervision over the administration of the trust; and

(ii) One or more United States persons have the authority to control all substantial decisions of the trust.

(b) This clause applies only to foreign persons. It implements 26 U.S.C. 5000C and its implementing regulations at 26 CFR 1.5000C-1 through 1.5000C-7.

(c) (1) If the Contractor is a foreign person and has only a partial or no exemption to the withholding, the Contractor shall include the Department of the Treasury IRS Form W-14, Certificate of Foreign Contracting Party Receiving Federal Procurement Payments, with each voucher or invoice submitted under this contract throughout the period in which this status is applicable. The excise tax withholding is applied at the payment level, not at the contract level. The Contractor should revise each IRS Form W-14 submission to reflect the exemption (if any) that applies to that particular invoice, such as a different exemption applying. In the absence of a completed IRS Form W-14 accompanying a payment request, the default withholding percentage is 2 percent for the section 5000C withholding for that payment request. Information about IRS Form W-14 and its separate instructions is available via the internet at www.irs.gov/w14.

(2) If the Contractor—

(i) Is a foreign person; and

(ii) Has indicated in its offer in the provision 52.229-11, Tax on Certain Foreign Procurements—Notice and Representation, that it is fully exempt from the withholding; and

(iii) Certified the full exemption on the IRS Form W-14, and if that full exemption no longer applies due to a change in circumstances during the performance of the contract that causes the Contractor to become subject to the withholding for the 2 percent excise tax; then the Contractor shall–

(A) Notify the Contracting Officer within 30 days of a change in circumstances that causes the Contractor to be subject to the excise tax withholding under 26 U.S.C. 5000C; and

(B) Comply with paragraph (c)(1) of this clause.

(d) The Government will withhold a full 2 percent of each payment unless the Contractor claims an exemption. If the Contractor enters a ratio in Line 12 of the IRS Form W-14, the result of Line 11 divided by Line 10, the Government will withhold from each payment an amount equal to 2 percent multiplied by the contract ratio. If the Contractor marks box 9 of the IRS Form W-14 (rather than completes Lines 10 through 12), the Contractor must identify and enter the specific exempt and nonexempt amounts in Line 15 of the IRS Form W-14; the Government will then withhold 2 percent only from the nonexempt amount. See the IRS Form W-14 and its instructions.

(e) Exemptions from the withholding under this clause are described at 26 CFR 1.5000C-1(d)(5) through (7). Any exemption claimed and self-certified on the IRS Form W-14 is subject to audit by the IRS. Any disputes regarding the imposition and collection of the 26 U.S.C. 5000C tax are adjudicated by the IRS as the 26 U.S.C. 5000C tax is a tax matter, not a contract issue.

(f) Taxes imposed under 26 U.S.C. 5000C may not be—

(1) Included in the contract price; nor

(2) Reimbursed.

(g) A taxpayer may, for a fee, seek advice from the IRS as to the proper tax treatment of a transaction. This is called a private letter ruling. Also, the IRS may publish a revenue ruling, which is an official interpretation by the IRS of the Internal Revenue Code, related statutes, tax treaties, and regulations. A revenue ruling is the conclusion of the IRS on how the law is applied to a specific set of facts. For questions relating to the interpretation of the IRS regulations go to https://www.irs.gov/help/tax-law-questions.

(End of clause)

52.229-13 [Reserved]

(DEVIATION DATE)

52.229-14 [Reserved]

(DEVIATION DATE)

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52.230 [Reserved]

52.230-1 Cost Accounting Standards Notices and Certification.

As prescribed in 30.204(a), insert the following provision:

COST ACCOUNTING STANDARDS NOTICES AND CERTIFICATION (DEVIATION DATE)

Note: This notice does not apply to small businesses or foreign governments. This notice is in three parts, identified by Roman numerals I through III.

Offerors shall examine each part and provide the requested information in order to determine Cost Accounting Standards (CAS) requirements applicable to any resultant contract.

If the offeror is an educational institution, part II does not apply unless the contemplated contract will be subject to full or modified CAS coverage pursuant to 48 CFR 9903.201-2(c)(5) or 9903.201-2(c)(6), respectively.

I. DISCLOSURE STATEMENT-COST ACCOUNTING PRACTICES AND CERTIFICATION

(a) Any contract in excess of the lower CAS threshold specified in Federal Acquisition Regulation (FAR) 30.205(b) resulting from this solicitation will be subject to the requirements of the Cost Accounting Standards Board (48 CFR chapter 99), except for those contracts which are exempt as specified in 48 CFR 9903.201-1.

(b) Any offeror submitting a proposal which, if accepted, will result in a contract subject to the requirements of 48 CFR chapter 99 must, as a condition of contracting, submit a Disclosure Statement as required by 48 CFR 9903.202. When required, the Disclosure Statement must be submitted as a part of the offeror's proposal under this solicitation unless the offeror has already submitted a Disclosure Statement disclosing the practices used in connection with the pricing of this proposal. If an applicable Disclosure Statement has already been submitted, the offeror may satisfy the requirement for submission by providing the information requested in paragraph (c) of part I of this provision.

Caution: In the absence of specific regulations or agreement, a practice disclosed in a Disclosure Statement shall not, by virtue of such disclosure, be deemed to be a proper, approved, or agreed-to practice for pricing proposals or accumulating and reporting contract performance cost data.

(c) Check the appropriate box below:

(1) □ *Certificate of Concurrent Submission of Disclosure Statement*. The offeror hereby certifies that, as a part of the offer, copies of the Disclosure Statement have been submitted as follows:

(i) Original and one copy to the cognizant Administrative Contracting Officer (ACO) or cognizant Federal agency official authorized to act in that capacity (Federal official), as applicable; and

(ii) One copy to the cognizant Federal auditor.

(Disclosure must be on Form No. CASB DS-1 or CASB DS-2, as applicable. Forms may be obtained from the cognizant ACO or Federal official.)

Date of Disclosure Statement: _____ Name and Address of Cognizant ACO or Federal Official Where Filed: _____

The offeror further certifies that the practices used in estimating costs in pricing this proposal are consistent with the cost accounting practices disclosed in the Disclosure Statement.

(2) □ *Certificate of Previously Submitted Disclosure Statement*. The offeror hereby certifies that the required Disclosure Statement was filed as follows:

Date of Disclosure Statement: _____ Name and Address of Cognizant ACO or Federal Official Where Filed: _____

The offeror further certifies that the practices used in estimating costs in pricing this proposal are consistent with the cost accounting practices disclosed in the applicable Disclosure Statement.

(3) □ *Certificate of Monetary Exemption*. The offeror hereby certifies that the offeror, together with all divisions, subsidiaries, and affiliates under common control, did not receive net awards of negotiated prime contracts and subcontracts subject to CAS totaling $50 million or more in the cost accounting period immediately preceding the period in which this proposal was submitted. The offeror further certifies that if such status changes before an award resulting from this proposal, the offeror will advise the Contracting Officer immediately.

(4) □ *Certificate of Interim Exemption*. The offeror hereby certifies that (i) the offeror first exceeded the monetary exemption for disclosure, as defined in (3) of this subsection, in the cost accounting period immediately preceding the period

in which this offer was submitted and (ii) in accordance with 48 CFR 9903.202-1, the offeror is not yet required to submit a Disclosure Statement. The offeror further certifies that if an award resulting from this proposal has not been made within 90 days after the end of that period, the offeror will immediately submit a revised certificate to the Contracting Officer, in the form specified under paragraph (c)(1) or (c)(2) of part I of this provision, as appropriate, to verify submission of a completed Disclosure Statement.

Caution: Offerors currently required to disclose because they were awarded a CAS-covered prime contract or subcontract of $50 million or more in the current cost accounting period may not claim this exemption (4). Further, the exemption applies only in connection with proposals submitted before expiration of the 90-day period following the cost accounting period in which the monetary exemption was exceeded.

II. COST ACCOUNTING STANDARDS-ELIGIBILITY FOR MODIFIED CONTRACT COVERAGE

If the offeror is eligible to use the modified provisions of 48 CFR 9903.201-2(b) and elects to do so, the offeror shall indicate by checking the box below. Checking the box below shall mean that the resultant contract is subject to the Disclosure and Consistency of Cost Accounting Practices clause in lieu of the Cost Accounting Standards clause.

□ The offeror hereby claims an exemption from the Cost Accounting Standards clause under the provisions of 48 CFR 9903.201-2(b) and certifies that the offeror is eligible for use of the Disclosure and Consistency of Cost Accounting Practices clause because during the cost accounting period immediately preceding the period in which this proposal was submitted, the offeror received less than $50 million in awards of CAS-covered prime contracts and subcontracts. The offeror further certifies that if such status changes before an award resulting from this proposal, the offeror will advise the Contracting Officer immediately.

Caution: An offeror may not claim the above eligibility for modified contract coverage if this proposal is expected to result in the award of a CAS-covered contract of $50 million or more or if, during its current cost accounting period, the offeror has been awarded a single CAS-covered prime contract or subcontract of $50 million or more.

III. ADDITIONAL COST ACCOUNTING STANDARDS APPLICABLE TO EXISTING CONTRACTS

The offeror shall indicate below whether award of the contemplated contract would, in accordance with paragraph (a)(3) of the Cost Accounting Standards clause, require a change in established cost accounting practices affecting existing contracts and subcontracts.

□ Yes □ No

(End of provision)

52.230-2 Cost Accounting Standards.

As prescribed in 30.205(a)(1), insert the following clause:

COST ACCOUNTING STANDARDS (DEVIATION DATE)

(a) Unless the contract is exempt under 48 CFR 9903.201-1 and 9903.201-2, the provisions of 48 CFR part 9903 are incorporated herein by reference and the Contractor, in connection with this contract, shall-

(1) *(CAS-covered Contracts Only)* By submission of a Disclosure Statement, disclose in writing the Contractor's cost accounting practices as required by 48 CFR 9903.202-1 through 9903.202-5, including methods of distinguishing direct costs from indirect costs and the basis used for allocating indirect costs. The practices disclosed for this contract shall be the same as the practices currently disclosed and applied on all other contracts and subcontracts being performed by the Contractor and which contain a Cost Accounting Standards (CAS) clause. If the Contractor has notified the Contracting Officer that the Disclosure Statement contains trade secrets and commercial or financial information which is privileged and confidential, the Disclosure Statement shall be protected and shall not be released outside of the Government.

(2) Follow consistently the Contractor's cost accounting practices in accumulating and reporting contract performance cost data concerning this contract. If any change in cost accounting practices is made for the purposes of any contract or subcontract subject to CAS requirements, the change must be applied prospectively to this contract and the Disclosure

Statement must be amended accordingly. If the contract price or cost allowance of this contract is affected by such changes, adjustment shall be made in accordance with paragraph (a)(4) or (a)(5) of this clause, as appropriate.

(3) Comply with all CAS, including any modifications and interpretations indicated thereto contained in 48 CFR part 9904, in effect on the date of award of this contract or, if the Contractor has submitted certified cost or pricing data, on the date of final agreement on price as shown on the Contractor's signed certificate of current cost or pricing data. The Contractor shall also comply with any CAS (or modifications to CAS) which hereafter become applicable to a contract or subcontract of the Contractor. Such compliance shall be required prospectively from the date of applicability to such contract or subcontract.

(4) (i) (Agree to an equitable adjustment as provided in the Changes clause of this contract if the contract cost is affected by a change which, pursuant to paragraph (a)(3) of this clause, the Contractor is required to make to the Contractor's established cost accounting practices.

(ii) Negotiate with the Contracting Officer to determine the terms and conditions under which a change may be made to a cost accounting practice, other than a change made under other provisions of paragraph (a)(4) of this clause; provided that no agreement may be made under this provision that will increase costs paid by the United States.

(iii) When the parties agree to a change to a cost accounting practice, other than a change under subdivision (a)(4)(i) of this clause, negotiate an equitable adjustment as provided in the Changes clause of this contract.

(5) Agree to an adjustment of the contract price or cost allowance, as appropriate, if the Contractor or a subcontractor fails to comply with an applicable Cost Accounting Standard, or to follow any cost accounting practice consistently and such failure results in any increased costs paid by the United States. Such adjustment shall provide for recovery of the increased costs to the United States, together with interest thereon computed at the annual rate established under section 6621(a)(2) of the Internal Revenue Code of 1986 (26 U.S.C. 6621(a)(2)) for such period, from the time the payment by the United States was made to the time the adjustment is effected. In no case shall the Government recover costs greater than the increased cost to the Government, in the aggregate, on the relevant contracts subject to the price adjustment, unless the Contractor made a change in its cost accounting practices of which it was aware or should have been aware at the time of price negotiations and which it failed to disclose to the Government.

(b) If the parties fail to agree whether the Contractor or a subcontractor has complied with an applicable CAS in 48 CFR part 9904 or a CAS rule or regulation in 48 CFR part 9903 and as to any cost adjustment demanded by the United States, such failure to agree will constitute a dispute under 41 U.S.C. chapter 71, Contract Disputes.

(c) The Contractor shall permit any authorized representatives of the Government to examine and make copies of any documents, papers, or records relating to compliance with the requirements of this clause.

(d) The Contractor shall include in all negotiated subcontracts which the Contractor enters into, the substance of this clause, except paragraph (b), and shall require such inclusion in all other subcontracts, of any tier, including the obligation to comply with all CAS in effect on the subcontractor's award date or if the subcontractor has submitted certified cost or pricing data, on the date of final agreement on price as shown on the subcontractor's signed Certificate of Current Cost or Pricing Data. If the subcontract is awarded to a business unit which pursuant to 48 CFR 9903.201-2 is subject to other types of CAS coverage, the substance of the applicable clause set forth in subsection 30.205 of the Federal Acquisition Regulation (FAR) shall be inserted. This requirement shall apply only to negotiated subcontracts in excess of the lower CAS threshold specified in FAR 30.205(b) on the date of subcontract award, except that the requirement shall not apply to negotiated subcontracts otherwise exempt from the requirement to include a CAS clause as specified in 48 CFR 9903.201-1.

(End of clause)

52.230-3 Disclosure and Consistency of Cost Accounting Practices.

As prescribed in 30.205(b)(1), insert the following clause:

DISCLOSURE AND CONSISTENCY OF COST ACCOUNTING PRACTICES (DEVIATION DATE)

(a) The Contractor, in connection with this contract, shall-

(1) Comply with the requirements of 48 CFR 9904.401, Consistency in Estimating, Accumulating, and Reporting Costs; 48 CFR 9904.402, Consistency in Allocating Costs Incurred for the Same Purpose; 48 CFR 9904.405, Accounting for Unallowable Costs; and 48 CFR 9904.406, Cost Accounting Standard-Cost Accounting Period, in effect on the date of award of this contract as indicated in 48 CFR part 9904.

(2) *(CAS-covered Contracts Only)* If it is a business unit of a company required to submit a Disclosure Statement, disclose in writing its cost accounting practices as required by 48 CFR 9903.202-1 through 9903.202-5. If the Contractor has

notified the Contracting Officer that the Disclosure Statement contains trade secrets and commercial or financial information which is privileged and confidential, the Disclosure Statement shall be protected and shall not be released outside of the Government.

(3) (i) Follow consistently the Contractor's cost accounting practices. A change to such practices may be proposed, however, by either the Government or the Contractor, and the Contractor agrees to negotiate with the Contracting Officer the terms and conditions under which a change may be made. After the terms and conditions under which the change is to be made have been agreed to, the change must be applied prospectively to this contract, and the Disclosure Statement, if affected, must be amended accordingly.

(ii) The Contractor shall, when the parties agree to a change to a cost accounting practice and the Contracting Officer has made the finding required in 48 CFR 9903.201-6(c), that the change is desirable and not detrimental to the interests of the Government, negotiate an equitable adjustment as provided in the Changes clause of this contract. In the absence of the required finding, no agreement may be made under this contract clause that will increase costs paid by the United States.

(4) Agree to an adjustment of the contract price or cost allowance, as appropriate, if the Contractor or a subcontractor fails to comply with the applicable CAS or to follow any cost accounting practice, and such failure results in any increased costs paid by the United States. Such adjustment shall provide for recovery of the increased costs to the United States together with interest thereon computed at the annual rate established under section 6621(a)(2) of the Internal Revenue Code of 1986 (26 U.S.C. 6621(a)(2)), from the time the payment by the United States was made to the time the adjustment is effected.

(b) If the parties fail to agree whether the Contractor has complied with an applicable CAS, rule, or regulation as specified in 48 CFR parts 9903 and 9904 and as to any cost adjustment demanded by the United States, such failure to agree will constitute a dispute under 41 U.S.C. chapter 71, Contract Disputes.

(c) The Contractor shall permit any authorized representatives of the Government to examine and make copies of any documents, papers, and records relating to compliance with the requirements of this clause.

(d) The Contractor shall include in all negotiated subcontracts, which the Contractor enters into, the substance of this clause, except paragraph (b), and shall require such inclusion in all other subcontracts of any tier, except that-

(1) If the subcontract is awarded to a business unit which pursuant to 48 CFR 9903.201-2 is subject to other types of CAS coverage, the substance of the applicable clause set forth in section 30.205 of the Federal Acquisition Regulation (FAR) shall be inserted.

(2) The requirement in this paragraph (d) shall apply only to negotiated subcontracts in excess of the lower CAS threshold specified in FAR 30.205(b) on the date of subcontract award.

(3) The requirement shall not apply to negotiated subcontracts otherwise exempt from the requirement to include a CAS clause as specified in 48 CFR 9903.201-1.

(End of clause)

52.230-4 Disclosure and Consistency of Cost Accounting Practices-Foreign Concerns.

As prescribed in 30.205(c)(1), insert the following clause:

DISCLOSURE AND CONSISTENCY OF COST ACCOUNTING PRACTICES-FOREIGN CONCERNS (DEVIATION DATE)

(a) The Contractor, in connection with this contract, shall-

(1) Comply with the requirements of 48 CFR 9904.401, Consistency in Estimating, Accumulating, and Reporting Costs; and 48 CFR 9904.402, Consistency in Allocating Costs Incurred for the Same Purpose, in effect on the date of award of this contract, as indicated in 48 CFR part 9904.

(2) (Cost Accounting Standard (CAS)-covered Contracts Only). If it is a business unit of a company required to submit a Disclosure Statement, disclose in writing its cost accounting practices as required by 48 CFR 9903.202-1 through 48 CFR 9903.202-5. If the Contractor has notified the Contracting Officer that the Disclosure Statement contains trade secrets and commercial or financial information which is privileged and confidential, the Disclosure Statement shall be protected and shall not be released outside of the U.S. Government.

(3) (i) Follow consistently the Contractor's cost accounting practices. A change to such practices may be proposed, however, by either the U.S. Government or the Contractor, and the Contractor agrees to negotiate with the Contracting Officer the terms and conditions under which a change may be made. After the terms and conditions under which the change

is to be made have been agreed to, the change must be applied prospectively to this contract, and the Disclosure Statement, if affected, must be amended accordingly.

(ii) The Contractor shall, when the parties agree to a change to a cost accounting practice and the Contracting Officer has made the finding required in 48 CFR 9903.201-6(c) that the change is desirable and not detrimental to the interests of the U.S. Government, negotiate an equitable adjustment as provided in the Changes clause of this contract. In the absence of the required finding, no agreement may be made under this contract clause that will increase costs paid by the U.S. Government.

(4) Agree to an adjustment of the contract price or cost allowance, as appropriate, if the Contractor or a subcontractor fails to comply with the applicable CAS or to follow any cost accounting practice, and such failure results in any increased costs paid by the U.S. Government. Such adjustment shall provide for recovery of the increased costs to the U.S. Government, together with interest thereon computed at the annual rate established under section 6621(a)(2) of the Internal Revenue Code of 1986 (26 U.S.C. 6621(a)(2)) for such period, from the time the payment by the U.S. Government was made to the time the adjustment is effected.

(b) If the parties fail to agree whether the Contractor has complied with an applicable CAS rule, or regulation as specified in 48 CFR parts 9903 and 9904 and as to any cost adjustment demanded by the U.S. Government, such failure to agree will constitute a dispute under 41 U.S.C. chapter 71, Contract Disputes.

(c) The Contractor shall permit any authorized representatives of the U.S. Government to examine and make copies of any documents, papers, and records relating to compliance with the requirements of this clause.

(d) The Contractor shall include in all negotiated subcontracts, which the Contractor enters into, the substance of this clause, except paragraph (b), and shall require such inclusion in all other subcontracts of any tier, except that—

(1) If the subcontract is awarded to a business unit which pursuant to 48 CFR 9903.201-2 is subject to other types of CAS coverage, the substance of the applicable clause prescribed in Federal Acquisition Regulation (FAR) 30.205 shall be inserted.

(2) The requirement in this paragraph (d) shall apply only to negotiated subcontracts in excess of the lower CAS threshold specified in FAR 30.205(b) on the date of subcontract award.

(3) The requirement shall not apply to negotiated subcontracts otherwise exempt from the requirement to include a CAS clause as specified in 48 CFR 9903.201-1.

(End of clause)

52.230-5 Cost Accounting Standards-Educational Institution.

As prescribed in 30.205(e)(1), insert the following clause:

COST ACCOUNTING STANDARDS-EDUCATIONAL INSTITUTION (DEVIATION DATE)

(a) Unless the contract is exempt under 48 CFR 9903.201-1 and 9903.201-2, the provisions of 48 CFR part 9903 are incorporated herein by reference and the Contractor, in connection with this contract, shall-

(1) *(CAS-covered contracts only)*. If a business unit of an educational institution (defined as an institution of higher education in the OMB Uniform Guidance at 2 CFR part 200, subpart A and 20 U.S.C. 1001) is required to submit a Disclosure Statement, disclose in writing the Contractor's cost accounting practices as required by 48 CFR 9003.202-1 through 9903.202-5, including methods of distinguishing direct costs from indirect costs and the basis used for accumulating and allocating indirect costs. The practices disclosed for this contract shall be the same as the practices currently disclosed and applied on all other contracts and subcontracts being performed by the Contractor and which contain a Cost Accounting Standards (CAS) clause. If the Contractor has notified the Contracting Officer that the Disclosure Statement contains trade secrets, and commercial or financial information which is privileged and confidential, the Disclosure Statement shall be protected and shall not be released outside of the Government.

(2) Follow consistently the Contractor's cost accounting practices in accumulating and reporting contract performance cost data concerning this contract. If any change in cost accounting practices is made for the purposes of any contract or subcontract subject to CAS requirements, the change must be applied prospectively to this contract and the Disclosure Statement, if required, must be amended accordingly. If an accounting principle change mandated under OMB Uniform Guidance at 2 CFR part 200, subpart E and appendix III, requires that a change in the Contractor's cost accounting practices be made after the date of this contract award, the change must be applied prospectively to this contract and the Disclosure

Statement, if required, must be amended accordingly. If the contract price or cost allowance of this contract is affected by such changes, adjustment shall be made in accordance with paragraph (a)(4) or (a)(5) of this clause, as appropriate.

(3) Comply with all CAS, including any modifications and interpretations indicated thereto contained in 48 CFR part 9905 in effect on the date of award of this contract or, if the Contractor has submitted certified cost or pricing data, on the date of final agreement on price as shown on the Contractor's signed certificate of current cost or pricing data. The Contractor shall also comply with any CAS (or modifications to CAS) which hereafter become applicable to a contract or subcontract of the Contractor. Such compliance shall be required prospectively from the date of applicability to such contract or subcontract.

(4) (i) Agree to an equitable adjustment as provided in the Changes clause of this contract if the contract cost is affected by a change which, pursuant to paragraph (a)(3) of this clause, the Contractor is required to make to the Contractor's established cost accounting practices.

(ii) Negotiate with the Contracting Officer to determine the terms and conditions under which a change may be made to a cost accounting practice, other than a change made under other provisions of paragraph (a)(4) of this clause; provided that no agreement may be made under this provision that will increase costs paid by the United States.

(iii) When the parties agree to a change to a cost accounting practice, other than a change under subdivision (a)(4)(i) or (a)(4)(iv) of this clause, negotiate an equitable adjustment as provided in the Changes clause of this contract.

(iv) Agree to an equitable adjustment as provided in the Changes clause of this contract, if the contract cost is materially affected by an accounting principle amendment required under the OMB Uniform Guidance at 2 CFR part 200, subpart E and appendix III, which, on becoming effective after the date of contract award, requires the Contractor to make a change to the Contractor's established cost accounting practices.

(5) Agree to an adjustment of the contract price or cost allowance, as appropriate, if the Contractor or a subcontractor fails to comply with an applicable Cost Accounting Standard, or to follow any cost accounting practice consistently and such failure results in any increased costs paid by the United States. Such adjustment shall provide for recovery of the increased costs to the United States, together with interest thereon computed at the annual rate established under section 6621(a)(2) of the Internal Revenue Code of 1986 (26 U.S.C. 6621(a)(2)) for such period, from the time the payment by the United States was made to the time the adjustment is effected. In no case shall the Government recover costs greater than the increased cost to the Government, in the aggregate, on the relevant contracts subject to the price adjustment, unless the Contractor made a change in its cost accounting practices of which it was aware or should have been aware at the time of price negotiations and which it failed to disclose to the Government.

(b) If the parties fail to agree whether the Contractor or a subcontractor has complied with an applicable CAS or a CAS rule or regulation in 48 CFR part 9903 and as to any cost adjustment demanded by the United States, such failure to agree will constitute a dispute under 41 U.S.C. chapter 71, Contract Disputes.

(c) The Contractor shall permit any authorized representatives of the Government to examine and make copies of any documents, papers, or records relating to compliance with the requirements of this clause.

(d) The Contractor shall include in all negotiated subcontracts which the Contractor enters into, the substance of this clause, except paragraph (b), and shall require such inclusion in all other subcontracts, of any tier, including the obligation to comply with all applicable CAS in effect on the subcontractor's award date or, if the subcontractor has submitted certified cost or pricing data, on the date of final agreement on price as shown on the subcontractor's signed Certificate of Current Cost or Pricing Data, except that-

(1) If the subcontract is awarded to a business unit which pursuant to 48 CFR 9903.201-2 is subject to other types of CAS coverage, the substance of the applicable clause set forth in 48 CFR 9903.201-4 shall be inserted;

(2) The requirement in this paragraph (d) shall apply only to negotiated subcontracts in excess of the lower CAS threshold specified in Federal Acquisition Regulation (FAR) 30.205(b) on the date of subcontract award; and

(3) The requirement shall not apply to negotiated subcontracts otherwise exempt from the requirement to include a CAS clause as specified in 48 CFR 9903.201-1.

(End of clause)

52.230-6 Administration of Cost Accounting Standards.

As prescribed in 30.205(d)(1), insert the following clause:

ADMINISTRATION OF COST ACCOUNTING STANDARDS (DEVIATION DATE)

For the purpose of administering the Cost Accounting Standards (CAS) requirements under this contract, the Contractor shall take the steps outlined in paragraphs (b) through (i) and (k) through (n) of this clause:

(a) Definitions. As used in this clause-

Affected CAS-covered contract or subcontract means a contract or subcontract subject to CAS rules and regulations for which a Contractor or subcontractor-

(1) Used one cost accounting practice to estimate costs and a changed cost accounting practice to accumulate and report costs under the contract or subcontract; or

(2) Used a noncompliant practice for purposes of estimating or accumulating and reporting costs under the contract or subcontract.

Cognizant Federal agency official (CFAO) means the Contracting Officer assigned by the cognizant Federal agency to administer the CAS.

Desirable change means a compliant change to a Contractor's established or disclosed cost accounting practices that the CFAO finds is desirable and not detrimental to the Government and is, therefore, not subject to the no increased cost prohibition provisions of CAS-covered contracts and subcontracts affected by the change.

Fixed-price contracts and subcontracts means—

(1) The following types of fixed-price contracts and subcontracts—

(i) Firm-fixed-price contracts;

(ii) Fixed-priced contracts with economic price adjustment (except when price adjustments are based on actual costs of labor or material); and

(iii) Firm-fixed-price, level-of-effort term contracts.

(2) Fixed-price incentive contracts and subcontracts where the price is not adjusted based on actual costs incurred (FAR part 16);

(3) Orders issued under indefinite-delivery contracts and subcontracts where final payment is not based on actual costs incurred (FAR part 16); and

(4) The fixed-hourly rate portion of time-and-materials and labor-hours contracts and subcontracts (FAR part 16).

Flexibly-priced contracts and subcontracts means—

(1) The following types of fixed-price contracts and subcontracts—

(i) Fixed-price contracts with economic price adjustment based on actual costs of labor or material;

(ii) Fixed-price incentive contract;

(iii) Fixed-price contracts with prospective price redetermination.; and

(iv) Fixed-ceiling-price contracts with retroactive price redetermination.

(2) Cost-reimbursement contracts and subcontracts (FAR part 16);

(3) Incentive contracts and subcontracts where the price may be adjusted based on actual costs incurred (FAR part 16);

(4) Orders issued under indefinite-delivery contracts and subcontracts where final payment is based on actual costs incurred (FAR part 16); and

(5) The materials portion of time-and-materials contracts and subcontracts (FAR part 16).

Noncompliance means a failure in estimating, accumulating, or reporting costs to-

(1) Comply with applicable CAS; or

(2) Consistently follow disclosed or established cost accounting practices.

Required change means-

(1) A change in cost accounting practice that a Contractor is required to make in order to comply with applicable Standards, modifications or interpretations thereto, that subsequently become applicable to existing CAS-covered contracts or subcontracts due to the receipt of another CAS-covered contract or subcontract; or

(2) A prospective change to a disclosed or established cost accounting practice when the CFAO determines that the former practice was in compliance with applicable CAS and the change is necessary for the Contractor to remain in compliance.

Unilateral change means a change in cost accounting practice from one compliant practice to another compliant practice that a Contractor with a CAS-covered contract(s) or subcontract(s) elects to make that has not been deemed a desirable change by the CFAO and for which the Government will pay no aggregate increased costs.

(b) Submit to the CFAO a description of any cost accounting practice change as outlined in paragraphs (b)(1) through (3) of this clause (including revisions to the Disclosure Statement, if applicable), and any written statement that the cost impact of the change is immaterial. If a change in cost accounting practice is implemented without submitting the notice required by this paragraph, the CFAO may determine the change to be a failure to follow paragraph (a)(2) of the clause at FAR 52.230-2,

Cost Accounting Standards; paragraph (a)(4) of the clause at FAR 52.230-3, Disclosure and Consistency of Cost Accounting Practices; paragraph (a)(4) of the clause at FAR 52.230-4, Disclosure and Consistency of Cost Accounting Practices–Foreign Concerns; or paragraph (a)(2) of the clause at FAR 52.230-5, Cost Accounting Standards–Educational Institution.

(1) When a description has been submitted for a change in cost accounting practice that is dependent on a contact award and that contract is subsequently awarded, notify the CFAO within 15 days after such award.

(2) For any change in cost accounting practice not covered by (b)(1) of this clause that is required in accordance with paragraphs (a)(3) and (a)(4)(i) of the clause at FAR 52.230-2; or paragraphs (a)(3), (a)(4)(i), or (a)(4)(iv) of the clause at FAR 52.230-5; submit a description of the change to the CFAO not less than 60 days (or such other date as may be mutually agreed to by the CFAO and the Contractor) before implementation of the change.

(3) For any change in cost accounting practices proposed in accordance with paragraph (a)(4)(ii) or (iii) of the clauses at FAR 52.230-2 and FAR 52.230-5; or with paragraph (a)(3) of the clauses at FAR 52.230-3 and FAR 52.230-4, submit a description of the change not less than 60 days (or such other date as may be mutually agreed to by the CFAO and the Contractor) before implementation of the change. If the change includes a proposed retroactive date submit supporting rationale.

(4) Submit a description of the change necessary to correct a failure to comply with an applicable CAS or to follow a disclosed practice (as contemplated by paragraph (a)(5) of the clause at FAR 52.230-2 and FAR 52.230-5; or by paragraph (a)(4) of the clauses at FAR 52.230-3 and FAR 52.230-4)-

(i) Within 60 days (or such other date as may be mutually agreed to by the CFAO and the Contractor) after the date of agreement with the CFAO that there is a noncompliance; or

(ii) In the event of Contractor disagreement, within 60 days after the CFAO notifies the Contractor of the determination of noncompliance.

(c) When requested by the CFAO, submit on or before a date specified by the CFAO-

(1) A general dollar magnitude (GDM) proposal in accordance with paragraph (d) or (g) of this clause. The Contractor may submit a detailed cost-impact (DCI) proposal in lieu of the requested GDM proposal provided the DCI proposal is in accordance with paragraph (e) or (h) of this clause;

(2) A detailed cost-impact (DCI) proposal in accordance with paragraph (e) or (h) of this clause;

(3) For any request for a desirable change that is based on the criteria in FAR 30.302-2(b)(3)(ii), the data necessary to demonstrate the required cost savings; and

(4) For any request for a desirable change that is based on criteria other than that in FAR 30.302-2(b)(3)(ii), a GDM proposal and any other data necessary for the CFAO to determine if the change is a desirable change.

(d) For any change in cost accounting practice subject to paragraph (b)(1), (b)(2), or (b)(3) of this clause, the GDM proposal shall-

(1)) Calculate the cost impact in accordance with paragraph (f) of this clause;

(2) Use one or more of the following methods to determine the increase or decrease in cost accumulations:

(i) A representative sample of affected CAS-covered contracts and subcontracts.

(ii) The change in indirect rates multiplied by the total estimated base computed for each of the following groups:

(A) Fixed-price contracts and subcontracts.

(B) Flexibly-priced contracts and subcontracts.

(iii) Any other method that provides a reasonable approximation of the total increase or decrease in cost accumulations for all affected fixed-price and flexibly-priced contracts and subcontracts;

(3) Use a format acceptable to the CFAO but, as a minimum, include the following data:

(i) The estimated increase or decrease in cost accumulations by Executive agency, including any impact the change may have on contract and subcontract incentives, fees, and profits, for each of the following groups:

(A) Fixed-price contracts and subcontracts.

(B) Flexibly-priced contracts and subcontracts.

(ii) For unilateral changes, the increased or decreased costs to the Government for each of the following groups:

(A) Fixed-price contracts and subcontracts.

(B) Flexibly-priced contracts and subcontracts; and

(4) When requested by the CFAO, identify all affected CAS-covered contracts and subcontracts.

(e) For any change in cost accounting practice subject to paragraph (b)(1), (b)(2), or (b)(3) of this clause, the DCI proposal shall-

(1) Show the calculation of the cost impact in accordance with paragraph (f) of this clause;

(2) Show the estimated increase or decrease in cost accumulations for each affected CAS-covered contract and subcontract unless the CFAO and Contractor agree to include-

(i) Only those affected CAS-covered contracts and subcontracts having an estimate to complete exceeding a specified amount; and

(ii) An estimate of the total increase or decrease in cost accumulations for all affected CAS-covered contracts and subcontracts, using the results in paragraph (e)(2)(i) of this clause;

(3) Use a format acceptable to the CFAO but, as a minimum, include the information in paragraph (d)(3) of this clause; and

(4) When requested by the CFAO, identify all affected CAS-covered contracts and subcontracts.

(f) For GDM and DCI proposals that are subject to the requirements of paragraph (d) or (e) of this clause, calculate the cost impact as follows:

(1) The cost impact calculation shall include all affected CAS-covered contracts and subcontracts regardless of their status (i.e., open or closed) or the fiscal year in which the costs were incurred (i.e., whether or not the final indirect rates have been established).

(2) For unilateral changes-

(i) Determine the increased or decreased cost to the Government for flexibly-priced contracts and subcontracts as follows:

(A) When the estimated cost to complete using the changed practice exceeds the estimated cost to complete using the current practice, the difference is increased cost to the Government.

(B) When the estimated cost to complete using the changed practice is less than the estimated cost to complete using the current practice, the difference is decreased cost to the Government;

(ii) Determine the increased or decreased cost to the Government for fixed-priced contracts and subcontracts as follows:

(A) When the estimated cost to complete using the changed practice is less than the estimated cost to complete using the current practice, the difference is increased cost to the Government.

(B) When the estimated cost to complete using the changed practice exceeds the estimated cost to complete using the current practice, the difference is decreased cost to the Government;

(iii) Calculate the total increase or decrease in contract and subcontract incentives, fees, and profits associated with the increased or decreased costs to the Government in accordance with 48 CFR 9903.306(c). The associated increase or decrease is based on the difference between the negotiated incentives, fees, and profits and the amounts that would have been negotiated had the cost impact been known at the time the contracts and subcontracts were negotiated; and

(iv) Calculate the increased cost to the Government in the aggregate.

(3) For equitable adjustments for required or desirable changes-

(i) Estimated increased cost accumulations are the basis for increasing contract prices, target prices and cost ceilings; and

(ii) Estimated decreased cost accumulations are the basis for decreasing contract prices, target prices and cost ceilings.

(g) For any noncompliant cost accounting practice subject to paragraph (b)(4) of this clause, prepare the GDM proposal as follows:

(1) Calculate the cost impact in accordance with paragraph (i) of this clause.

(2) Use one or more of the following methods to determine the increase or decrease in contract and subcontract prices or cost accumulations, as applicable:

(i) A representative sample of affected CAS-covered contracts and subcontracts.

(ii) When the noncompliance involves cost accumulation the change in indirect rates multiplied by the applicable base for only flexibly-priced contracts and subcontracts.

(iii) Any other method that provides a reasonable approximation of the total increase or decrease.

(3) Use a format acceptable to the CFAO but, as a minimum, include the following data:

(i) The total increase or decrease in contract and subcontract price and cost accumulations, as applicable, by Executive agency, including any impact the noncompliance may have on contract and subcontract incentives, fees, and profits, for each of the following groups:

(A) Fixed-price contracts and subcontracts.

(B) Flexibly-priced contracts and subcontracts.

(ii) The increased or decreased cost to the Government for each of the following groups:

(A) Fixed-price contracts and subcontracts.

(B) Flexibly-priced contracts and subcontracts.

(iii) The total overpayments and underpayments made by the Government during the period of noncompliance.

(4) When requested by the CFAO, identify all CAS-covered contracts and subcontracts.

(h) For any noncompliant practice subject to paragraph (b)(4) of this clause, prepare the DCI proposal as follows:

(1) Calculate the cost impact in accordance with paragraph (i) of this clause.

(2) Show the increase or decrease in price and cost accumulations for each affected CAS-covered contract and subcontract unless the CFAO and Contractor agree to-

(i) Include only those affected CAS-covered contracts and subcontracts having-

(A) Contract and subcontract values exceeding a specified amount when the noncompliance involves estimating costs; and

(B) Incurred costs exceeding a specified amount when the noncompliance involves accumulating costs; and

(ii) Estimate the total increase or decrease in price and cost accumulations for all affected CAS-covered contracts and subcontracts using the results in paragraph (h)(2)(i) of this clause.

(3) Use a format acceptable to the CFAO that, as a minimum, include the information in paragraph (g)(3) of this clause.

(4) When requested by the CFAO, identify all CAS-covered contracts and subcontracts.

(i) For GDM and DCI proposals that are subject to the requirements of paragraph (g) or (h) of this clause, calculate the cost impact as follows:

(1) The cost impact calculation shall include all affected CAS-covered contracts and subcontracts regardless of their status (*i.e.,* open or closed) or the fiscal year in which the costs are incurred (i.e., whether or not the final indirect rates have been established).

(2) For noncompliances that involve estimating costs, determine the increased or decreased cost to the Government for fixed-price contracts and subcontracts as follows:

(i) When the negotiated contract or subcontract price exceeds what the negotiated price would have been had the Contractor used a compliant practice, the difference is increased cost to the Government.

(ii) When the negotiated contract or subcontract price is less than what the negotiated price would have been had the Contractor used a compliant practice, the difference is decreased cost to the Government.

(3) For noncompliances that involve accumulating costs, determine the increased or decreased cost to the Government for flexibly-priced contracts and subcontracts as follows:

(i) When the costs that were accumulated under the noncompliant practice exceed the costs that would have been accumulated using a compliant practice (from the time the noncompliant practice was first implemented until the date the noncompliant practice was replaced with a compliant practice), the difference is increased cost to the Government.

(ii) When the costs that were accumulated under the noncompliant practice are less than the costs that would have been accumulated using a compliant practice (from the time the noncompliant practice was first implemented until the date the noncompliant practice was replaced with a compliant practice), the difference is decreased cost to the Government.

(4) Calculate the total increase or decrease in contract and subcontracts incentives, fees, and profits associated with the increased or decreased cost to the Government in accordance with 48 CFR 9903.306(c). The associated increase or decrease is based on the difference between the negotiated incentives, fees, and profits and the amounts that would have been negotiated had the Contractor used a compliant practice.

(5) Calculate the increased cost to the Government in the aggregate.

(j) If the Contractor does not submit the information required by paragraph (b) or (c) of this clause within the specified time, or any extension granted by the CFAO, the CFAO may take one or both of the following actions:

(1) Withhold an amount not to exceed 10 percent of each subsequent amount payment to the Contractor's affected CAS-covered contracts, (up to the estimated GDM of the cost impact), until such time as the Contractor provides the required information to the CFAO.

(2) Issue a final decision in accordance with FAR part 33 and unilaterally adjust the contract(s) by the estimated amount of the cost impact.

(k) Agree to-

(1) Contract modifications to reflect adjustments required in accordance with paragraph (a)(4)(ii) or (a)(5) of the clauses at FAR 52.230-2 and 52.230-5; or with paragraph (a)(3)(i) or (a)(4) of the clauses at FAR 52.230-3 and FAR 52.230-4; and

(2) Repay the Government for any aggregate increased cost paid to the Contractor.

(l) For all subcontracts subject to the clauses at FAR 52.230-2, 52.230-3, 52.230-4, or 52.230-5-

(1) So state in the body of the subcontract, in the letter of award, or in both (do not use self-deleting clauses);

(2) Include the substance of this clause in all negotiated subcontracts; and

(3) Within 30 days after award of the subcontract, submit the following information to the Contractor's CFAO:

(i) Subcontractor's name and subcontract number.

(ii) Dollar amount and date of award.

(iii) Name of Contractor making the award.

(m) Notify the CFAO in writing of any adjustments required to subcontracts under this contract and agree to an adjustment to this contract price or estimated cost and fee. The Contractor shall-

(1) Provide this notice within 30 days after the Contractor receives the proposed subcontract adjustments; and

(2) Include a proposal for adjusting the higher-tier subcontract or the contract appropriately.

(n) For subcontracts containing the clause or substance of the clause at FAR 52.230-2, FAR 52.230-3, FAR 52.230-4, or FAR 52.230-5, require the subcontractor to comply with all Standards in effect on the date of award or of final agreement on price, as shown on the subcontractor's signed Certificate of Current Cost or Pricing Data, whichever is earlier.

(End of clause)

52.230-7 Proposal Disclosure-Cost Accounting Practice Changes.

As prescribed in 30.204(c), insert the following provision:

PROPOSAL DISCLOSURE-COST ACCOUNTING PRACTICE CHANGES (APR 2005)

The offeror shall check "yes" below if the contract award will result in a required or unilateral change in cost accounting practice, including unilateral changes requested to be desirable changes.

□ Yes □ No

If the offeror checked "Yes" above, the offeror shall-

(1) Prepare the price proposal in response to the solicitation using the changed practice for the period of performance for which the practice will be used; and

(2) Submit a description of the changed cost accounting practice to the Contracting Officer and the Cognizant Federal Agency Official as pricing support for the proposal.

(End of provision)

52.231 [Reserved]

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52.232 [Reserved]

52.232-1 Payments.

As prescribed in 32.111(a)(1), insert the following clause:

PAYMENTS (APR 1984)

The Government shall pay the Contractor, upon the submission of proper invoices or vouchers, the prices stipulated in this contract for supplies delivered and accepted or services rendered and accepted, less any deductions provided in this contract. Unless otherwise specified in this contract, payment shall be made on partial deliveries accepted by the Government if-

(a) The amount due on the deliveries warrants it; or

(b) The Contractor requests it and the amount due on the deliveries is at least $1,000 or 50 percent of the total contract price.

(End of clause)

52.232-2 Payments under Fixed-Price Research and Development Contracts.

As prescribed in 32.111(a)(2), insert the following clause:

PAYMENTS UNDER FIXED-PRICE RESEARCH AND DEVELOPMENT CONTRACTS (APR 1984)

The Government shall pay the Contractor, upon submission of proper invoices or vouchers, the prices stipulated in this contract for work delivered or rendered and accepted, less any deductions provided in this contract. Unless otherwise specified, payment shall be made upon acceptance of any portion of the work delivered or rendered for which a price is separately stated in the contract.

(End of clause)

52.232-3 Payments under Personal Services Contracts.

As prescribed in 32.111(a)(3), insert the following clause:

PAYMENTS UNDER PERSONAL SERVICES CONTRACTS (DEVIATION DATE)

The Government shall pay the Contractor for the services performed by the Contractor, as set forth in the Schedule of this contract, at the rates prescribed, upon the submission by the Contractor of proper invoices or time statements to the office or officer designated and at the time provided for in this contract. The Government shall also pay the Contractor-

(a) A per diem rate in lieu of subsistence for each day the Contractor is in a travel status away from home or regular place of employment in accordance with Federal Travel Regulations (41 CFR Subtitle F) as authorized in appropriate Travel Orders; and

(b) Any other transportation expenses if provided for in the Schedule.

(End of clause)

52.232-4 Payments under Transportation Contracts and Transportation-Related Services Contracts.

As prescribed in 32.111(a)(4), insert the following clause:

PAYMENTS UNDER TRANSPORTATION CONTRACTS AND TRANSPORTATION-RELATED SERVICES CONTRACTS (APR 1984)

The Government shall pay the Contractor upon the submission of properly certified invoices or vouchers, the amount due for services rendered and accepted, less deductions, if any, as herein provided.

(End of clause)

52.232-5 Payments under Fixed-Price Construction Contracts.

As prescribed in 32.111(a)(5), insert the following clause:

PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (MAY 2014)

(a) *Payment of price*. The Government shall pay the Contractor the contract price as provided in this contract.

(b) *Progress payments*. The Government shall make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates of work accomplished which meets the standards of quality established under the contract, as approved by the Contracting Officer.

(1) The Contractor's request for progress payments shall include the following substantiation:

(i) An itemization of the amounts requested, related to the various elements of work required by the contract covered by the payment requested.

(ii) A listing of the amount included for work performed by each subcontractor under the contract.

(iii) A listing of the total amount of each subcontract under the contract.

(iv) A listing of the amounts previously paid to each such subcontractor under the contract.

(v) Additional supporting data in a form and detail required by the Contracting Officer.

(2) In the preparation of estimates, the Contracting Officer may authorize material delivered on the site and preparatory work done to be taken into consideration. Material delivered to the Contractor at locations other than the site also may be taken into consideration if-

(i) Consideration is specifically authorized by this contract; and

(ii) The Contractor furnishes satisfactory evidence that it has acquired title to such material and that the material will be used to perform this contract.

(c) *Contractor certification*. Along with each request for progress payments, the Contractor shall furnish the following certification, or payment shall not be made: (However, if the Contractor elects to delete paragraph (c)(4) from the certification, the certification is still acceptable.)

I hereby certify, to the best of my knowledge and belief, that-

(1) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract;

(2) All payments due to subcontractors and suppliers from previous payments received under the contract have been made, and timely payments will be made from the proceeds of the payment covered by this certification, in accordance with subcontract agreements and the requirements of Chapter 39 of Title 31, United States Code;

(3) This request for progress payments does not include any amounts which the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of the subcontract; and

(4) This certification is not to be construed as final acceptance of a subcontractor's performance.

_____ (*Name*)

_____ (*Title*)

_____ (*Date*)

(d) *Refund of unearned amounts*. If the Contractor, after making a certified request for progress payments, discovers that a portion or all of such request constitutes a payment for performance by the Contractor that fails to conform to the specifications, terms, and conditions of this contract (hereinafter referred to as the "unearned amount"), the Contractor shall-

(1) Notify the Contracting Officer of such performance deficiency; and

(2) Be obligated to pay the Government an amount (computed by the Contracting Officer in the manner provided in paragraph (j) of this clause) equal to interest on the unearned amount from the 8th day after the date of receipt of the unearned amount until-

(i) The date the Contractor notifies the Contracting Officer that the performance deficiency has been corrected; or

(ii) The date the Contractor reduces the amount of any subsequent certified request for progress payments by an amount equal to the unearned amount.

(e) *Retainage*. If the Contracting Officer finds that satisfactory progress was achieved during any period for which a progress payment is to be made, the Contracting Officer shall authorize payment to be made in full. However, if satisfactory progress has not been made, the Contracting Officer may retain a maximum of 10 percent of the amount of the payment until satisfactory progress is achieved. When the work is substantially complete, the Contracting Officer may retain from previously withheld funds and future progress payments that amount the Contracting Officer considers adequate for protection of the Government and shall release to the Contractor all the remaining withheld funds. Also, on completion and

acceptance of each separate building, public work, or other division of the contract, for which the price is stated separately in the contract, payment shall be made for the completed work without retention of a percentage.

(f) *Title, liability, and reservation of rights*. All material and work covered by progress payments made shall, at the time of payment, become the sole property of the Government, but this shall not be construed as-

(1) Relieving the Contractor from the sole responsibility for all material and work upon which payments have been made or the restoration of any damaged work; or

(2) Waiving the right of the Government to require the fulfillment of all of the terms of the contract.

(g) *Reimbursement for bond premiums*. In making these progress payments, the Government shall, upon request, reimburse the Contractor for the amount of premiums paid for performance and payment bonds (including coinsurance and reinsurance agreements, when applicable) after the Contractor has furnished evidence of full payment to the surety. The retainage provisions in paragraph (e) of this clause shall not apply to that portion of progress payments attributable to bond premiums.

(h) *Final payment*. The Government shall pay the amount due the Contractor under this contract after-

(1) Completion and acceptance of all work;

(2) Presentation of a properly executed voucher; and

(3) Presentation of release of all claims against the Government arising by virtue of this contract, other than claims, in stated amounts, that the Contractor has specifically excepted from the operation of the release. A release may also be required of the assignee if the Contractor's claim to amounts payable under this contract has been assigned under the Assignment of Claims Act of1940 (31 U.S.C.3727 and 41 U.S.C. 6305).

(i) *Limitation because of undefinitized work*. Notwithstanding any provision of this contract, progress payments shall not exceed 80 percent on work accomplished on undefinitized contract actions. A "contract action" is any action resulting in a contract, as defined in FAR subpart 2.1, including contract modifications for additional supplies or services, but not including contract modifications that are within the scope and under the terms of the contract, such as contract modifications issued pursuant to the Changes clause, or funding and other administrative changes.

(j) *Interest computation on unearned amounts*. In accordance with 31 U.S.C. 3903(c)(1), the amount payable under paragraph (d)(2) of this clause shall be-

(1) Computed at the rate of average bond equivalent rates of 91-day Treasury bills auctioned at the most recent auction of such bills prior to the date the Contractor receives the unearned amount; and

(2) Deducted from the next available payment to the Contractor.

(End of clause)

52.232-6 Payment under Communication Service Contracts with Common Carriers.

As prescribed in 32.111(a)(6), insert the following clause:

PAYMENT UNDER COMMUNICATION SERVICE CONTRACTS WITH COMMON CARRIERS (APR 1984)

The Government shall pay the Contractor, in arrears, upon submission of invoices for services and facilities furnished in accordance with the terms of CSAs issued under this contract, the rates and charges for the services and facilities as set forth in the clause entitled "Rates, Charges and Services."

(End of clause)

52.232-7 Payments under Time-and-Materials and Labor-Hour Contracts.

As prescribed in 32.111(a)(7), insert the following clause:

PAYMENTS UNDER TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS (NOV 2021)

The Government will pay the Contractor as follows upon the submission of vouchers approved by the Contracting Officer or the authorized representative:

(a) *Hourly rate*. (1) *Hourly rate* means the rate(s) prescribed in the contract for payment for labor that meets the labor category qualifications of a labor category specified in the contract that are-

(i) Performed by the Contractor;

(ii) Performed by the subcontractors; or

(iii) Transferred between divisions, subsidiaries, or affiliates of the Contractor under a common control.

(2) The amounts shall be computed by multiplying the appropriate hourly rates prescribed in the Schedule by the number of direct labor hours performed.

(3) The hourly rates shall be paid for all labor performed on the contract that meets the labor qualifications specified in the contract. Labor hours incurred to perform tasks for which labor qualifications were specified in the contract will not be paid to the extent the work is performed by employees that do not meet the qualifications specified in the contract, unless specifically authorized by the Contracting Officer.

(4) The hourly rates shall include wages, indirect costs, general and administrative expense, and profit. Fractional parts of an hour shall be payable on a prorated basis.

(5) Vouchers may be submitted not more than once every two weeks, to the Contracting Officer or authorized representative. A small business concern may receive more frequent payments than every two weeks. The Contractor shall substantiate vouchers (including any subcontractor hours reimbursed at the hourly rate in the schedule) by evidence of actual payment and by-

(i) Individual daily job timekeeping records;

(ii) Records that verify the employees meet the qualifications for the labor categories specified in the contract; or

(iii) Other substantiation approved by the Contracting Officer.

(6) Promptly after receipt of each substantiated voucher, the Government shall, except as otherwise provided in this contract, and subject to the terms of paragraph (e) of this clause, pay the voucher as approved by the Contracting Officer or authorized representative.

(7) Unless otherwise prescribed in the Schedule, the Contracting Officer may unilaterally issue a contract modification requiring the Contractor to withhold amounts from its billings until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government's interests. The Contracting Officer may require a withhold of 5 percent of the amounts due under paragraph (a) of this clause, but the total amount withheld for the contract shall not exceed $50,000. The amounts withheld shall be retained until the Contractor executes and delivers the release required by paragraph (g) of this clause.

(8) Unless the Schedule prescribes otherwise, the hourly rates in the Schedule shall not be varied by virtue of the Contractor having performed work on an overtime basis. If no overtime rates are provided in the Schedule and overtime work is approved in advance by the Contracting Officer, overtime rates shall be negotiated. Failure to agree upon these overtime rates shall be treated as a dispute under the Disputes clause of this contract. If the Schedule provides rates for overtime, the premium portion of those rates will be reimbursable only to the extent the overtime is approved by the Contracting Officer.

(b) *Materials*. (1) For the purposes of this clause-

(i) *Direct materials* means those materials that enter directly into the end product, or that are used or consumed directly in connection with the furnishing of the end product or service.

(ii) *Materials* means-

(A) Direct materials, including supplies transferred between divisions, subsidiaries, or affiliates of the Contractor under a common control;

(B) Subcontracts for supplies and incidental services for which there is not a labor category specified in the contract;

(C) Other direct costs (*e.g.*, incidental services for which there is not a labor category specified in the contract, travel, computer usage charges, etc.); and

(D) Applicable indirect costs.

(2) If the Contractor furnishes its own materials that meet the definition of a commercial product or commercial service in Federal Acquisition Regulation (FAR) 2.101, the price to be paid for such materials shall not exceed the Contractor's established catalog or market price, adjusted to reflect the-

(i) Quantities being acquired; and

(ii) Actual cost of any modifications necessary because of contract requirements.

(3) Except as provided for in paragraph (b)(2) of this clause, the Government will reimburse the Contractor for allowable cost of materials provided the Contractor-

(i) Has made payments for materials in accordance with the terms and conditions of the agreement or invoice; or

(ii) Ordinarily makes these payments within 30 days of the submission of the Contractor's payment request to the Government and such payment is in accordance with the terms and conditions of the agreement or invoice.

(4) Payment for materials is subject to the Allowable Cost and Payment clause of this contract. The Contracting Officer will determine allowable costs of materials in accordance with FAR subpart 31.2 in effect on the date of this contract.

(5) The Contractor may include allocable indirect costs and other direct costs to the extent they are-

(i) Comprised only of costs that are clearly excluded from the hourly rate;

(ii) Allocated in accordance with the Contractor's written or established accounting practices; and

(iii) Indirect costs are not applied to subcontracts that are paid at the hourly rates.

(6) To the extent able, the Contractor shall-

(i) Obtain materials at the most advantageous prices available with due regard to securing prompt delivery of satisfactory materials; and

(ii) Take all cash and trade discounts, rebates, allowances, credits, salvage, commissions, and other benefits. When unable to take advantage of the benefits, the Contractor shall promptly notify the Contracting Officer and give the reasons. The Contractor shall give credit to the Government for cash and trade discounts, rebates, scrap, commissions, and other amounts that have accrued to the benefit of the Contractor, or would have accrued except for the fault or neglect of the Contractor. The Contractor shall not deduct from gross costs the benefits lost without fault or neglect on the part of the Contractor, or lost through fault of the Government.

(7) Except as provided for in 31.205-26(e) and (f), the Government will not pay profit or fee to the prime Contractor on materials.

(c) If the Contractor enters into any subcontract that requires consent under the clause at 52.244-2, Subcontracts, without obtaining such consent, the Government is not required to reimburse the Contractor for any costs incurred under the subcontract prior to the date the Contractor obtains the required consent. Any reimbursement of subcontract costs incurred prior to the date the consent was obtained shall be at the sole discretion of the Government.

(d) *Total cost*. It is estimated that the total cost to the Government for the performance of this contract shall not exceed the ceiling price set forth in the Schedule, and the Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within such ceiling price. If at any time the Contractor has reason to believe that the hourly rate payments and material costs that will accrue in performing this contract in the next succeeding 30 days, if added to all other payments and costs previously accrued, will exceed 85 percent of the ceiling price in the Schedule, the Contractor shall notify the Contracting Officer giving a revised estimate of the total price to the Government for performing this contract with supporting reasons and documentation. If at any time during performing this contract, the Contractor has reason to believe that the total price to the Government for performing this contract will be substantially greater or less than the then stated ceiling price, the Contractor shall so notify the Contracting Officer, giving a revised estimate of the total price for performing this contract, with supporting reasons and documentation. If at any time during performing this contract, the Government has reason to believe that the work to be required in performing this contract will be substantially greater or less than the stated ceiling price, the Contracting Officer will so advise the Contractor, giving the then revised estimate of the total amount of effort to be required under the contract.

(e) *Ceiling price*. The Government will not be obligated to pay the Contractor any amount in excess of the ceiling price in the Schedule, and the Contractor shall not be obligated to continue performance if to do so would exceed the ceiling price set forth in the Schedule, unless and until the Contracting Officer notifies the Contractor in writing that the ceiling price has been increased and specifies in the notice a revised ceiling that shall constitute the ceiling price for performance under this contract. When and to the extent that the ceiling price set forth in the Schedule has been increased, any hours expended and material costs incurred by the Contractor in excess of the ceiling price before the increase shall be allowable to the same extent as if the hours expended and material costs had been incurred after the increase in the ceiling price.

(f) *Audit*. At any time before final payment under this contract, the Contracting Officer may request audit of the vouchers and supporting documentation. Each payment previously made shall be subject to reduction to the extent of amounts, on preceding vouchers, that are found by the Contracting Officer or authorized representative not to have been properly payable and shall also be subject to reduction for overpayments or to increase for underpayments. Upon receipt and approval of the voucher designated by the Contractor as the "completion voucher" and supporting documentation, and upon compliance by the Contractor with all terms of this contract (including, without limitation, terms relating to patents and the terms of paragraph (g) of this clause), the Government shall promptly pay any balance due the Contractor. The completion voucher, and supporting documentation, shall be submitted by the Contractor as promptly as practicable following completion of the work under this contract, but in no event later than 120 days (or such longer period as the Contracting Officer may approve in writing) from the date of completion.

(g) *Assignment and Release of Claims*. The Contractor, and each assignee under an assignment entered into under this contract and in effect at the time of final payment under this contract, shall execute and deliver, at the time of and

as a condition precedent to final payment under this contract, a release discharging the Government, its officers, agents, and employees of and from all liabilities, obligations, and claims arising out of or under this contract, subject only to the following exceptions:

(1) Specified claims in stated amounts, or in estimated amounts if the amounts are not susceptible of exact statement by the Contractor.

(2) Claims, together with reasonable incidental expenses, based upon the liabilities of the Contractor to third parties arising out of performing this contract, that are not known to the Contractor on the date of the execution of the release, and of which the Contractor gives notice in writing to the Contracting Officer not more than 6 years after the date of the release or the date of any notice to the Contractor that the Government is prepared to make final payment, whichever is earlier.

(3) Claims for reimbursement of costs (other than expenses of the Contractor by reason of its indemnification of the Government against patent liability), including reasonable incidental expenses, incurred by the Contractor under the terms of this contract relating to patents.

(h) *Interim payments on contracts for other than services.* (1) Interim payments made prior to the final payment under the contract are contract financing payments. Contract financing payments are not subject to the interest penalty provisions of the Prompt Payment Act.

(2) The designated payment office will make interim payments for contract financing on the _____ *[Contracting Officer insert day as prescribed by agency head; if not prescribed, insert "30th*] day after the designated billing office receives a proper payment request. In the event that the Government requires an audit or other review of a specific payment request to ensure compliance with the terms and conditions of the contract, the designated payment office is not compelled to make payment by the specified due date.

(i) *Interim payments on contracts for services*. For interim payments made prior to the final payment under this contract, the Government will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and prompt payment regulations at 5 CFR part 1315.

(End of clause)

52.232-8 Discounts for Prompt Payment.

As prescribed in 32.111(b)(1), insert the following clause:

DISCOUNTS FOR PROMPT PAYMENT (FEB 2002)

(a) Discounts for prompt payment will not be considered in the evaluation of offers. However, any offered discount will form a part of the award, and will be taken if payment is made within the discount period indicated in the offer by the offeror. As an alternative to offering a discount for prompt payment in conjunction with the offer, offerors awarded contracts may include discounts for prompt payment on individual invoices.

(b) In connection with any discount offered for prompt payment, time shall be computed from the date of the invoice. If the Contractor has not placed a date on the invoice, the due date shall be calculated from the date the designated billing office receives a proper invoice, provided the agency annotates such invoice with the date of receipt at the time of receipt. For the purpose of computing the discount earned, payment shall be considered to have been made on the date that appears on the payment check or, for an electronic funds transfer, the specified payment date. When the discount 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.

(End of clause)

52.232-9 Limitation on Withholding of Payments.

As prescribed in 32.111(b)(2), insert the following clause:

LIMITATION ON WITHHOLDING OF PAYMENTS (APR 1984)

If more than one clause or Schedule term of this contract authorizes the temporary withholding of amounts otherwise payable to the Contractor for supplies delivered or services performed, the total of the amounts withheld at any one time shall

not exceed the greatest amount that may be withheld under any one clause or Schedule term at that time; *provided*, that this limitation shall not apply to-

(a) Withholdings pursuant to any clause relating to wages or hours of employees;

(b) Withholdings not specifically provided for by this contract;

(c) The recovery of overpayments; and

(d) Any other withholding for which the Contracting Officer determines that this limitation is inappropriate.

(End of clause)

52.232-10 Payments under Fixed-Price Architect-Engineer Contracts.

As prescribed in 32.111(c)(1), insert the following clause:

PAYMENTS UNDER FIXED-PRICE ARCHITECT-ENGINEER CONTRACTS (APR 2010)

(a) Estimates shall be made monthly of the amount and value of the work and services performed by the Contractor under this contract which meet the standards of quality established under this contract. The estimates, along with any supporting data required by the Contracting Officer, shall be prepared by the Contractor and submitted along with its voucher.

(b) After receipt of each substantiated voucher, the Government shall pay the voucher as approved by the Contracting Officer or authorized representative. The Contracting Officer shall require a withholding from amounts due under paragraph (a) of this clause of up to 10 percent only if the Contracting Officer determines that such a withholding is necessary to protect the Government's interest and ensure satisfactory completion of the contract. The amount withheld shall be determined based upon the Contractor's performance record under this contract. Whenever the Contracting Officer determines that the work is substantially complete and that the amount retained is in excess of the amount adequate for the protection of the Government, the Contracting Officer shall release the excess amount to the Contractor.

(c) Upon satisfactory completion by the Contractor and final acceptance by the Contracting Officer of all the work done by the Contractor under the "Statement of Architect-Engineer Services", the Contractor will be paid the unpaid balance of any money due for work under the statement, including all withheld amounts.

(d) Before final payment under the contract, or before settlement upon termination of the contract, and as a condition precedent thereto, the Contractor shall execute and deliver to the Contracting Officer a release of all claims against the Government arising under or by virtue of this contract, other than any claims that are specifically excepted by the Contractor from the operation of the release in amounts stated in the release.

(e) Notwithstanding any other provision in this contract, and specifically paragraph (b) of this clause, progress payments shall not exceed 80 percent on work accomplished on undefinitized contract actions. A "contract action" is any action resulting in a contract, as defined in FAR subpart 2.1, including contract modifications for additional supplies or services, but not including contract modifications that are within the scope and under the terms of the contract, such as contract modifications issued pursuant to the Changes clause, or funding and other administrative changes.

(End of clause)

52.232-11 Extras.

As prescribed in 32.111(c)(2), insert the following clause:

EXTRAS (APR 1984)

Except as otherwise provided in this contract, no payment for extras shall be made unless such extras and the price therefor have been authorized in writing by the Contracting Officer.

(End of clause)

52.232-12 Advance Payments.

As prescribed in 32.412(a), insert the following clause:

ADVANCE PAYMENTS (DEVIATION DATE)

(a) *Requirements for payment*. Advance payments will be made under this contract (1) upon submission of properly certified invoices or vouchers by the Contractor, and approval by the administering office, ____ *[Insert the name of the office designated under agency procedures]*, or (2) under a letter of credit. The amount of the invoice or voucher submitted plus all advance payments previously approved shall not exceed $___ If a letter of credit is used, the Contractor shall withdraw cash only when needed for disbursements acceptable under this contract and report cash disbursements and balances as required by the administering office. The Contractor shall apply terms similar to this clause to any advance payments to subcontractors.

(b) *Special account*. Until (1) the Contractor has liquidated all advance payments made under the contract and related interest charges and (2) the administering office has approved in writing the release of any funds due and payable to the Contractor, all advance payments and other payments under this contract shall be made by check payable to the Contractor marked for deposit only in the Contractor's special account with the ____ [insert the name of the financial institution]. None of the funds in the special account shall be mingled with other funds of the Contractor. Withdrawals from the special account may be made only by check of the Contractor countersigned by the Contracting Officer or a Government countersigning agent designated in writing by the Contracting Officer.

(c) Use of funds. The Contractor may withdraw funds from the special account only to pay for properly allocable, allowable, and reasonable costs for direct materials, direct labor, and indirect costs. Other withdrawals require approval in writing by the administering office. Determinations of whether costs are properly allocable, allowable, and reasonable shall be in accordance with generally accepted accounting principles, subject to any applicable subparts of part 31 of the Federal Acquisition Regulation.

(d) Repayment to the Government. At any time, the Contractor may repay all or any part of the funds advanced by the Government. Whenever requested in writing to do so by the administering office, the Contractor shall repay to the Government any part of unliquidated advance payments considered by the administering office to exceed the Contractor's current requirements or the amount specified in paragraph (a) above. If the Contractor fails to repay the amount requested by the administering office, all or any part of the unliquidated advance payments may be withdrawn from the special account by check signed by only the countersigning agent and applied to reduction of the unliquidated advance payments under this contract.

(e) Maximum payment. When the sum of all unliquidated advance payments, unpaid interest charges, and other payments exceed _ percent of the contract price, the Government shall withhold further payments to the Contractor. On completion or termination of the contract, the Government shall deduct from the amount due to the Contractor all unliquidated advance payments and all interest charges payable. If previous payments to the Contractor exceed the amount due, the excess amount shall be paid to the Government on demand. For purposes of this paragraph, the contract price shall be considered to be the stated contract price of $___, less any subsequent price reductions under the contract, plus (1) any price increases resulting from any terms of this contract for price redetermination or escalation, and (2) any other price increases that do not, in the aggregate, exceed $___ [Insert an amount not higher than 10 percent of the stated contract amount inserted in this paragraph]. Any payments withheld under this paragraph shall be applied to reduce the unliquidated advance payments. If full liquidation has been made, payments under the contract shall resume.

(f) Interest.

(1) The Contractor shall pay interest to the Government on the daily unliquidated advance payments at the daily rate specified in subparagraph (f)(3) of this clause. Interest shall be computed at the end of each calendar month for the actual number of days involved. For the purpose of computing the interest charge—

(i) Advance payments shall be considered as increasing the unliquidated balance as of the date of the advance payment check;

(ii) Repayments by Contractor check shall be considered as decreasing the unliquidated balance as of the date on which the check is received by the Government authority designated by the Contracting Officer; and

(iii) Liquidations by deductions from Government payments to the Contractor shall be considered as decreasing the unliquidated balance as of the date of the check for the reduced payment.

(2) Interest charges resulting from the monthly computation shall be deducted from payments, other than advance payments, due the Contractor. If the accrued interest exceeds the payment due, any excess interest shall be carried forward and deducted from subsequent payments. Interest carried forward shall not be compounded. Interest on advance payments shall cease to accrue upon satisfactory completion or termination of the contract for the convenience of the Government. The Contractor shall charge interest on advance payments to subcontractors in the manner described above and credit the interest to the Government. Interest need not be charged on advance payments to nonprofit educational or research subcontractors for experimental, developmental, or research work.

(3) If interest is required under the contract, the Contracting Officer shall determine a daily interest rate based on the higher of

(i) the published prime rate of the financial institution (depository) in which the special account is established or

(ii) the rate established by the Secretary of the Treasury under Pub. L. 92-41 (41 U.S.C. 7109(b)). The Contracting Officer shall revise the daily interest rate during the contract period in keeping with any changes in the cited interest rates.

(4) If the full amount of interest charged under this paragraph has not been paid by deduction or otherwise upon completion or termination of this contract, the Contractor shall pay the remaining interest to the Government on demand.

(g) Financial institution agreement. Before an advance payment is made under this contract, the Contractor shall transmit to the administering office, in the form prescribed by the administering office, an agreement in triplicate from the financial institution in which the special account is established, clearly setting forth the special character of the account and the responsibilities of the financial institution under the account. The Contractor shall select a financial institution that is a member bank of the Federal Reserve System, an "insured" bank within the meaning of the Federal Deposit Insurance Corporation Act (12 U.S.C. 1811), or a credit union insured by the National Credit Union Administration.

(h) Lien on Special Bank Account. The Government shall have a lien upon any balance in the special account paramount to all other liens. The Government lien shall secure the repayment of any advance payments made under this contract and any related interest charges.

(i) Lien on property under contract.

(1) All advance payments under this contract, together with interest charges, shall be secured, when made, by a lien in favor of the Government, paramount to all other liens, on the supplies or other things covered by this contract and on all material and other property acquired for or allocated to the performance of this contract, except to the extent that the Government by virtue of any other terms of this contract, or otherwise, shall have valid title to the supplies, materials, or other property as against other creditors of the Contractor.

(2) The Contractor shall identify, by marking or segregation, all property that is subject to a lien in favor of the Government by virtue of any terms of this contract in such a way as to indicate that it is subject to a lien and that it has been acquired for or allocated to performing this contract. If, for any reason, the supplies, materials, or other property are not identified by marking or segregation, the Government shall be considered to have a lien to the extent of the Government's interest under this contract on any mass of property with which the supplies, materials, or other property are commingled. The Contractor shall maintain adequate accounting control over the property on its books and records.

(3) If, at any time during the progress of the work on the contract, it becomes necessary to deliver to a third person any items or materials on which the Government has a lien, the Contractor shall notify the third person of the lien and shall obtain from the third person a receipt in duplicate acknowledging the existence of the lien. The Contractor shall provide a copy of each receipt to the Contracting Officer.

(4) If, under the termination clause, the Contracting Officer authorizes the Contractor to sell or retain termination inventory, the approval shall constitute a release of the Government's lien to the extent that—

(i) The termination inventory is sold or retained; and

(ii) The sale proceeds or retention credits are applied to reduce any outstanding advance payments.

(j) Insurance.

(1) The Contractor shall maintain with responsible insurance carriers—

(i) Insurance on plant and equipment against fire and other hazards, to the extent that similar properties are usually insured by others operating plants and properties of similar character in the same general locality;

(ii) Adequate insurance against liability on account of damage to persons or property; and

(iii) Adequate insurance under all applicable workers' compensation laws.

(2) Until work under this contract has been completed and all advance payments made under the contract have been liquidated, the Contractor shall—

(i) Maintain this insurance;

(ii) Maintain adequate insurance on any materials, parts, assemblies, subassemblies, supplies, equipment, and other property acquired for or allocable to this contract and subject to the Government lien under paragraph (i) of this clause; and

(iii) Furnish any evidence with respect to its insurance that the administering office may require.

(k) Default.

(1) If any of the following events occurs, the Government may, by written notice to the Contractor, withhold further withdrawals from the special account and further payments on this contract:

(i) Termination of this contract for a fault of the Contractor.

(ii) A finding by the administering office that the Contractor has failed to—

(A) Observe any of the conditions of the advance payment terms;

(B) Comply with any material term of this contract;

(C) Make progress or maintain a financial condition adequate for performance of this contract;

(D) Limit inventory allocated to this contract to reasonable requirements; or

(E) Avoid delinquency in payment of taxes or of the costs of performing this contract in the ordinary course of business.

(iii) The appointment of a trustee, receiver, or liquidator for all or a substantial part of the Contractor's property, or the institution of proceedings by or against the Contractor for bankruptcy, reorganization, arrangement, or liquidation.

(iv) The service of any writ of attachment, levy of execution, or commencement of garnishment proceedings concerning the special account.

(v) The commission of an act of bankruptcy.

(2) If any of the events described in subparagraph (k)(1) of this clause continue for 30 days after the written notice to the Contractor, the Government may take any of the following additional actions:

(i) Withdraw by checks payable to the Treasurer of the United States, signed only by the countersigning agency, all or any part of the balance in the special account and apply the amounts to reduce outstanding advance payments and any other claims of the Government against the Contractor.

(ii) Charge interest, in the manner prescribed in paragraph (f) of this clause, on outstanding advance payments during the period of any event described in subparagraph (k)(1) of this clause.

(iii) Demand immediate repayment by the Contractor of the unliquidated balance of advance payments.

(iv) Take possession of and, with or without advertisement, sell at public or private sale all or any part of the property on which the Government has a lien under this contract and, after deducting any expenses incident to the sale, apply the net proceeds of the sale to reduce the unliquidated balance of advance payments or other Government claims against the Contractor.

(3) The Government may take any of the actions described in subparagraphs (k) (1) and (2) of this clause it considers appropriate at its discretion and without limiting any other rights of the Government.

(l) Prohibition against assignment. Notwithstanding any other terms of this contract, the Contractor shall not assign this contract, any interest therein, or any claim under the contract to any party.

(m) Information and access to records. The Contractor shall furnish to the administering office (1) monthly or at other intervals as required, signed or certified balance sheets and profit and loss statements together with a report on the operation of the special account in the form prescribed by the administering office; and (2) if requested, other information concerning the operation of the Contractor's business. The Contractor shall provide the authorized Government representatives proper facilities for inspection of the Contractor's books, records, and accounts.

(n) Other security. The terms of this contract are considered to provide adequate security to the Government for advance payments; however, if the administering office considers the security inadequate, the Contractor shall furnish additional security satisfactory to the administering office, to the extent that the security is available.

(o) Representations. The Contractor represents the following:

(1) The balance sheet, the profit and loss statement, and any other supporting financial statements furnished to the administering office fairly reflect the financial condition of the Contractor at the date shown or the period covered, and there has been no subsequent materially adverse change in the financial condition of the Contractor.

(2) No litigation or proceedings are presently pending or threatened against the Contractor, except as shown in the financial statements.

(3) The Contractor has disclosed all contingent liabilities, except for liability resulting from the renegotiation of defense production contracts, in the financial statements furnished to the administering office.

(4) None of the terms in this clause conflict with the authority under which the Contractor is doing business or with the provision of any existing indenture or agreement of the Contractor.

(5) The Contractor has the power to enter into this contract and accept advance payments, and has taken all necessary action to authorize the acceptance under the terms of this contract.

(6) The assets of the Contractor are not subject to any lien or encumbrance of any character except for current taxes not delinquent, and except as shown in the financial statements furnished by the Contractor. There is no current assignment of claims under any contract affected by these advance payment provisions.

(7) All information furnished by the Contractor to the administering office in connection with each request for advance payments is true and correct.

(8) These representations shall be continuing and shall be considered to have been repeated by the submission of each invoice for advance payments.

(p) Covenants. To the extent the Government considers it necessary while any advance payments made under this contract remain outstanding, the Contractor, without the prior written consent of the administering office, shall not—

(1) Mortgage, pledge, or otherwise encumber or allow to be encumbered, any of the assets of the Contractor now owned or subsequently acquired, or permit any preexisting mortgages, liens, or other encumbrances to remain on or attach to any assets of the Contractor which are allocated to performing this contract and with respect to which the Government has a lien under this contract;

(2) Sell, assign, transfer, or otherwise dispose of accounts receivable, notes, or claims for money due or to become due;

(3) Declare or pay any dividends, except dividends payable in stock of the corporation, or make any other distribution on account of any shares of its capital stock, or purchase, redeem, or otherwise acquire for value any of its stock, except as required by sinking fund or redemption arrangements reported to the administering office incident to the establishment of these advance payment provisions;

(4) Sell, convey, or lease all or a substantial part of its assets;

(5) Acquire for value the stock or other securities of any corporation, municipality, or governmental authority, except direct obligations of the United States;

(6) Make any advance or loan or incur any liability as guarantor, surety, or accommodation endorser for any party;

(7) Permit a writ of attachment or any similar process to be issued against its property without getting a release or bonding the property within 30 days after the entry of the writ of attachment or other process;

(8) Pay any remuneration in any form to its directors, officers, or key employees higher than rates provided in existing agreements of which notice has been given to the administering office; accrue excess remuneration without first obtaining an agreement subordinating it to all claims of the Government; or employ any person at a rate of compensation over $___ a year;

(9) Change substantially the management, ownership, or control of the corporation;

(10) Merge or consolidate with any other firm or corporation, change the type of business, or engage in any transaction outside the ordinary course of the Contractor's business as presently conducted;

(11) Deposit any of its funds except in a bank or trust company insured by the Federal Deposit Insurance Corporation or a credit union insured by the National Credit Union Administration;

(12) Create or incur indebtedness for advances, other than advances to be made under the terms of this contract, or for borrowings;

(13) Make or covenant for capital expenditures exceeding $___ in total;

(14) Permit its net current assets, computed in accordance with generally accepted accounting principles, to become less than $___; or

(15) Make any payments on account of the obligations listed below, except in the manner and to the extent provided in this *[Contracting officer to list the pertinent obligations.]* _____.

(End of clause)

Alternate I (APR 1984). If the agency desires to waive the countersignature requirement because of the Contractor's financial strength, good performance record, and favorable experience concerning cost disallowances, add the following sentence, if appropriate, to paragraph (b) of the basic clause:

However, for this contract, countersignature on behalf of the Government will not be required unless it is determined necessary by the administering office.

Alternate II (MAY 2001). If used in a cost-reimbursement contract, substitute the following paragraphs (c) and (e), and paragraphs (f)(1) and (f)(2) for paragraphs (c) and (e) and paragraphs (f)(1) and (2) of the basic clause:

(c) *Use of funds*. The Contractor shall withdraw funds from the special account only to pay for allowable costs as prescribed by the _____ clause of this contract. Payment for any other types of expenses shall be approved in writing by the administering office.

(e) *Maximum payment*. When the sum of all unliquidated advance payments, unpaid interest charges, and other payments equal the total estimated cost of $_____ (not including fixed-fee, if any) for the work under this contract, the Government shall withhold further payments to the Contractor. Upon completion or termination of the contract, the Government shall deduct from the amount due to the Contractor all unliquidated advance payments and interest charges payable. The Contractor shall pay any deficiency to the Government upon demand. For purposes of this paragraph, the estimated cost

shall be considered to be the stated estimated cost, less any subsequent reductions of the estimated cost, plus any increases in the estimated costs that do not, in the aggregate, exceed $_____ *[Insert an amount not higher than 10 percent of the stated estimated cost inserted in this paragraph]*. The estimated cost shall include, without limitation, any reimbursable cost (as estimated by the Contracting Officer) incident to a termination for the convenience of the Government. Any payments withheld under this paragraph shall be applied to reduce the unliquidated advance payments. If full liquidation has been made, payments under the contract shall resume.

(f) *Interest*. (1) The Contractor shall pay interest to the Government on the daily unliquidated advance payments at the daily rate specified in paragraph (f)(3) of this clause. Interest shall be computed at the end of each calendar month for the actual number of days involved. For the purpose of computing the interest charge, the following shall be observed:

(i) Advance payments shall be considered as increasing the unliquidated balance as of the date of the advance payment check.

(ii) Repayments by Contractor check shall be considered as decreasing the unliquidated balance as of the date on which the check is received by the Government authority designated by the Contracting Officer.

(iii) Liquidations by deductions from payments to the Contractor shall be considered as decreasing the unliquidated balance as of the dates on which the Contractor presents to the Contracting Officer full and accurate data for the preparation of each voucher. Credits resulting from these deductions shall be made upon the approval of the reimbursement vouchers by the Disbursing Officer, based upon the Contracting Officer's certification of the applicable dates.

(2) Interest charges resulting from the monthly computation shall be deducted from any payments on account of the fixed-fee due to the Contractor. If the accrued interest exceeds the payment due, any excess interest shall be carried forward and deducted from subsequent payments of the contract price or fixed-fee. Interest carried forward shall not be compounded. Interest on advance payments shall cease to accrue upon (i) satisfactory completion or (ii) termination of the contract for the convenience of the Government. The Contractor shall charge interest on advance payments to subcontractors in the manner described above and credit the interest to the Government. Interest need not be charged on advance payments to nonprofit educational or research subcontractors for experimental, developmental, or research work.

Alternate III (APR 1984). If the agency considers a more rapid liquidation appropriate, add the following sentence as the first sentence of paragraph (e) of the basic clause with the appropriate percentage specified:

To liquidate the principal amount of any advance payment made to the Contractor, there shall be deductions of _____ percent from all payments made by the Government under the contracts involved.

Alternate IV (APR 1984). If the agency provides advance payments under the contract at no interest to the prime contractor, add the following sentences as the beginning sentences of paragraph (f) of the clause:

No interest shall be charged to the prime Contractor for advance payments except for interest charged during a period of default. The terms of this paragraph concerning interest charges for advance payments shall not apply to the prime Contractor.

Alternate V (MAY 2001). If the requirement for a special account is eliminated in accordance with 32.409-3(e) or (g), insert the clause set forth below instead of the basic clause.

If this Alternate is used in combination with *Alternate II*, disregard the instructions concerning paragraph (c), Use of funds, in *Alternate II*; substitute paragraph (e), Maximum payment, in *Alternate II* for paragraph (d) below; and substitute paragraph (f), Interest, in *Alternate II* for paragraph (e) below and change the reference to paragraph (f)(3) in the first sentence of paragraph (f) of *Alternate II* to (e)(3).

If this Alternate is used in combination with *Alternate III*, insert the additional sentence set forth in *Alternate III* as the first sentence of paragraph (d) of this Alternate.

If this Alternate is used in combination with *Alternate IV*, insert the additional sentences set forth in *Alternate IV* as the beginning sentences of paragraph (e) of this Alternate.

ADVANCE PAYMENTS WITHOUT SPECIAL ACCOUNT (DATE DEVIATION)

(a) *Requirements for payment.* Advance payments will be made under this contract (1) upon submission of properly certified invoices or vouchers by the contractor, and approval by the administering office, _____ *[insert the name of the office designated under agency procedures]*, or (2) under a letter of credit. The amount of the invoice or voucher submitted plus all advance payments previously approved shall not exceed $___. If a letter of credit is used, the Contractor shall withdraw cash only when needed for disbursements acceptable under this contract and report cash disbursements and

balances as required by the administering office. The Contractor shall apply terms similar to this clause to any advance payments to subcontractors.

(b) *Use of funds*. The Contractor may use advance payment funds only to pay for properly allocable, allowable, and reasonable costs for direct materials, direct labor, and indirect costs. Determinations of whether costs are properly allocable, allowable, and reasonable shall be in accordance with generally accepted accounting principles, subject to any applicable subparts of part 31 of the Federal Acquisition Regulation.

(c) *Repayment to the Government*. At any time, the Contractor may repay all or any part of the funds advanced by the Government. Whenever requested in writing to do so by the administering office, the Contractor shall repay to the Government any part of unliquidated advance payments considered by the administering office to exceed the Contractor's current requirements or the amount specified in paragraph (a) of this clause.

(d) *Maximum payment.* When the sum of all unliquidated advance payments, unpaid interest charges, and other payments exceed __ percent of the contract price, the Government shall withhold further payments to the Contractor. On completion or termination of the contract, the Government shall deduct from the amount due to the Contractor all unliquidated advance payments and all interest charges payable. If previous payments to the Contractor exceed the amount due, the excess amount shall be paid to the Government on demand. For purposes of this paragraph, the contract price shall be considered to be the stated contract price of $___, less any subsequent price reductions under the contract, plus (1) any price increases resulting from any terms of this contract for price redetermination or escalation, and (2) any other price increases that do not, in the aggregate, exceed $___ *[insert an amount not higher than 10 percent of the stated contract amount inserted in this paragraph]*. Any payments withheld under this paragraph shall be applied to reduce the unliquidated advance payments. If full liquidation has been made, payments under the contract shall resume.

(e) *Interest*. (1) The Contractor shall pay interest to the Government on the daily unliquidated advance payments at the daily rate in subparagraph (e)(3) of this clause. Interest shall be computed at the end of each calendar month for the actual number of days involved. For the purpose of computing the interest charge—

(i) Advance payments shall be considered as increasing the unliquidated balance as of the date of the advance payment check;

(ii) Repayments by Contractor check shall be considered as decreasing the unliquidated balance as of the date on which the check is received by the Government authority designated by the Contracting Officer; and

(iii) Liquidations by deductions from Government payments to the Contractor shall be considered as decreasing the unliquidated balance as of the date of the check for the reduced payment.

(2) Interest charges resulting from the monthly computation shall be deducted from payments, other than advance payments, due the Contractor. If the accrued interest exceeds the payment due, any excess interest shall be carried forward and deducted from subsequent payments. Interest carried forward shall not be compounded. Interest on advance payments shall cease to accrue upon satisfactory completion or termination of the contract for the convenience of the Government. The Contractor shall charge interest on advance payments to subcontractors in the manner described above and credit the interest to the Government. Interest need not be charged on advance payments to nonprofit educational or research subcontractors, for experimental, developmental, or research work.

(3) If interest is required under the contract, the Contracting Officer shall determine a daily interest rate based on the rate established by the Secretary of the Treasury under Pub. L. 92-41 (41 U.S.C. 7109(b)). The Contracting Officer shall revise the daily interest rate during the contract period in keeping with any changes in the cited interest rate.

(4) If the full amount of interest charged under this paragraph has not been paid by deduction or otherwise upon completion or termination of this contract, the Contractor shall pay the remaining interest to the Government on demand.

(f) Lien on property under contract.

(1) All advance payments under this contract, together with interest charges, shall be secured, when made, by a lien in favor of the Government, paramount to all other liens, on the supplies or other things covered by this contract and on all material and other property acquired for or allocated to the performance of this contract, except to the extent that the Government by virtue of any other terms of this contract, or otherwise, shall have valid title to the supplies, materials, or other property as against other creditors of the Contractor.

(2) The Contractor shall identify, by marking or segregation, all property that is subject to a lien in favor of the Government by virtue of any terms of this contract in such a way as to indicate that it is subject to a lien and that it has been acquired for or allocated to performing this contract. If, for any reason, the supplies, materials, or other property are not identified by marking or segregation, the Government shall be considered to have a lien to the extent of the Government's interest under this contract on any mass of property with which the supplies, materials, or other property are commingled. The Contractor shall maintain adequate accounting control over the property on its books and records.

(3) If, at any time during the progress of the work on the contract, it becomes necessary to deliver to a third person any items or materials on which the Government has a lien, the Contractor shall notify the third person of the lien and shall obtain from the third person a receipt in duplicate acknowledging the existence of the lien. The Contractor shall provide a copy of each receipt to the Contracting Officer.

(4) If, under the termination clause, the Contracting Officer authorizes the contractor to sell or retain termination inventory, the approval shall constitute a release of the Government's lien to the extent that—

(i) The termination inventory is sold or retained; and

(ii) The sale proceeds or retention credits are applied to reduce any outstanding advance payments.

(g) Insurance.

(1) The Contractor shall maintain with responsible insurance carriers—

(i) Insurance on plant and equipment against fire and other hazards, to the extent that similar properties are usually insured by others operating plants and properties of similar character in the same general locality;

(ii) Adequate insurance against liability on account of damage to persons or property; and

(iii) Adequate insurance under all applicable workers' compensation laws.

(2) Until work under this contract has been completed and all advance payments made under the contract have been liquidated, the Contractor shall—

(i) Maintain this insurance;

(ii) Maintain adequate insurance on any materials, parts, assemblies, subassemblies, supplies, equipment, and other property acquired for or allocable to this contract and subject to the Government lien under paragraph (f) of this clause; and

(iii) Furnish any evidence with respect to its insurance that the administering office may require.

(h) Default.

(1) If any of the following events occur, the Government may, by written notice to the Contractor, withhold further payments on this contract:

(i) Termination of this contract for a fault of the Contractor.

(ii) A finding by the administering office that the Contractor has failed to—

(A) Observe any of the conditions of the advance payment terms;

(B) Comply with any material term of this contract;

(C) Make progress or maintain a financial condition adequate for performance of this contract;

(D) Limit inventory allocated to this contract to reasonable requirements; or

(E) Avoid delinquency in payment of taxes or of the costs of performing this contract in the ordinary course of business.

(iii) The appointment of a trustee, receiver, or liquidator for all or a substantial part of the Contractor's property, or the institution of proceedings by or against the Contractor for bankruptcy, reorganization, arrangement, or liquidation.

(iv) The commission of an act of bankruptcy.

(2) If any of the events described in subparagraph (h)(1) of this clause continue for 30 days after the written notice to the Contractor, the Government may take any of the following additional actions:

(i) Charge interest, in the manner prescribed in paragraph (e) of this clause, on outstanding advance payments during the period of any event described in subparagraph (h)(1) of this clause.

(ii) Demand immediate repayment by the Contractor of the unliquidated balance of advance payments.

(iii) Take possession of and, with or without advertisement, sell at public or private sale all or any part of the property on which the Government has a lien under this contract and, after deducting any expenses incident to the sale, apply the net proceeds of the sale to reduce the unliquidated balance of advance payments or other Government claims against the Contractor.

(3) The Government may take any of the actions described in subparagraphs (h)(1) and (h)(2) of this clause it considers appropriate at its discretion and without limiting any other rights of the Government.

(i) Prohibition against assignment. Notwithstanding any other terms of this contract, the Contractor shall not assign this contract, any interest therein, or any claim under the contract to any party.

(j) Information and access to records. The Contractor shall furnish to the administering office (1) monthly or at other intervals as required, signed or certified balance sheets and profit and loss statements, and (2) if requested, other information concerning the operation of the contractor's business. The Contractor shall provide the authorized Government representatives proper facilities for inspection of the Contractor's books, records, and accounts.

(k) Other security. The terms of this contract are considered to provide adequate security to the Government for advance payments; however, if the administering office considers the security inadequate, the Contractor shall furnish additional security satisfactory to the administering office, to the extent that the security is available.

(l) Representations. The Contractor represents the following:

(1) The balance sheet, the profit and loss statement, and any other supporting financial statements furnished to the administering office fairly reflect the financial condition of the Contractor at the date shown or the period covered, and there has been no subsequent materially adverse change in the financial condition of the Contractor.

(2) No litigation or proceedings are presently pending or threatened against the Contractor, except as shown in the financial statements.

(3) The Contractor has disclosed all contingent liabilities, except for liability resulting from the renegotiation of defense production contracts, in the financial statements furnished to the administering office.

(4) None of the terms in this clause conflict with the authority under which the Contractor is doing business or with the provision of any existing indenture or agreement of the Contractor.

(5) The Contractor has the power to enter into this contract and accept advance payments, and has taken all necessary action to authorize the acceptance under the terms of this contract.

(6) The assets of the Contractor are not subject to any lien or encumbrance of any character except for current taxes not delinquent, and except as shown in the financial statements furnished by the Contractor. There is no current assignment of claims under any contract affected by these advance payment provisions.

(7) All information furnished by the Contractor to the administering office in connection with each request for advance payments is true and correct.

(8) These representations shall be continuing and shall be considered to have been repeated by the submission of each invoice for advance payments.

(p) Covenants. To the extent the Government considers it necessary while any advance payments made under this contract remain outstanding, the Contractor, without the prior written consent of the administering office, shall not—

(1) Mortgage, pledge, or otherwise encumber or allow to be encumbered, any of the assets of the Contractor now owned or subsequently acquired, or permit any preexisting mortgages, liens, or other encumbrances to remain on or attach to any assets of the Contractor which are allocated to performing this contract and with respect to which the Government has a lien under this contract;

(2) Sell, assign, transfer, or otherwise dispose of accounts receivable, notes, or claims for money due or to become due;

(3) Declare or pay any dividends, except dividends payable in stock of the corporation, or make any other distribution on account of any shares of its capital stock, or purchase, redeem, or otherwise acquire for value any of its stock, except as required by sinking fund or redemption arrangements reported to the administering office incident to the establishment of these advance payment provisions;

(4) Sell, convey, or lease all or a substantial part of its assets;

(5) Acquire for value the stock or other securities of any corporation, municipality, or Governmental authority, except direct obligations of the United States;

(6) Make any advance or loan or incur any liability as guarantor, surety, or accommodation endorser for any party;

(7) Permit a writ of attachment or any similar process to be issued against its property without getting a release or bonding the property within 30 days after the entry of the writ of attachment or other process;

(8) Pay any remuneration in any form to its directors, officers, or key employees higher than rates provided in existing agreements of which notice has been given to the administering office; accrue excess remuneration without first obtaining an agreement subordinating it to all claims of the Government; or employ any person at a rate of compensation over ___ a year.

(9) Change substantially the management, ownership, or control of the corporation;

(10) Merge or consolidate with any other firm or corporation, change the type of business, or engage in any transaction outside the ordinary course of the Contractor's business as presently conducted;

(11) Deposit any of its funds except in a bank or trust company insured by the Federal Deposit Insurance Corporation or a credit union insured by the National Credit Union Administration;

(12) Create or incur indebtedness for advances, other than advances to be made under the terms of this contract, or for borrowings;

(13) Make or covenant for capital expenditures exceeding $___ in total;

(14) Permit its net current assets, computed in accordance with generally accepted accounting principles, to become less than ___; or

(15) Make any payments on account of the obligations listed below, except in the manner and to the extent provided in this *[Contracting officer to list the pertinent obligations.]* _____.

52.232-13 Notice of Progress Payments.

As prescribed in 32.502-3(a), insert the following provision:

NOTICE OF PROGRESS PAYMENTS (APR 1984)

The need for customary progress payments conforming to the regulations in subpart 32.5 of the Federal Acquisition Regulation (FAR) will not be considered as a handicap or adverse factor in the award of the contract. The Progress Payments clause included in this solicitation will be included in any resulting contract, modified or altered if necessary in accordance with subsection 52.232-16 and its Alternate I of the FAR. Even though the clause is included in the contract, the clause shall be inoperative during any time the contractor's accounting system and controls are determined by the Government to be inadequate for segregation and accumulation of contract costs.

(End of provision)

52.232-14 Notice of Availability of Progress Payments Exclusively for Small Business Concerns.

As prescribed in 32.502-3(b)(2), insert the following provision:

NOTICE OF AVAILABILITY OF PROGRESS PAYMENTS EXCLUSIVELY FOR SMALL BUSINESS CONCERNS (APR 1984)

The Progress Payments clause will be available only to small business concerns. Any bid conditioned upon inclusion of a progress payment clause in the resulting contract will be rejected as nonresponsive if the bidder is not a small business concern.

(End of provision)

52.232-15 Progress Payments Not Included.

As prescribed in 32.502-3(c), insert the following provision:

PROGRESS PAYMENTS NOT INCLUDED (APR 1984)

A progress payments clause is not included in this solicitation, and will not be added to the resulting contract at the time of award. Bids conditioned upon inclusion of a progress payment clause in the resulting contract will be rejected as nonresponsive.

(End of provision)

52.232-16 Progress Payments.

As prescribed in 32.502-4(a), insert the following clause:

PROGRESS PAYMENTS (DEVIATION DATE)

The Government will make progress payments to the Contractor when requested as work progresses, but not more frequently than monthly, in amounts of $2,500 or more approved by the Contracting Officer, under the following conditions:

(a) Computation of amounts. (1) Unless the Contractor requests a smaller amount, the Government will compute each progress payment as 80 percent of the Contractor's total costs incurred under this contract whether or not actually paid, plus financing payments to subcontractors (see paragraph (j) of this clause), less the sum of all previous progress payments made by the Government under this contract. The Contracting Officer will consider cost of money that would be allowable under Federal Acquisition Regulation (FAR) 31.205-10 as an incurred cost for progress payment purposes.

(2) The amount of financing and other payments for supplies and services purchased directly for the contract are limited to the amounts that have been paid by cash, check, or other forms of payment, or that are determined due and will be paid to subcontractors—

(i) In accordance with the terms and conditions of a subcontract or invoice; and

(ii) Ordinarily within 30 days of the submission of the Contractor's payment request to the Government.

(3) The Government will exclude accrued costs of Contractor contributions under employee pension plans until actually paid unless—

(i) The Contractor's practice is to make contributions to the retirement fund quarterly or more frequently; and

(ii) The contribution does not remain unpaid 30 days after the end of the applicable quarter or shorter payment period (any contribution remaining unpaid shall be excluded from the Contractor's total costs for progress payments until paid).

(4) The Contractor shall not include the following in total costs for progress payment purposes in paragraph (a)(1) of this clause:

(i) Costs that are not reasonable, allocable to this contract, and consistent with sound and generally accepted accounting principles and practices.

(ii) Costs incurred by subcontractors or suppliers.

(iii) Costs ordinarily capitalized and subject to depreciation or amortization except for the properly depreciated or amortized portion of such costs.

(iv) Payments made or amounts payable to subcontractors or suppliers, except for—

(A) Completed work, including partial deliveries, to which the Contractor has acquired title; and

(B) Work under cost-reimbursement or time-and-material subcontracts to which the Contractor has acquired title.

(5) The amount of unliquidated progress payments may exceed neither (i) the progress payments made against incomplete work (including allowable unliquidated progress payments to subcontractors) nor (ii) the value, for progress payment purposes, of the incomplete work. Incomplete work shall be considered to be the supplies and services required by this contract, for which delivery and invoicing by the Contractor and acceptance by the Government are incomplete.

(6) The total amount of progress payments shall not exceed 80 percent of the total contract price.

(7) If a progress payment or the unliquidated progress payments exceed the amounts permitted by subparagraphs (a)(4) or (a)(5) of this clause, the Contractor shall repay the amount of such excess to the Government on demand.

(8) Notwithstanding any other terms of the contract, the Contractor agrees not to request progress payments in dollar amounts of less than $2,500. The Contracting Officer may make exceptions.

(9) The costs applicable to items delivered, invoiced, and accepted shall not include costs in excess of the contract price of the items.

(b) *Liquidation.* Except as provided in the Termination for Convenience of the Government clause, all progress payments shall be liquidated by deducting from any payment under this contract, other than advance or progress payments, the unliquidated progress payments, or 80 percent of the amount invoiced, whichever is less. The Contractor shall repay to the Government any amounts required by a retroactive price reduction, after computing liquidations and payments on past invoices at the reduced prices and adjusting the unliquidated progress payments accordingly. The Government reserves the right to unilaterally change from the ordinary liquidation rate to an alternate rate when deemed appropriate for proper contract financing.

(c) *Reduction or suspension.* The Contracting Officer may reduce or suspend progress payments, increase the rate of liquidation, or take a combination of these actions, after finding on substantial evidence any of the following conditions:

(1) The Contractor failed to comply with any material requirement of this contract (which includes paragraphs (f) and (g) of this clause).

(2) Performance of this contract is endangered by the Contractor's (i) failure to make progress or (ii) unsatisfactory financial condition.

(3) Inventory allocated to this contract substantially exceeds reasonable requirements.

(4) The Contractor is delinquent in payment of the costs of performing this contract in the ordinary course of business.

(5) The fair value of the undelivered work is less than the amount of unliquidated progress payments for that work.

(6) The Contractor is realizing less profit than that reflected in the establishment of any alternate liquidation rate in paragraph (b) of this clause, and that rate is less than the progress payment rate stated in subparagraph (a)(1) of this clause.

(d) *Title.*

(1) Title to the property described in this paragraph (d) shall vest in the Government. Vestiture shall be immediately upon the date of this contract, for property acquired or produced before that date. Otherwise, vestiture shall occur when the property is or should have been allocable or properly chargeable to this contract.

(2) *Property,* as used in this clause, includes all of the below-described items acquired or produced by the Contractor that are or should be allocable or properly chargeable to this contract under sound and generally accepted accounting principles and practices.

(i) Parts, materials, inventories, and work in process;

(ii) Special tooling and special test equipment to which the Government is to acquire title;

(iii) Nondurable (i.e., noncapital) tools, jigs, dies, fixtures, molds, patterns, taps, gauges, test equipment, and other similar manufacturing aids, title to which would not be obtained as special tooling under paragraph (d)(2)(ii) of this clause; and

(iv) Drawings and technical data, to the extent the Contractor or subcontractors are required to deliver them to the Government by other clauses of this contract.

(3) Although title to property is in the Government under this clause, other applicable clauses of this contract, e.g., the termination clauses, shall determine the handling and disposition of the property.

(4) The Contractor may sell any scrap resulting from production under this contract without requesting the Contracting Officer's approval, but the proceeds shall be credited against the costs of performance.

(5) To acquire for its own use or dispose of property to which title is vested in the Government under this clause, the Contractor must obtain the Contracting Officer's advance approval of the action and the terms. The Contractor shall (i) exclude the allocable costs of the property from the costs of contract performance, and (ii) repay to the Government any amount of unliquidated progress payments allocable to the property. Repayment may be by cash or credit memorandum.

(6) When the Contractor completes all of the obligations under this contract, including liquidation of all progress payments, title shall vest in the Contractor for all property (or the proceeds thereof) not—

(i) Delivered to, and accepted by, the Government under this contract; or

(ii) Incorporated in supplies delivered to, and accepted by, the Government under this contract and to which title is vested in the Government under this clause.

(7) The terms of this contract concerning liability for Government-furnished property shall not apply to property to which the Government acquired title solely under this clause.

(e) *Risk of loss.* Before delivery to and acceptance by the Government, the Contractor shall bear the risk of loss for property, the title to which vests in the Government under this clause, except to the extent the Government expressly assumes the risk. The Contractor shall repay the Government an amount equal to the unliquidated progress payments that are based on costs allocable to property that is lost (see 45.101).

(f) *Control of costs and property.* The Contractor shall maintain an accounting system and controls adequate for the proper administration of this clause.

(g) *Reports, forms, and access to records.*

(1) The Contractor shall promptly furnish reports, certificates, financial statements, and other pertinent information (including estimates to complete) reasonably requested by the Contracting Officer for the administration of this clause. Also, the Contractor shall give the Government reasonable opportunity to examine and verify the Contractor's books, records, and accounts.

(2) The Contractor shall furnish estimates to complete that have been developed or updated within six months of the date of the progress payment request. The estimates to complete shall represent the Contractor's best estimate of total costs to complete all remaining contract work required under the contract. The estimates shall include sufficient detail to permit Government verification.

(3) Each Contractor request for progress payment shall:

(i) Be submitted on Standard Form 1443, Contractor's Request for Progress Payment, or the electronic equivalent as required by agency regulations, in accordance with the form instructions and the contract terms; and

(ii) Include any additional supporting documentation requested by the Contracting Officer.

(h) *Special terms regarding default.* If this contract is terminated under the Default clause, (i) the Contractor shall, on demand, repay to the Government the amount of unliquidated progress payments and (ii) title shall vest in the Contractor, on full liquidation of progress payments, for all property for which the Government elects not to require delivery under the Default clause. The Government shall be liable for no payment except as provided by the Default clause.

(i) *Reservations of rights.*

(1) No payment or vesting of title under this clause shall (i) excuse the Contractor from performance of obligations under this contract or (ii) constitute a waiver of any of the rights or remedies of the parties under the contract.

(2) The Government's rights and remedies under this clause (i) shall not be exclusive but rather shall be in addition to any other rights and remedies provided by law or this contract and (ii) shall not be affected by delayed, partial, or omitted exercise of any right, remedy, power, or privilege, nor shall such exercise or any single exercise preclude or impair any further exercise under this clause or the exercise of any other right, power, or privilege of the Government.

(j) *Financing payments to subcontractors.* The financing payments to subcontractors mentioned in paragraphs (a)(1) and (a)(2) of this clause shall be all financing payments to subcontractors or divisions, if the following conditions are met:

(1) The amounts included are limited to—

(i) The unliquidated remainder of financing payments made; plus

(ii) Any unpaid subcontractor requests for financing payments.

(2) The subcontract or interdivisional order is expected to involve a minimum of approximately 6 months between the beginning of work and the first delivery; or, if the subcontractor is a small business concern, 4 months.

(3) If the financing payments are in the form of progress payments, the terms of the subcontract or interdivisional order concerning progress payments—

(i) Are substantially similar to the terms of this clause for any subcontractor that is a large business concern, or this clause with its *Alternate I* for any subcontractor that is a small business concern;

(ii) Are at least as favorable to the Government as the terms of this clause;

(iii) Are not more favorable to the subcontractor or division than the terms of this clause are to the Contractor;

(iv) Are in conformance with the requirements of FAR 32.504(e); and

(v) Subordinate all subcontractor rights concerning property to which the Government has title under the subcontract to the Government's right to require delivery of the property to the Government if—

(A) The Contractor defaults; or

(B) The subcontractor becomes bankrupt or insolvent.

(4) If the financing payments are in the form of performance-based payments, the terms of the subcontract or interdivisional order concerning payments—

(i) Are substantially similar to the Performance-Based Payments clause at FAR 52.232-32 and meet the criteria for, and definition of, performance-based payments in FAR Part 32;

(ii) Are in conformance with the requirements of FAR 32.504(f); and

(iii) Subordinate all subcontractor rights concerning property to which the Government has title under the subcontract to the Government's right to require delivery of the property to the Government if—

(A) The Contractor defaults; or

(B) The subcontractor becomes bankrupt or insolvent.

(5) If the financing payments are in the form of commercial product or commercial service financing payments, the terms of the subcontract or interdivisional order concerning payments—

(i) Are constructed in accordance with FAR 32.206(c) and included in a subcontract for a commercial product or commercial service purchase that meets the definition and standards for acquisition of commercial products and commercial services in FAR parts 2 and 12;

(ii) Are in conformance with the requirements of FAR 32.504(g); and

(iii) Subordinate all subcontractor rights concerning property to which the Government has title under the subcontract to the Government's right to require delivery of the property to the Government if—

(A) The Contractor defaults; or

(B) The subcontractor becomes bankrupt or insolvent.

(6) If financing is in the form of progress payments, the progress payment rate in the subcontract is the customary rate used by the contracting agency, depending on whether the subcontractor is or is not a small business concern.

(7) Concerning any proceeds received by the Government for property to which title has vested in the Government under the subcontract terms, the parties agree that the proceeds shall be applied to reducing any unliquidated financing payments by the Government to the Contractor under this contract.

(8) If no unliquidated financing payments to the Contractor remain, but there are unliquidated financing payments that the Contractor has made to any subcontractor, the Contractor shall be subrogated to all the rights the Government obtained through the terms required by this clause to be in any subcontract, as if all such rights had been assigned and transferred to the Contractor.

(9) To facilitate small business participation in subcontracting under this contract, the Contractor shall provide financing payments to small business concerns, in conformity with the standards for customary contract financing payments stated in FAR 32.113. The Contractor shall not consider the need for such financing payments as a handicap or adverse factor in the award of subcontracts.

(k) *Limitations on undefinitized contract actions.* Notwithstanding any other progress payment provisions in this contract, progress payments may not exceed 80 percent of costs incurred on work accomplished under undefinitized contract actions. A *contract action* is any action resulting in a contract, as defined in subpart 2.1, including contract modifications for additional supplies or services, but not including contract modifications that are within the scope and under the terms of the contract, such as contract modifications issued pursuant to the Changes clause, or funding and other administrative changes. This limitation shall apply to the costs incurred, as computed in accordance with paragraph (a) of this clause, and shall remain in effect until the contract action is definitized. Costs incurred which are subject to this limitation shall be segregated on Contractor progress payment requests and invoices from those costs eligible for higher progress payment rates. For purposes of progress payment liquidation, as described in paragraph (b) of this clause, progress payments for undefinitized contract actions shall be liquidated at 80 percent of the amount invoiced for work performed under the undefinitized contract action as long as the contract action remains undefinitized. The amount of unliquidated progress payments for undefinitized contract actions shall not exceed 80 percent of the maximum liability of the Government under the undefinitized contract action or such lower limit specified elsewhere in the contract. Separate limits may be specified for separate actions.

(l) *Due date.* The designated payment office will make progress payments on the ____ [*Contracting Officer insert date as prescribed by agency head; if not prescribed, insert "30th"*] day after the designated billing office receives a proper progress payment request. In the event that the Government requires an audit or other review of a specific progress payment request to ensure compliance with the terms and conditions of the contract, the designated payment office is not compelled to make payment by the specified due date. Progress payments are considered contract financing and are not subject to the interest penalty provisions of the Prompt Payment Act.

(m) Progress payments under indefinite—delivery contracts. The Contractor shall account for and submit progress payment requests under individual orders as if the order constituted a separate contract, unless otherwise specified in this contract.

(End of clause)

Alternate I (MAR 2000). If the contract is with a small business concern, change each mention of the progress payment and liquidation rates excepting paragraph (k) to the customary rate of 85 percent for small business concerns (see FAR 32.501-1).

Alternate II (APR 2003). If the contract is a letter contract, add paragraphs (n) and (o). The amount specified in paragraph (o) shall not exceed 80 percent of the maximum liability of the Government under the letter contract. The contracting officer may specify separate limits for separate parts of the work.

(n) The Contracting Officer will liquidate progress payments made under this letter contract, unless previously liquidated under paragraph (b) of this clause, using the following procedures:

(1) If this letter contract is superseded by a definitive contract, unliquidated progress payments made under this letter contract shall be liquidated by deducting the amount from the first progress or other payments made under the definitive contract.

(2) If this letter contract is not superseded by a definitive contract calling for the furnishing of all or part of the articles or services covered under the letter contract, unliquidated progress payments made under the letter contract shall be liquidated by deduction from the amount payable under the Termination clause.

(3) If this letter contract is partly terminated and partly superseded by a contract, the Government will allocate the unliquidated progress payments to the terminated and unterminated portions as the Government deems equitable, and will liquidate each portion under the relevant procedure in paragraphs (n)(1) and (n)(2) of this clause.

(4) If the method of liquidating progress payments provided in this clause does not result in full liquidation, the Contractor shall immediately pay the unliquidated balance to the Government on demand.

(o) The amount of unliquidated progress payments shall not exceed _____ *[Contracting Officer specify dollar amount]*.

Alternate III (JUN 2020). As prescribed in 32.502-4 (d), add the following paragraph (n) to the basic clause. If Alternate II is also being used, redesignate the following paragraph as paragraph (p):

(n) The provisions of this clause will not be applicable to individual orders at or below the simplified acquisition threshold, as defined in FAR 2.101 on the date of individual order award.

52.232-17 Interest.

As prescribed in 32.611 (a) and (b), insert the following clause:

INTEREST (MAY 2014)

(a) Except as otherwise provided in this contract under a Price Reduction for Defective Certified Cost or Pricing Data clause or a Cost Accounting Standards clause, all amounts that become payable by the Contractor to the Government under this contract shall bear simple interest from the date due until paid unless paid within 30 days of becoming due. The interest rate shall be the interest rate established by the Secretary of the Treasury as provided in 41 U.S.C. 7109, which is applicable to the period in which the amount becomes due, as provided in paragraph (e) of this clause, and then at the rate applicable for each six-month period as fixed by the Secretary until the amount is paid.

(b) The Government may issue a demand for payment to the Contractor upon finding a debt is due under the contract.

(c) *Final Decisions*. The Contracting Officer will issue a final decision as required by 33.211 if-

(1) The Contracting Officer and the Contractor are unable to reach agreement on the existence or amount of a debt in a timely manner;

(2) The Contractor fails to liquidate a debt previously demanded by the Contracting Officer within the timeline specified in the demand for payment unless the amounts were not repaid because the Contractor has requested an installment payment agreement; or

(3) The Contractor requests a deferment of collection on a debt previously demanded by the Contracting Officer (see 32.607-2).

(d) If a demand for payment was previously issued for the debt, the demand for payment included in the final decision shall identify the same due date as the original demand for payment.

(e) Amounts shall be due at the earliest of the following dates:

(1) The date fixed under this contract.

(2) The date of the first written demand for payment, including any demand for payment resulting from a default termination.

(f) The interest charge shall be computed for the actual number of calendar days involved beginning on the due date and ending on-

(1) The date on which the designated office receives payment from the Contractor;

(2) The date of issuance of a Government check to the Contractor from which an amount otherwise payable has been withheld as a credit against the contract debt; or

(3) The date on which an amount withheld and applied to the contract debt would otherwise have become payable to the Contractor.

(g) The interest charge made under this clause may be reduced under the procedures prescribed in 32.608-2 of the Federal Acquisition Regulation in effect on the date of this contract.

(End of clause)

52.232-18 Availability of Funds.

As prescribed in 32.706-1(a), insert the following clause:

AVAILABILITY OF FUNDS (APR 1984)

Funds are not presently available for this contract. The Government's obligation under this contract 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 until funds are made available to the Contracting Officer for this contract and until the Contractor receives notice of such availability, to be confirmed in writing by the Contracting Officer.

(End of clause)

52.232-19 Availability of Funds for the Next Fiscal Year.

As prescribed in 32.706-1(b), insert the following clause:

AVAILABILITY OF FUNDS FOR THE NEXT FISCAL YEAR (APR 1984)

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)

52.232-20 Limitation of Cost.

As prescribed in 32.706-2(a), insert the following clause:

LIMITATION OF COST (DEVIATION DATE)

(a) The parties estimate that performance of this contract, exclusive of any fee, will not cost the Government more than (1) the estimated cost specified in the Schedule or, (2) if this is a cost-sharing contract, the Government's share of the estimated cost specified in the Schedule. The Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within the estimated cost, which, if this is a cost-sharing contract, includes both the Government's and the Contractor's share of the cost.

(b) The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that—

(1) The costs the Contractor expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of the estimated cost specified in the Schedule; or

(2) The total cost for the performance of this contract, exclusive of any fee, will be either greater or substantially less than had been previously estimated.

(c) As part of the notification, the Contractor shall provide the Contracting Officer a revised estimate of the total cost of performing this contract.

(d) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause—

(1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of (i) the estimated cost specified in the Schedule or, (ii) if this is a cost-sharing contract, the estimated cost to the Government specified in the Schedule; and

(2) The Contractor is not obligated to continue performance under this contract (including actions under the Termination clause of this contract) or otherwise incur costs in excess of the estimated cost specified in the Schedule, until the Contracting Officer (i) notifies the Contractor in writing that the estimated cost has been increased and (ii) provides a revised estimated total cost of performing this contract. If this is a cost-sharing contract, the increase shall be allocated in accordance with the formula specified in the Schedule.

(e) No notice, communication, or representation in any form other than that specified in subparagraph (d)(2) in this clause, or from any person other than the Contracting Officer, shall affect this contract's estimated cost to the Government. In the absence of the specified notice, the Government is not obligated to reimburse the Contractor for any costs in excess of the estimated cost or, if this is a cost-sharing contract, for any costs in excess of the estimated cost to the Government specified in the Schedule, whether those excess costs were incurred during the course of the contract or as a result of termination.

(f) If the estimated cost specified in the Schedule is increased, any costs the Contractor incurs before the increase that are in excess of the previously estimated cost shall be allowable to the same extent as if incurred afterward, unless the Contracting Officer issues a termination or other notice directing that the increase is solely to cover termination or other specified expenses.

(g) Change orders shall not be considered an authorization to exceed the estimated cost to the Government specified in the Schedule, unless they contain a statement increasing the estimated cost.

(h) If this contract is terminated or the estimated cost is not increased, the Government and the Contractor shall negotiate an equitable distribution of all property produced or purchased under the contract, based upon the share of costs incurred by each.

(End of clause)

52.232-21 [Reserved]

52.232-22 Limitation of Funds.

As prescribed in 32.706-2(b), insert the following clause:

LIMITATION OF FUNDS (DEVIATION DATE)

(a) The parties estimate that performance of this contract will not cost the Government more than (1) the estimated cost specified in the Schedule or, (2) if this is a cost-sharing contract, the Government's share of the estimated cost specified in the Schedule. The Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within the estimated cost, which, if this is a cost-sharing contract, includes both the Government's and the Contractor's share of the cost.

(b) The Schedule specifies the amount presently available for payment by the Government and allotted to this contract, the items covered, the Government's share of the cost if this is a cost-sharing contract, and the period of performance it is estimated the allotted amount will cover. The parties contemplate that the Government will allot additional funds incrementally to the contract up to the fully estimated cost to the Government specified in the Schedule, exclusive of any fee. The Contractor agrees to perform, or have performed, work on the contract up to the point at which the total amount paid and payable by the Government under the contract approximates but does not exceed the total amount actually allotted by the Government to the contract.

(c) The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that the costs it expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of (1) the total amount so far allotted to the contract by the Government or, (2) if this is a cost-sharing contract, the amount then allotted to the contract by the Government plus the Contractor's corresponding share. The notice shall state the estimated amount of additional funds required to continue performance for the period specified in the Schedule.

(d) Sixty days before the end of the period specified in the Schedule, the Contractor shall notify the Contracting Officer in writing of the estimated amount of additional funds, if any, required to continue timely performance under the contract or for any further period specified in the Schedule or otherwise agreed upon, and when the funds will be required.

(e) If, after notification, additional funds are not allotted by the end of the period specified in the Schedule or another agreed-upon date, upon the Contractor's written request the Contracting Officer will terminate this contract on that date in accordance with the provisions of the Termination clause of this contract. If the Contractor estimates that the funds available will allow it to continue to discharge its obligations beyond that date, it may specify a later date in its request, and the Contracting Officer may terminate this contract on that later date.

(f) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause—

(1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of the total amount allotted by the Government to this contract; and

(2) The Contractor is not obligated to continue performance under this contract (including actions under the Termination clause of this contract) or otherwise incur costs in excess of-

(i) The amount then allotted to the contract by the Government; or,

(ii) If this is a cost-sharing contract, the amount then allotted by the Government to the contract plus the Contractor's corresponding share, until the Contracting Officer notifies the Contractor in writing that the amount allotted by the Government has been increased and specifies an increased amount, which shall then constitute the total amount allotted by the Government to this contract.

(g) The estimated cost shall be increased to the extent that (1) the amount allotted by the Government or, (2) if this is a cost-sharing contract, the amount then allotted by the Government to the contract plus the Contractor's corresponding share, exceeds the estimated cost specified in the Schedule. If this is a cost-sharing contract, the increase shall be allocated in accordance with the formula specified in the Schedule.

(h) No notice, communication, or representation in any form other than that specified in subparagraph (f)(2) of this clause, or from any person other than the Contracting Officer, shall affect the amount allotted by the Government to this contract. In the absence of the specified notice, the Government is not obligated to reimburse the Contractor for any costs in excess of the total amount allotted by the Government to this contract, whether incurred during the course of the contract or as a result of termination.

(i) When and to the extent that the amount allotted by the Government to the contract is increased, any costs the Contractor incurs before the increase that are in excess of—

(1) The amount previously allotted by the Government; or

(2) If this is a cost-sharing contract, the amount previously allotted by the Government to the contract plus the Contractor's corresponding share, shall be allowable to the same extent as if incurred afterward, unless the Contracting Officer issues a termination or other notice and directs that the increase is solely to cover termination or other specified expenses.

(j) Change orders shall not be considered an authorization to exceed the amount allotted by the Government specified in the Schedule, unless they contain a statement increasing the amount allotted.

(k) Nothing in this clause shall affect the right of the Government to terminate this contract. If this contract is terminated, the Government and the Contractor shall negotiate an equitable distribution of all property produced or purchased under the contract, based upon the share of costs incurred by each.

(l) If the Government does not allot sufficient funds to allow completion of the work, the Contractor is entitled to a percentage of the fee specified in the Schedule equaling the percentage of completion of the work contemplated by this contract.

(End of clause)

52.232-23 Assignment of Claims.

As prescribed in 32.806(a)(1), insert the following clause:

ASSIGNMENT OF CLAIMS (MAY 2014)

(a) The Contractor, under the Assignment of Claims Act, as amended, 31 U.S.C.3727, 41 U.S.C.6305 (hereafter referred to as "the Act"), may assign its rights to be paid amounts due or to become due as a result of the performance of this contract to a bank, trust company, or other financing institution, including any Federal lending agency. The assignee under such an assignment may thereafter further assign or reassign its right under the original assignment to any type of financing institution described in the preceding sentence.

(b) Any assignment or reassignment authorized under the Act and this clause shall cover all unpaid amounts payable under this contract, and shall not be made to more than one party, except that an assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in the financing of this contract.

(c) The Contractor shall not furnish or disclose to any assignee under this contract any classified document (including this contract) or information related to work under this contract until the Contracting Officer authorizes such action in writing.

(End of clause)

Alternate I (APR 1984). If a no-setoff commitment is to be included in the contract (see 32.801 and 32.803(d)), add the following sentence at the end of paragraph (a) of the basic clause:

Unless otherwise stated in this contract, payments to an assignee of any amounts due or to become due under this contract shall not, to the extent specified in the Act, be subject to reduction or setoff.

52.232-24 Prohibition of Assignment of Claims.

As prescribed in 32.806(b), insert the following clause:

PROHIBITION OF ASSIGNMENT OF CLAIMS (MAY 2014)

The assignment of claims under the Assignment of Claims Act of 1940 "(31 U.S.C.3727, 41 U.S.C. 6305)" is prohibited for this contract.

(End of clause)

52.232-25 Prompt Payment.

As prescribed in 32.908(c), insert the following clause:

PROMPT PAYMENT (JAN 2017)

Notwithstanding any other payment clause in this contract, the Government will make invoice payments under the terms and conditions specified in this clause. The Government considers payment as being made on the day a check is dated or the date of an electronic funds transfer (EFT). Definitions of pertinent terms are set forth in sections 2.101, 32.001, and 32.902 of the Federal Acquisition Regulation. All days referred to in this clause are calendar days, unless otherwise specified. (However, see paragraph (a)(4) of this clause concerning payments due on Saturdays, Sundays, and legal holidays.)

(a) Invoice payments- (1) Due date. (i) Except as indicated in paragraphs (a)(2) and (c) of this clause, the due date for making invoice payments by the designated payment office is the later of the following two events:

(A) The 30th day after the designated billing office receives a proper invoice from the Contractor (except as provided in paragraph (a)(1)(ii) of this clause).

(B) The 30th day after Government acceptance of supplies delivered or services performed. For a final invoice, when the payment amount is subject to contract settlement actions, acceptance is deemed to occur on the effective date of the contract settlement.

(ii) If the designated billing office fails to annotate the invoice with the actual date of receipt at the time of receipt, the invoice payment due date is the 30th day after the date of the Contractor's invoice, provided the designated billing office receives a proper invoice and there is no disagreement over quantity, quality, or Contractor compliance with contract requirements.

(2) 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 of1921 (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, and 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 of1930 (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 dairy products, as defined in section 111(e) of the Dairy Production Stabilization Act of1983 (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 dressings, 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.

(3) *Contractor's invoice*. The Contractor shall prepare and submit invoices to the designated billing office specified in the contract. A proper invoice must include the items listed in paragraphs (a)(3)(i) through (a)(3)(x) of this clause. If the invoice does not comply with these requirements, the designated billing office will return it within 7 days after receipt (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), with the reasons why it is not a proper invoice. The Government will take into account untimely notification when computing any interest penalty owed the Contractor.

(i) Name and address of the Contractor.

(ii) Invoice date and invoice number. (The Contractor should 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 performed (including order number and line item number).

(iv) Description, quantity, unit of measure, unit price, and extended price of supplies delivered or services performed.

(v) Shipping and payment terms (*e.g.,* shipment number and date of shipment, discount for prompt payment terms). Bill of lading number and weight of shipment will be shown for shipments on Government bills of 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 notify in the event of a defective invoice.

(viii) Taxpayer Identification Number (TIN). The Contractor shall include its TIN on the invoice only if required elsewhere in this contract.

(ix) Electronic funds transfer (EFT) banking information.

(A) The Contractor shall include EFT banking information on the invoice only if required elsewhere in this contract.

(B) If EFT banking information is not required to be on the invoice, in order for the invoice to be a proper invoice, the Contractor shall have submitted correct EFT banking information in accordance with the applicable solicitation provision (*e.g.,* 52.232-38, Submission of Electronic Funds Transfer Information with Offer), contract clause (*e.g.,* 52.232-33, Payment by Electronic Funds Transfer-System for Award Management, or 52.232-34, Payment by Electronic Funds Transfer-Other Than System for Award Management), or applicable agency procedures.

(C) EFT banking information is not required if the Government waived the requirement to pay by EFT.

(x) Any other information or documentation required by the contract (*e.g.,* evidence of shipment).

(4) *Interest penalty*. The designated payment office will pay an interest penalty automatically, without request from the Contractor, if payment is not made by the due date and the conditions listed in paragraphs (a)(4)(i) through (a)(4)(iii) of this clause are met, if applicable. However, when the due date falls on a Saturday, Sunday, or legal holiday, the designated payment office may make payment on the following working day without incurring a late payment interest penalty.

(i) The designated billing office received a proper invoice.

(ii) The Government processed a receiving report or other Government documentation authorizing payment, 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.

(5) *Computing penalty amount*. The Government will compute the interest penalty in accordance with the Office of Management and Budget prompt payment regulations at 5 CFR part 1315.

(i) For the sole purpose of computing an interest penalty that might be due the Contractor, Government acceptance is deemed to occur constructively on the 7th day (unless otherwise specified in this contract) after the Contractor delivers the supplies or performs 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. If actual acceptance occurs within the constructive acceptance period, the Government will base the determination of an interest penalty 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 prompt payment regulations at 5 CFR1315.10(c) do not require the Government to pay interest penalties if payment delays are 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. The Government and the Contractor shall resolve claims involving disputes and any interest that may be payable in accordance with the clause at FAR 52.233-1, Disputes.

(6) *Discounts for prompt payment*. The designated payment office will pay an interest penalty automatically, without request from the Contractor, if the Government takes a discount for prompt payment improperly. The Government will calculate the interest penalty in accordance with the prompt payment regulations at 5 CFR part 1315.

(7) Additional interest penalty. (i) The designated payment office will pay a penalty amount, calculated in accordance with the prompt payment regulations at 5 CFR part 1315 in addition to the interest penalty amount only if-

(A) The Government owes an interest penalty of $1 or more;

(B) The designated payment office does not pay the interest penalty within 10 days after the date the invoice amount is paid; and

(C) The Contractor makes a written demand to the designated payment office for additional penalty payment, in accordance with paragraph (a)(7)(ii) of this clause, postmarked not later than 40 days after the invoice amount is paid.

(ii) (A) The Contractor shall support written demands for additional penalty payments with the following data. The Government will not request any additional data. The Contractor 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 is due; and

(3) State that payment of the principal has been received, including the date of receipt.

(B) If there is no postmark or the postmark is illegible-

(1) The designated payment office that receives the demand will annotate it with the date of receipt, provided the demand is received on or before the 40th day after payment was made; or

(2) If the designated payment office fails to make the required annotation, the Government will determine the demand's validity based on the date the Contractor has placed on the demand, provided such date is no later than the 40th day after payment was made.

(iii) 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 payment*. If this contract provides for contract financing, the Government will make contract financing payments in accordance with the applicable contract financing clause.

(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.

(d) *Overpayments*. If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the Contractor shall-

(1) Remit the overpayment amount to the payment office cited in the contract along with a description of the overpayment including the-

(i) Circumstances of the overpayment (*e.g.*, duplicate payment, erroneous payment, liquidation errors, date(s) of overpayment);

(ii) Affected contract number and delivery order number if applicable;

(iii) Affected line item or subline item, if applicable; and

(iv) Contractor point of contact.

(2) Provide a copy of the remittance and supporting documentation to the Contracting Officer.

(End of clause)

Alternate I (FEB 2002). As prescribed in 32.908 (c)(3), add the following paragraph (e) to the basic clause:

(e) *Invoices for interim payments*. For interim payments under this cost-reimbursement contract for services-

(1) Paragraphs (a)(2), (a)(3), (a)(4)(ii), (a)(4)(iii), and (a)(5)(i) do not apply;

(2) For purposes of computing late payment interest penalties that may apply, the due date for payment is the 30th day after the designated billing office receives a proper invoice; and

(3) The contractor shall submit invoices for interim payments in accordance with paragraph (a) of FAR 52.216-7, Allowable Cost and Payment. If the invoice does not comply with contract requirements, it will be returned within 7 days after the date the designated billing office received the invoice.

52.232-26 Prompt Payment for Fixed-Price Architect-Engineer Contracts.

As prescribed in 32.908(a), insert the following clause:

PROMPT PAYMENT FOR FIXED-PRICE ARCHITECT-ENGINEER CONTRACTS (JAN 2017)

Notwithstanding any other payment terms in this contract, the Government will make invoice payments under the terms and conditions specified in this clause. The Government considers payment 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 sections 2.101, 32.001, and 32.902 of the

Federal Acquisition Regulation. All days referred to in this clause are calendar days, unless otherwise specified. (However, see paragraph (a)(3) of this clause concerning payments due on Saturdays, Sundays, and legal holidays.)

(a) Invoice payments- (1) *Due date*. The due date for making invoice payments is-

(i) For work or services completed by the Contractor, the later of the following two events:

(A) The 30th day after the designated billing office receives a proper invoice from the Contractor (except as provided in paragraph (a)(1)(iii) of this clause).

(B) The 30th day after Government acceptance of the work or services completed by the Contractor. For a final invoice, when the payment amount is subject to contract settlement actions (*e.g.,* release of claims), acceptance is deemed to occur on the effective date of the settlement.

(ii) The due date for progress payments is the 30th day after Government approval of Contractor estimates of work or services accomplished.

(iii) If the designated billing office fails to annotate the invoice or payment request with the actual date of receipt at the time of receipt, the payment due date is the 30th day after the date of the Contractor's invoice or payment request, provided the designated billing office receives a proper invoice or payment request and there is no disagreement over quantity, quality, or Contractor compliance with contract requirements.

(2) *Contractor's invoice*. The Contractor shall prepare and submit invoices to the designated billing office specified in the contract. A proper invoice must include the items listed in paragraphs (a)(2)(i) through (a)(2)(x) of this clause. If the invoice does not comply with these requirements, the designated billing office will return it within 7 days after receipt, with the reasons why it is not a proper invoice. When computing any interest penalty owed the Contractor, the Government will take into account if the Government notifies the Contractor of an improper invoice in an untimely manner.

(i) Name and address of the Contractor.

(ii) Invoice date and invoice number. (The Contractor should date invoices as close as possible to the date of mailing or transmission.)

(iii) Contract number or other authorization for work or services performed (including order number and line item number).

(iv) Description of work or services performed.

(v) Delivery and payment terms (*e.g.,* discount for prompt payment terms).

(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 notify in the event of a defective invoice.

(viii) Taxpayer Identification Number (TIN). The Contractor shall include its TIN on the invoice only if required elsewhere in this contract.

(ix) Electronic funds transfer (EFT) banking information.

(A) The Contractor shall include EFT banking information on the invoice only if required elsewhere in this contract.

(B) If EFT banking information is not required to be on the invoice, in order for the invoice to be a proper invoice, the Contractor shall have submitted correct EFT banking information in accordance with the applicable solicitation provision (*e.g.,* 52.232-38, Submission of Electronic Funds Transfer Information with Offer), contract clause (*e.g.,* 52.232-33, Payment by Electronic Funds Transfer-System for Award Management, or 52.232-34, Payment by Electronic Funds Transfer-Other Than System for Award Management), or applicable agency procedures.

(C) EFT banking information is not required if the Government waived the requirement to pay by EFT.

(x) Any other information or documentation required by the contract.

(3) *Interest penalty*. The designated payment office will pay an interest penalty automatically, without request from the Contractor, if payment is not made by the due date and the conditions listed in paragraphs (a)(3)(i) through (a)(3)(iii) of this clause are met, if applicable. However, when the due date falls on a Saturday, Sunday, or legal holiday, the designated payment office may make payment on the following working day without incurring a late payment interest penalty.

(i) The designated billing office received a proper invoice.

(ii) The Government processed a receiving report or other Government documentation authorizing payment and there was no disagreement over quantity, quality, Contractor compliance with any contract term or condition, or requested progress payment amount.

(iii) In the case of a final invoice for any balance of funds due the Contractor for work or services performed, the amount was not subject to further contract settlement actions between the Government and the Contractor.

(4) *Computing penalty amount*. The Government will compute the interest penalty in accordance with the Office of Management and Budget prompt payment regulations at 5 CFR part 1315.

(i) For the sole purpose of computing an interest penalty that might be due the Contractor, Government acceptance or approval is deemed to occur constructively as shown in paragraphs (a)(4)(i)(A) and (B) of this clause. If actual acceptance or approval occurs within the constructive acceptance or approval period, the Government will base the determination of an interest penalty on the actual date of acceptance or approval. Constructive acceptance or constructive approval requirements do not apply if there is a disagreement over quantity, quality, Contractor compliance with a contract provision, or requested progress payment amounts. These requirements also do not compel Government officials to accept work or services, approve Contractor estimates, perform contract administration functions, or make payment prior to fulfilling their responsibilities.

(A) For work or services completed by the Contractor, Government acceptance is deemed to occur constructively on the 7th day after the Contractor completes the work or services in accordance with the terms and conditions of the contract.

(B) For progress payments, Government approval is deemed to occur on the 7th day after the designated billing office receives the Contractor estimates.

(ii) The prompt payment regulations at 5 CFR 1315.10(c) do not require the Government to pay interest penalties if payment delays are 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. The Government and the Contractor shall resolve claims involving disputes, and any interest that may be payable in accordance with the clause at FAR 52.233-1, Disputes.

(5) *Discounts for prompt payment*. The designated payment office will pay an interest penalty automatically, without request from the Contractor, if the Government takes a discount for prompt payment improperly. The Government will calculate the interest penalty in accordance with 5 CFR part 1315.

(6) Additional interest penalty. (i) The designated payment office will pay a penalty amount, calculated in accordance with the prompt payment regulations at 5 CFR part 1315, in addition to the interest penalty amount only if-

(A) The Government owes an interest penalty of $1 or more;

(B) The designated payment office does not pay the interest penalty within 10 days after the date the invoice amount is paid; and

(C) The contractor makes a written demand to the designated payment office for additional penalty payment, in accordance with paragraph (a)(6)(ii) of this clause, postmarked not later than 40 days after the date the invoice amount is paid.

(ii) (A) The Contractor shall support written demands for additional penalty payments with the following data. The Government will not request any additional data. The Contractor 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 is due; and

(3) State that payment of the principal has been received, including the date of receipt.

(B) If there is no postmark or the postmark is illegible-

(1) The designated payment office that receives the demand will annotate it with the date of receipt, provided the demand is received on or before the 40th day after payment was made; or

(2) If the designated payment office fails to make the required annotation, the Government will determine the demand's validity based on the date the Contractor has placed on the demand, provided such date is no later than the 40th day after payment was made.

(iii) 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*. If this contract provides for contract financing, the Government will make contract financing payments in accordance with the applicable contract financing clause.

(c) *Overpayments*. If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the Contractor shall-

(1) Remit the overpayment amount to the payment office cited in the contract along with a description of the overpayment including the-

(i) Circumstances of the overpayment (*e.g.*, duplicate payment, erroneous payment, liquidation errors, date(s) of overpayment);

(ii) Affected contract number and delivery order number if applicable;

(iii) Affected line item or subline item, if applicable; and

(iv) Contractor point of contact.

(2) Provide a copy of the remittance and supporting documentation to the Contracting Officer.

(End of clause)

52.232-27 Prompt Payment for Construction Contracts.

As prescribed in 32.908(b), insert the following clause:

PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (JAN 2017)

Notwithstanding any other payment terms in this contract, the Government will make invoice payments under the terms and conditions specified in this clause. The Government considers payment 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 sections 2.101, 32.001, and 32.902 of the Federal Acquisition Regulation. All days referred to in this clause are calendar days, unless otherwise specified. (However, see paragraph (a)(3) concerning payments due on Saturdays, Sundays, and legal holidays.)

(a) Invoice payments- (1) *Types of invoice payments*. For purposes of this clause, there are several types of invoice payments that may occur under this contract, as follows:

(i) Progress payments, if provided for elsewhere in this contract, based on Contracting Officer approval of the estimated amount and value of work or services performed, including payments for reaching milestones in any project.

(A) The due date for making such payments is 14 days after the designated billing office receives a proper payment request. If the designated billing office fails to annotate the payment request with the actual date of receipt at the time of receipt, the payment due date is the 14th day after the date of the Contractor's payment request, provided the designated billing office receives a proper payment request and there is no disagreement over quantity, quality, or Contractor compliance with contract requirements.

(B) The due date for payment of any amounts retained by the Contracting Officer in accordance with the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts, is as specified in the contract or, if not specified, 30 days after approval by the Contracting Officer for release to the Contractor.

(ii) Final payments based on completion and acceptance of all work and presentation of release of all claims against the Government arising by virtue of the contract, and payments for partial deliveries that have been accepted by the Government (*e.g.,* each separate building, public work, or other division of the contract for which the price is stated separately in the contract).

(A) The due date for making such payments is the later of the following two events:

(1) The 30th day after the designated billing office receives a proper invoice from the Contractor.

(2) The 30th day after Government acceptance of the work or services completed by the Contractor. For a final invoice when the payment amount is subject to contract settlement actions (*e.g.,* release of claims), acceptance is deemed to occur on the effective date of the contract settlement.

(B) If the designated billing office fails to annotate the invoice with the date of actual receipt at the time of receipt, the invoice payment due date is the 30th day after the date of the Contractor's invoice, provided the designated billing office receives a proper invoice and there is no disagreement over quantity, quality, or Contractor compliance with contract requirements.

(2) *Contractor's invoice*. The Contractor shall prepare and submit invoices to the designated billing office specified in the contract. A proper invoice must include the items listed in paragraphs (a)(2)(i) through (a)(2)(xi) of this clause. If the invoice does not comply with these requirements, the designated billing office must return it within 7 days after receipt, with the reasons why it is not a proper invoice. When computing any interest penalty owed the Contractor, the Government will take into account if the Government notifies the Contractor of an improper invoice in an untimely manner.

(i) Name and address of the Contractor.

(ii) Invoice date and invoice number. (The Contractor should date invoices as close as possible to the date of mailing or transmission.)

(iii) Contract number or other authorization for work or services performed (including order number and line item number).

(iv) Description of work or services performed.

(v) Delivery and payment terms (*e.g.,* discount for prompt payment terms).

(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 notify in the event of a defective invoice.

(viii) For payments described in paragraph (a)(1)(i) of this clause, substantiation of the amounts requested and certification in accordance with the requirements of the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts.

(ix) Taxpayer Identification Number (TIN). The Contractor shall include its TIN on the invoice only if required elsewhere in this contract.

(x) Electronic funds transfer (EFT) banking information.

(A) The Contractor shall include EFT banking information on the invoice only if required elsewhere in this contract.

(B) If EFT banking information is not required to be on the invoice, in order for the invoice to be a proper invoice, the Contractor shall have submitted correct EFT banking information in accordance with the applicable solicitation provision (*e.g.,* 52.232-38, Submission of Electronic Funds Transfer Information with Offer), contract clause (*e.g.,* 52.232-33, Payment by Electronic Funds Transfer-System for Award Management, or 52.232-34, Payment by Electronic Funds Transfer-Other Than System for Award Management), or applicable agency procedures.

(C) EFT banking information is not required if the Government waived the requirement to pay by EFT.

(xi) Any other information or documentation required by the contract.

(3) *Interest penalty*. The designated payment office will pay an interest penalty automatically, without request from the Contractor, if payment is not made by the due date and the conditions listed in paragraphs (a)(3)(i) through (a)(3)(iii) of this clause are met, if applicable. However, when the due date falls on a Saturday, Sunday, or legal holiday, the designated payment office may make payment on the following working day without incurring a late payment interest penalty.

(i) The designated billing office received a proper invoice.

(ii) The Government processed a receiving report or other Government documentation authorizing payment and there was no disagreement over quantity, quality, Contractor compliance with any contract term or condition, or requested progress payment amount.

(iii) In the case of a final invoice for any balance of funds due the Contractor for work or services performed, the amount was not subject to further contract settlement actions between the Government and the Contractor.

(4) *Computing penalty amount*. The Government will compute the interest penalty in accordance with the Office of Management and Budget prompt payment regulations at 5 CFR part 1315.

(i) For the sole purpose of computing an interest penalty that might be due the Contractor for payments described in paragraph (a)(1)(ii) of this clause, Government acceptance or approval is deemed to occur constructively on the 7th day after the Contractor has completed the work or services in accordance with the terms and conditions of the contract. If actual acceptance or approval occurs within the constructive acceptance or approval period, the Government will base the determination of an interest penalty on the actual date of acceptance or approval. Constructive acceptance or constructive approval requirements do not apply if there is a disagreement over quantity, quality, or Contractor compliance with a contract provision. These requirements also do not compel Government officials to accept work or services, approve Contractor estimates, perform contract administration functions, or make payment prior to fulfilling their responsibilities.

(ii) The prompt payment regulations at 5 CFR1315.10(c) do not require the Government to pay interest penalties if payment delays are 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. The Government and the Contractor shall resolve claims involving disputes, and any interest that may be payable in accordance with the clause at FAR 52.233-1, Disputes.

(5) *Discounts for prompt payment*. The designated payment office will pay an interest penalty automatically, without request from the Contractor, if the Government takes a discount for prompt payment improperly. The Government will calculate the interest penalty in accordance with the prompt payment regulations at 5 CFR part 1315.

(6) Additional interest penalty. (i) The designated payment office will pay a penalty amount, calculated in accordance with the prompt payment regulations at 5 CFR part 1315 in addition to the interest penalty amount only if-

(A) The Government owes an interest penalty of $1 or more;

(B) The designated payment office does not pay the interest penalty within 10 days after the date the invoice amount is paid; and

(C) The Contractor makes a written demand to the designated payment office for additional penalty payment, in accordance with paragraph (a)(6)(ii) of this clause, postmarked not later than 40 days after the date the invoice amount is paid.

(ii) (A) The Contractor shall support written demands for additional penalty payments with the following data. The Government will not request any additional data. The Contractor 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) If there is no postmark or the postmark is illegible-

(1) The designated payment office that receives the demand will annotate it with the date of receipt provided the demand is received on or before the 40th day after payment was made; or

(2) If the designated payment office fails to make the required annotation, the Government will determine the demand's validity based on the date the Contractor has placed on the demand, provided such date is no later than the 40th day after payment was made.

(b) *Contract financing payments*. If this contract provides for contract financing, the Government will make contract financing payments in accordance with the applicable contract financing clause.

(c) *Subcontract clause requirements*. The Contractor shall include in each subcontract for property or services (including a material supplier) for the purpose of performing this contract the following:

(1) *Prompt payment for subcontractors*. A payment clause that obligates the Contractor to pay the subcontractor for satisfactory performance under its subcontract not later than 7 days from receipt of payment out of such amounts as are paid to the Contractor under this contract.

(2) *Interest for subcontractors*. An interest penalty clause that obligates the Contractor to pay to the subcontractor an interest penalty for each payment not made in accordance with the payment clause-

(i) For the period beginning on the day after the required payment date and ending on the date on which payment of the amount due is made; and

(ii) Computed at the rate of interest established by the Secretary of the Treasury, and published in the *Federal Register*, for interest payments under 41 U.S.C. 7109 in effect at the time the Contractor accrues the obligation to pay an interest penalty.

(3) *Subcontractor clause flowdown*. A clause requiring each subcontractor to-

(i) Include a payment clause and an interest penalty clause conforming to the standards set forth in paragraphs (c)(1) and (c)(2) of this clause in each of its subcontracts; and

(ii) Require each of its subcontractors to include such clauses in their subcontracts with each lower-tier subcontractor or supplier.

(d) *Subcontract clause interpretation*. The clauses required by paragraph (c) of this clause shall not be construed to impair the right of the Contractor or a subcontractor at any tier to negotiate, and to include in their subcontract, provisions that-

(1) *Retainage permitted*. Permit the Contractor or a subcontractor to retain (without cause) a specified percentage of each progress payment otherwise due to a subcontractor for satisfactory performance under the subcontract without incurring any obligation to pay a late payment interest penalty, in accordance with terms and conditions agreed to by the parties to the subcontract, giving such recognition as the parties deem appropriate to the ability of a subcontractor to furnish a performance bond and a payment bond;

(2) *Withholding permitted*. Permit the Contractor or subcontractor to make a determination that part or all of the subcontractor's request for payment may be withheld in accordance with the subcontract agreement; and

(3) *Withholding requirements*. Permit such withholding without incurring any obligation to pay a late payment penalty if-

(i) A notice conforming to the standards of paragraph (g) of this clause previously has been furnished to the subcontractor; and

(ii) The Contractor furnishes to the Contracting Officer a copy of any notice issued by a Contractor pursuant to paragraph (d)(3)(i) of this clause.

(e) *Subcontractor withholding procedures*. If a Contractor, after making a request for payment to the Government but before making a payment to a subcontractor for the subcontractor's performance covered by the payment request, discovers that all or a portion of the payment otherwise due such subcontractor is subject to withholding from the subcontractor in accordance with the subcontract agreement, then the Contractor shall-

(1) *Subcontractor notice*. Furnish to the subcontractor a notice conforming to the standards of paragraph (g) of this clause as soon as practicable upon ascertaining the cause giving rise to a withholding, but prior to the due date for subcontractor payment;

(2) *Contracting Officer notice*. Furnish to the Contracting Officer, as soon as practicable, a copy of the notice furnished to the subcontractor pursuant to paragraph (e)(1) of this clause;

(3) *Subcontractor progress payment reduction*. Reduce the subcontractor's progress payment by an amount not to exceed the amount specified in the notice of withholding furnished under paragraph (e)(1) of this clause;

(4) *Subsequent subcontractor payment*. Pay the subcontractor as soon as practicable after the correction of the identified subcontract performance deficiency, and-

(i) Make such payment within-

(A) Seven days after correction of the identified subcontract performance deficiency (unless the funds therefor must be recovered from the Government because of a reduction under paragraph (e)(5)(i)) of this clause; or

(B) Seven days after the Contractor recovers such funds from the Government; or

(ii) Incur an obligation to pay a late payment interest penalty computed at the rate of interest established by the Secretary of the Treasury, and published in the *Federal Register*, for interest payments under 41 U.S.C. 7109 in effect at the time the Contractor accrues the obligation to pay an interest penalty;

(5) *Notice to Contracting Officer*. Notify the Contracting Officer upon-

(i) Reduction of the amount of any subsequent certified application for payment; or

(ii) Payment to the subcontractor of any withheld amounts of a progress payment, specifying-

(A) The amounts withheld under paragraph (e)(1) of this clause; and

(B) The dates that such withholding began and ended; and

(6) *Interest to Government*. Be obligated to pay to the Government an amount equal to interest on the withheld payments (computed in the manner provided in 31 U.S.C. 3903(c)(1)), from the 8th day after receipt of the withheld amounts from the Government until-

(i) The day the identified subcontractor performance deficiency is corrected; or

(ii) The date that any subsequent payment is reduced under paragraph (e)(5)(i) of this clause.

(f) Third-party deficiency reports- (1) *Withholding from subcontractor*. If a Contractor, after making payment to a first-tier subcontractor, receives from a supplier or subcontractor of the first-tier subcontractor (hereafter referred to as a "second-tier subcontractor") a written notice in accordance with 40 U.S.C. 3133, asserting a deficiency in such first-tier subcontractor's performance under the contract for which the Contractor may be ultimately liable, and the Contractor determines that all or a portion of future payments otherwise due such first-tier subcontractor is subject to withholding in accordance with the subcontract agreement, the Contractor may, without incurring an obligation to pay an interest penalty under paragraph (e)(6) of this clause-

(i) Furnish to the first-tier subcontractor a notice conforming to the standards of paragraph (g) of this clause as soon as practicable upon making such determination; and

(ii) Withhold from the first-tier subcontractor's next available progress payment or payments an amount not to exceed the amount specified in the notice of withholding furnished under paragraph (f)(1)(i) of this clause.

(2) *Subsequent payment or interest charge*. As soon as practicable, but not later than 7 days after receipt of satisfactory written notification that the identified subcontract performance deficiency has been corrected, the Contractor shall-

(i) Pay the amount withheld under paragraph (f)(1)(ii) of this clause to such first-tier subcontractor; or

(ii) Incur an obligation to pay a late payment interest penalty to such first-tier subcontractor computed at the rate of interest established by the Secretary of the Treasury, and published in the *Federal Register*, for interest payments under 41 U.S.C. 7109 in effect at the time the Contractor accrues the obligation to pay an interest penalty.

(g) *Written notice of subcontractor withholding*. The Contractor shall issue a written notice of any withholding to a subcontractor (with a copy furnished to the Contracting Officer), specifying-

(1) The amount to be withheld;

(2) The specific causes for the withholding under the terms of the subcontract; and

(3) The remedial actions to be taken by the subcontractor in order to receive payment of the amounts withheld.

(h) *Subcontractor payment entitlement*. The Contractor may not request payment from the Government of any amount withheld or retained in accordance with paragraph (d) of this clause until such time as the Contractor has determined and certified to the Contracting Officer that the subcontractor is entitled to the payment of such amount.

(i) *Prime-subcontractor disputes*. A dispute between the Contractor and subcontractor relating to the amount or entitlement of a subcontractor to a payment or a late payment interest penalty under a clause included in the subcontract

pursuant to paragraph (c) of this clause does not constitute a dispute to which the Government is a party. The Government may not be interpleaded in any judicial or administrative proceeding involving such a dispute.

(j) *Preservation of prime-subcontractor rights*. Except as provided in paragraph (i) of this clause, this clause shall not limit or impair any contractual, administrative, or judicial remedies otherwise available to the Contractor or a subcontractor in the event of a dispute involving late payment or nonpayment by the Contractor or deficient subcontract performance or nonperformance by a subcontractor.

(k) *Non-recourse for prime contractor interest penalty*. The Contractor's obligation to pay an interest penalty to a subcontractor pursuant to the clauses included in a subcontract under paragraph (c) of this clause shall not be construed to be an obligation of the Government for such interest penalty. A cost-reimbursement claim may not include any amount for reimbursement of such interest penalty.

(l) *Overpayments*. If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the Contractor shall-

(1) Remit the overpayment amount to the payment office cited in the contract along with a description of the overpayment including the-

(i) Circumstances of the overpayment (*e.g.*, duplicate payment, erroneous payment, liquidation errors, date(s) of overpayment);

(ii) Affected contract number and delivery order number if applicable;

(iii) Affected line item or subline item, if applicable; and

(iv) Contractor point of contact.

(2) Provide a copy of the remittance and supporting documentation to the Contracting Officer.

(End of clause)

52.232-28 Invitation to Propose Performance-Based Payments.

As prescribed in 32.1005(b)(1), insert the following provision:

INVITATION TO PROPOSE PERFORMANCE-BASED PAYMENTS (MAR 2000)

(a) The Government invites the offeror to propose terms under which the Government will make performance-based contract financing payments during contract performance. The Government will consider performance-based payment financing terms proposed by the offeror in the evaluation of the offeror's proposal. The Contracting Officer will incorporate the financing terms of the successful offeror and the FAR clause, Performance-Based Payments, at FAR 52.232-32, in any resulting contract.

(b) In the event of any conflict between the terms proposed by the offeror and the terms in the clause at FAR 52.232-32, Performance-Based Payments, the terms of the clause at FAR 52.232-32 shall govern.

(c) The Contracting Officer will not accept the offeror's proposed performance-based payment financing if the financing does not conform to the following limitations:

(1) The Government will make delivery payments only for supplies delivered and accepted, or services rendered and accepted in accordance with the payment terms of this contract.

(2) The terms and conditions of the performance-based payments must-

(i) Comply with FAR 32.1004;

(ii) Be reasonable and consistent with all other technical and cost information included in the offeror's proposal; and

(iii) Their total shall not exceed 90 percent of the contract price if on a whole contract basis, or 90 percent of the delivery item price if on a delivery item basis.

(3) The terms and conditions of the performance-based financing must be in the best interests of the Government.

(d) The offeror's proposal of performance-based payment financing shall include the following:

(1) The proposed contractual language describing the performance-based payments (see FAR 32.1004 for appropriate criteria for establishing performance bases and performance-based finance payment amounts).

(2) A listing of-

(i) The projected performance-based payment dates and the projected payment amounts; and

(ii) The projected delivery date and the projected payment amount.

(3) Information addressing the Contractor's investment in the contract.

(e) Evaluation of the offeror's proposed prices and financing terms will include whether the offeror's proposed performance-based payment events and payment amounts are reasonable and consistent with all other terms and conditions of the offeror's proposal.

(End of provision)

Alternate I (MAR 2000). As prescribed in FAR 32.1005 (b)(2), add the following paragraph (f) to the basic provision:

(f) The Government will adjust each proposed price to reflect the cost of providing the proposed performance-based payments to determine the total cost to the Government of that particular combination of price and performance-based financing. The Government will make the adjustment using the procedure described in FAR 32.205(c).

52.232-29 Terms for Financing of Purchases of Commercial Products and Commercial Services.

As prescribed in 32.206(b)(2), insert the following clause:

TERMS FOR FINANCING OF PURCHASES OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES (NOV 2021)

(a) *Contractor entitlement to financing payments*. The Contractor may request, and the Government shall pay, a contract financing payment as specified elsewhere in this contract when: the payment requested is properly due in accordance with this contract; the supplies deliverable or services due under the contract will be delivered or performed in accordance with the contract; and there has been no impairment or diminution of the Government's security under this contract.

(b) *Special terms regarding termination for cause*. If this contract is terminated for cause, the Contractor shall, on demand, repay to the Government the amount of unliquidated contract financing payments. The Government shall be liable for no payment except as provided by the Termination for Cause paragraph of the clause at Federal Acquisition Regulation (FAR) 52.212-4, Contract Terms and Conditions—Commercial Products and Commercial Services.

(c) *Security for Government financing*. In the event the Contractor fails to provide adequate security, as required in this contract, no financing payment shall be made under this contract. Upon receipt of adequate security, financing payments shall be made, including all previous payments to which the Contractor is entitled, in accordance with the terms of the provisions for contract financing. If at any time the Contracting Officer determines that the security provided by the Contractor is insufficient, the Contractor shall promptly provide such additional security as the Contracting Officer determines necessary. In the event the Contractor fails to provide such additional security, the Contracting Officer may collect or liquidate such security that has been provided and suspend further payments to the Contractor; and the Contractor shall repay to the Government the amount of unliquidated financing payments as the Contracting Officer at his sole discretion deems repayable.

(d) Reservation of rights. (1) No payment or other action by the Government under this clause shall-

(i) Excuse the Contractor from performance of obligations under this contract; or

(ii) Constitute a waiver of any of the rights or remedies of the parties under the contract.

(2) The Government's rights and remedies under this clause-

(i) Shall not be exclusive, but rather shall be in addition to any other rights and remedies provided by law or this contract; and

(ii) Shall not be affected by delayed, partial, or omitted exercise of any right, remedy, power, or privilege, nor shall such exercise or any single exercise preclude or impair any further exercise under this clause or the exercise of any other right, power, or privilege of the Government.

(e) *Content of Contractor's request for financing payment*. The Contractor's request for financing payment shall contain the following:

(1) The name and address of the Contractor;

(2) The date of the request for financing payment;

(3) The contract number and/or other identifier of the contract or order under which the request is made; and

(4) An appropriately itemized and totaled statement of the financing payments requested and such other information as is necessary for computation of the payment, prepared in accordance with the direction of the Contracting Officer.

(f) *Limitation on frequency of financing payments*. Contractor financing payments shall be provided no more frequently than monthly.

(g) *Dates for payment*. A payment under this clause is a contract financing payment and not subject to the interest penalty provisions of the Prompt Payment Act. The designated payment office will pay approved payment requests within 30 days of submittal of a proper request for payment.

(h) *Conflict between terms of offeror and clause*. In the event of any conflict between the terms proposed by the offeror in response to an invitation to propose financing terms (FAR 52.232-31) and the terms in this clause, the terms of this clause shall govern.

(End of clause)

52.232-30 Installment Payments for Commercial Products and Commercial Services.

As prescribed in 32.206(g), insert the following clause:

INSTALLMENT PAYMENTS FOR COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES (NOV 2021)

(a) *Contractor entitlement to financing payments*. The Contractor may request, and the Government shall pay, a contract financing installment payment as specified in this contract when: the payment requested is properly due in accordance with this contract; the supplies deliverable or services due under the contract will be delivered or performed in accordance with the contract; and there has been no impairment or diminution of the Government's security under this contract.

(b) *Computation of amounts*. Installment payment financing shall be paid to the Contractor when requested for each separately priced unit of supply (but not for services) of each line item in amounts approved by the Contracting Officer pursuant to this clause.

(1) *Number of installment payments for each line item*. Each separately priced unit of each line item is authorized a fixed number of monthly installment payments. The number of installment payments authorized for each unit of a line item is equal to the number of months from the date of contract award to the date one month before the first delivery of the first separately priced unit of the line item. For example, if the first scheduled delivery of any separately priced unit of a line item is 9 months after award of the contract, all separately priced units of that line item are authorized 8 installment payments.

(2) *Amount of each installment payment*. The amount of each installment payment for each separately priced unit of each line item is equal to 70 percent of the unit price divided by the number of installment payments authorized for that unit.

(3) *Date of each installment payment.* Installment payments for any particular separately priced unit of a line item begin the number of months prior to the delivery of that unit that are equal to the number of installment payments authorized for that unit. For example, if 8 installment payments are authorized for each separately priced unit of a line item, the first installment payment for any particular unit of that line item would be 8 months before the scheduled delivery date for that unit. The last installment payment would be 1 month before scheduled delivery of a unit.

(4) *Limitation on payment*. Prior to the delivery payment for a separately priced unit of a line item, the sum of all installment payments for that unit shall not exceed 70 percent of the price of that unit.

(c) *Contractor request for installment payment*. The Contractor may submit requests for payment of installment payments not more frequently than monthly, in a form and manner acceptable to the Contracting Officer. Unless otherwise authorized by the Contracting Officer, all installment payments in any month for which payment is being requested shall be included in a single request, appropriately itemized and totaled.

(d) *Dates for payment*. An installment payment under this clause is a contract financing payment under the Prompt Payment clause of this contract, and except as provided in paragraph (e) of this clause, approved requests shall be paid within 30 days of submittal of a proper request for payment.

(e) *Liquidation of installment payments*. Installment payments shall be liquidated by deducting from the delivery payment of each item the total unliquidated amount of installment payments made for that separately priced unit of that line item. The liquidation amounts for each unit of each line item shall be clearly delineated in each request for delivery payment submitted by the Contractor.

(f) *Security for installment payment financing*. In the event the Contractor fails to provide adequate security as required in this contract, no financing payment shall be made under this contract. Upon receipt of adequate security, financing payments shall be made, including all previous payments to which the Contractor is entitled, in accordance with the terms of the contract. If at any time the Contracting Officer determines that the security provided by the Contractor is insufficient, the Contractor shall promptly provide such additional security as the Contracting Officer determines necessary. In the event the Contractor fails to provide such additional security, the Contracting Officer may collect or liquidate such security that has been provided, and suspend further payments to the Contractor; the Contractor shall repay to the Government the amount of unliquidated financing payments as the Contracting Officer at his sole discretion deems repayable.

(g) *Special terms regarding termination for cause*. If this contract is terminated for cause, the Contractor shall, on demand, repay to the Government the amount of unliquidated installment payments. The Government shall be liable for no payment

except as provided by the Termination for Cause paragraph of the clause at Federal Acquisition Regulation 52.212-4, Contract Terms and Conditions—Commercial Products and Commercial Services.

(h) Reservation of rights. (1) No payment, vesting of title under this clause, or other action taken by the Government under this clause shall-

(i) Excuse the Contractor from performance of obligations under this contract; or

(ii) Constitute a waiver of any of the rights or remedies of the parties under the contract.

(2) The Government's rights and remedies under this clause-

(i) Shall not be exclusive, but rather shall be in addition to any other rights and remedies provided by law or this contract; and

(ii) Shall not be affected by delayed, partial, or omitted exercise of any right, remedy, power, or privilege, nor shall such exercise or any single exercise preclude or impair any further exercise under this clause or the exercise of any other right, power, or privilege of the Government.

(i) *Content of Contractor's request for installment payment*. The Contractor's request for installment payment shall contain the following:

(1) The name and address of the Contractor;

(2) The date of the request for installment payment;

(3) The contract number and/or other identifier of the contract or order under which the request is made; and

(4) An itemized and totaled statement of the items, installment payment amount, and month for which payment is being requested, for each separately priced unit of each line item.

(End of clause)

52.232-31 Invitation to Propose Financing Terms.

As prescribed in 32.205 (b) and 32.206 , insert the following provision:

INVITATION TO PROPOSE FINANCING TERMS (DEC 2022)

(a) The offeror is invited to propose terms under which the Government shall make contract financing payments during contract performance. The financing terms proposed by the offeror shall be a factor in the evaluation of the offeror's proposal. The financing terms of the successful offeror and the clause, Terms for Financing of Purchases of Commercial Products and Commercial Services, at Federal Acquisition Regulation (FAR) 52.232-29, shall be incorporated in any resulting contract.

(b) The offeror agrees that in the event of any conflict between the terms proposed by the offeror and the terms in the clause at FAR 52.232-29, Terms for Financing of Purchases of Commercial Products and Commercial Services, the terms of the clause at FAR 52.232-29 shall govern.

(c) Because of statutory limitations (10 U.S.C. 3805 and 41 U.S.C. 4505), the offeror's proposed financing shall not be acceptable if it does not conform to the following limitations:

(1) Delivery payments shall be made only for supplies delivered and accepted, or services rendered and accepted in accordance with the payment terms of this contract;

(2) Contract financing payments shall not exceed 15 percent of the contract price in advance of any performance of work under the contract;

(3) The terms and conditions of the contract financing must be appropriate or customary in the commercial marketplace; and

(4) The terms and conditions of the contract financing must be in the best interests of the United States.

(d) The offeror's proposal of financing terms shall include the following:

(1) The proposed contractual language describing the contract financing (see FAR 32.202-2 for appropriate definitions of types of payments); and

(2) A listing of the earliest date and greatest amount at which each contract financing payment may be payable and the amount of each delivery payment. Any resulting contract shall provide that no contract financing payment shall be made at any earlier date or in a greater amount than shown in the offeror's listing.

(e) The offeror's proposed prices and financing terms shall be evaluated to determine the cost to the United States of the proposal using the interest rate and delivery schedule specified elsewhere in this solicitation.

(End of provision)

52.232-32 Performance-Based Payments.

As prescribed in 32.1005 , insert the following clause:

PERFORMANCE-BASED PAYMENTS (APR 2012)

(a) *Amount of payments and limitations on payments*. Subject to such other limitations and conditions as are specified in this contract and this clause, the amount of payments and limitations on payments shall be specified in the contract's description of the basis for payment.

(b) *Contractor request for performance-based payment*. The Contractor may submit requests for payment of performance-based payments not more frequently than monthly, in a form and manner acceptable to the Contracting Officer. Unless otherwise authorized by the Contracting Officer, all performance-based payments in any period for which payment is being requested shall be included in a single request, appropriately itemized and totaled. The Contractor's request shall contain the information and certification detailed in paragraphs (l) and (m) of this clause.

(c) Approval and payment of requests. (1) The Contractor shall not be entitled to payment of a request for performance-based payment prior to successful accomplishment of the event or performance criterion for which payment is requested. The Contracting Officer shall determine whether the event or performance criterion for which payment is requested has been successfully accomplished in accordance with the terms of the contract. The Contracting Officer may, at any time, require the Contractor to substantiate the successful performance of any event or performance criterion which has been or is represented as being payable.

(2) A payment under this performance-based payment clause is a contract financing payment under the Prompt Payment clause of this contract and not subject to the interest penalty provisions of the Prompt Payment Act. The designated payment office will pay approved requests on the _____ *[Contracting Officer insert day as prescribed by agency head; if not prescribed, insert "30t"h]* day after receipt of the request for performance-based payment by the designated payment office. However, the designated payment office is not required to provide payment if the Contracting Officer requires substantiation as provided in paragraph (c)(1) of this clause, or inquires into the status of an event or performance criterion, or into any of the conditions listed in paragraph (a) of this clause, or into the Contractor certification. The payment period will not begin until the Contracting Officer approves the request.

(3) The approval by the Contracting Officer of a request for performance-based payment does not constitute an acceptance by the Government and does not excuse the Contractor from performance of obligations under this contract.

(d) Liquidation of performance-based payments. (1) Performance-based finance amounts paid prior to payment for delivery of an item shall be liquidated by deducting a percentage or a designated dollar amount from the delivery payment. If the performance-based finance payments are on a delivery item basis, the liquidation amount for each such line item shall be the percent of that delivery item price that was previously paid under performance-based finance payments or the designated dollar amount. If the performance-based finance payments are on a whole contract basis, liquidation shall be by either predesignated liquidation amounts or a liquidation percentage.

(2) If at any time the amount of payments under this contract exceeds any limitation in this contract, the Contractor shall repay to the Government the excess. Unless otherwise determined by the Contracting Officer, such excess shall be credited as a reduction in the unliquidated performance-based payment balance(s), after adjustment of invoice payments and balances for any retroactive price adjustments.

(e) *Reduction or suspension of performance-based payments*. The Contracting Officer may reduce or suspend performance-based payments, liquidate performance-based payments by deduction from any payment under the contract, or take a combination of these actions after finding upon substantial evidence any of the following conditions:

(1) The Contractor failed to comply with any material requirement of this contract (which includes paragraphs (h) and (i) of this clause).

(2) Performance of this contract is endangered by the Contractor's-

(i) Failure to make progress; or

(ii) Unsatisfactory financial condition.

(3) The Contractor is delinquent in payment of any subcontractor or supplier under this contract in the ordinary course of business.

(f) Title. (1) Title to the property described in this paragraph (f) shall vest in the Government. Vestiture shall be immediately upon the date of the first performance-based payment under this contract, for property acquired or produced before that date. Otherwise, vestiture shall occur when the property is or should have been allocable or properly chargeable to this contract.

(2) "Property," as used in this clause, includes all of the following described items acquired or produced by the Contractor that are or should be allocable or properly chargeable to this contract under sound and generally accepted accounting principles and practices:

(i) Parts, materials, inventories, and work in process;

(ii) Special tooling and special test equipment to which the Government is to acquire title;

(iii) Nondurable (*i.e.,* noncapital) tools, jigs, dies, fixtures, molds, patterns, taps, gauges, test equipment and other similar manufacturing aids, title to which would not be obtained as special tooling under paragraph (f)(2)(ii) of this clause; and

(iv) Drawings and technical data, to the extent the Contractor or subcontractors are required to deliver them to the Government by other clauses of this contract.

(3) Although title to property is in the Government under this clause, other applicable clauses of this contract (*e.g.,* the termination clauses) shall determine the handling and disposition of the property.

(4) The Contractor may sell any scrap resulting from production under this contract, without requesting the Contracting Officer's approval, provided that any significant reduction in the value of the property to which the Government has title under this clause is reported in writing to the Contracting Officer.

(5) In order to acquire for its own use or dispose of property to which title is vested in the Government under this clause, the Contractor shall obtain the Contracting Officer's advance approval of the action and the terms. If approved, the basis for payment (the events or performance criteria) to which the property is related shall be deemed to be not in compliance with the terms of the contract and not payable (if the property is part of or needed for performance), and the Contractor shall refund the related performance-based payments in accordance with paragraph (d) of this clause.

(6) When the Contractor completes all of the obligations under this contract, including liquidation of all performance-based payments, title shall vest in the Contractor for all property (or the proceeds thereof) not-

(i) Delivered to, and accepted by, the Government under this contract; or

(ii) Incorporated in supplies delivered to, and accepted by, the Government under this contract and to which title is vested in the Government under this clause.

(7) The terms of this contract concerning liability for Government-furnished property shall not apply to property to which the Government acquired title solely under this clause.

(g) *Risk of loss*. Before delivery to and acceptance by the Government, the Contractor shall bear the risk of loss for property, the title to which vests in the Government under this clause, except to the extent the Government expressly assumes the risk. If any property is lost (see 45.101), the basis of payment (the events or performance criteria) to which the property is related shall be deemed to be not in compliance with the terms of the contract and not payable (if the property is part of or needed for performance), and the Contractor shall refund the related performance-based payments in accordance with paragraph (d) of this clause.

(h) *Records and controls*. The Contractor shall maintain records and controls adequate for administration of this clause. The Contractor shall have no entitlement to performance-based payments during any time the Contractor's records or controls are determined by the Contracting Officer to be inadequate for administration of this clause.

(i) *Reports and Government access*. The Contractor shall promptly furnish reports, certificates, financial statements, and other pertinent information requested by the Contracting Officer for the administration of this clause and to determine that an event or other criterion prompting a financing payment has been successfully accomplished. The Contractor shall give the Government reasonable opportunity to examine and verify the Contractor's records and to examine and verify the Contractor's performance of this contract for administration of this clause.

(j) *Special terms regarding default*. If this contract is terminated under the Default clause, (1) the Contractor shall, on demand, repay to the Government the amount of unliquidated performance-based payments, and (2) title shall vest in the Contractor, on full liquidation of all performance-based payments, for all property for which the Government elects not to require delivery under the Default clause of this contract. The Government shall be liable for no payment except as provided by the Default clause.

(k) Reservation of rights. (1) No payment or vesting of title under this clause shall-

(i) Excuse the Contractor from performance of obligations under this contract; or

(ii) Constitute a waiver of any of the rights or remedies of the parties under the contract.

(2) The Government's rights and remedies under this clause-

(i) Shall not be exclusive, but rather shall be in addition to any other rights and remedies provided by law or this contract; and

(ii) Shall not be affected by delayed, partial, or omitted exercise of any right, remedy, power, or privilege, nor shall such exercise or any single exercise preclude or impair any further exercise under this clause or the exercise of any other right, power, or privilege of the Government.

(l) *Content of Contractor's request for performance-based payment*. The Contractor's request for performance-based payment shall contain the following:

(1) The name and address of the Contractor;

(2) The date of the request for performance-based payment;

(3) The contract number and/or other identifier of the contract or order under which the request is made;

(4) Such information and documentation as is required by the contract's description of the basis for payment; and

(5) A certification by a Contractor official authorized to bind the Contractor, as specified in paragraph (m) of this clause.

(m) *Content of Contractor's certification*. As required in paragraph (l)(5) of this clause, the Contractor shall make the following certification in each request for performance-based payment:

I certify to the best of my knowledge and belief that-

(1) This request for performance-based payment is true and correct; this request (and attachments) has been prepared from the books and records of the Contractor, in accordance with the contract and the instructions of the Contracting Officer;

(2) (Except as reported in writing on _____), all payments to subcontractors and suppliers under this contract have been paid, or will be paid, currently, when due in the ordinary course of business;

(3) There are no encumbrances (except as reported in writing on _____) against the property acquired or produced for, and allocated or properly chargeable to, the contract which would affect or impair the Government's title;

(4) There has been no materially adverse change in the financial condition of the Contractor since the submission by the Contractor to the Government of the most recent written information dated _____; and

(5) After the making of this requested performance-based payment, the amount of all payments for each deliverable item for which performance-based payments have been requested will not exceed any limitation in the contract, and the amount of all payments under the contract will not exceed any limitation in the contract.

(End of clause)

52.232-33 Payment by Electronic Funds Transfer-System for Award Management.

As prescribed in 32.1110(a)(1), insert the following clause:

PAYMENT BY ELECTRONIC FUNDS TRANSFER-SYSTEM FOR AWARD MANAGEMENT (OCT 2018)

(a) Method of payment. (1) All payments by the Government under this contract shall be made by electronic funds transfer (EFT), except as provided in paragraph (a)(2) of this clause. As used in this clause, the term "EFT" refers to the funds transfer and may also include the payment information transfer.

(2) In the event the Government is unable to release one or more payments by EFT, the Contractor agrees to either-

(i) Accept payment by check or some other mutually agreeable method of payment; or

(ii) Request the Government to extend the payment due date until such time as the Government can make payment by EFT (but see paragraph (d) of this clause).

(b) *Contractor's EFT information*. The Government shall make payment to the Contractor using the EFT information contained in the System for Award Management (SAM). In the event that the EFT information changes, the Contractor shall be responsible for providing the updated information to SAM.

(c) *Mechanisms for EFT payment*. The Government may make payment by EFT through either the Automated Clearing House (ACH) network, subject to the rules of the National Automated Clearing House Association, or the Fedwire Transfer System. The rules governing Federal payments through the ACH are contained in 31 CFR part 210.

(d) *Suspension of payment*. If the Contractor's EFT information in SAM is incorrect, then the Government need not make payment to the Contractor under this contract until correct EFT information is entered into SAM; and any invoice or contract

financing request shall be deemed not to be a proper invoice for the purpose of prompt payment under this contract. The prompt payment terms of the contract regarding notice of an improper invoice and delays in accrual of interest penalties apply.

(e) Liability for uncompleted or erroneous transfers. (1) If an uncompleted or erroneous transfer occurs because the Government used the Contractor's EFT information incorrectly, the Government remains responsible for-

(i) Making a correct payment;

(ii) Paying any prompt payment penalty due; and

(iii) Recovering any erroneously directed funds.

(2) If an uncompleted or erroneous transfer occurs because the Contractor's EFT information was incorrect, or was revised within 30 days of Government release of the EFT payment transaction instruction to the Federal Reserve System, and-

(i) If the funds are no longer under the control of the payment office, the Government is deemed to have made payment and the Contractor is responsible for recovery of any erroneously directed funds; or

(ii) If the funds remain under the control of the payment office, the Government shall not make payment, and the provisions of paragraph (d) of this clause shall apply.

(f) *EFT and prompt payment*. A payment shall be deemed to have been made in a timely manner in accordance with the prompt payment terms of this contract if, in the EFT payment transaction instruction released to the Federal Reserve System, the date specified for settlement of the payment is on or before the prompt payment due date, provided the specified payment date is a valid date under the rules of the Federal Reserve System.

(g) *EFT and assignment of claims*. If the Contractor assigns the proceeds of this contract as provided for in the assignment of claims terms of this contract, the Contractor shall require as a condition of any such assignment, that the assignee shall register separately in SAM and shall be paid by EFT in accordance with the terms of this clause. Notwithstanding any other requirement of this contract, payment to an ultimate recipient other than the Contractor, or a financial institution properly recognized under an assignment of claims pursuant to subpart 32.8, is not permitted. In all respects, the requirements of this clause shall apply to the assignee as if it were the Contractor. EFT information that shows the ultimate recipient of the transfer to be other than the Contractor, in the absence of a proper assignment of claims acceptable to the Government, is incorrect EFT information within the meaning of paragraph (d) of this clause.

(h) *Liability for change of EFT information by financial agent*. The Government is not liable for errors resulting from changes to EFT information made by the Contractor's financial agent.

(i) *Payment information*. The payment or disbursing office shall forward to the Contractor available payment information that is suitable for transmission as of the date of release of the EFT instruction to the Federal Reserve System. The Government may request the Contractor to designate a desired format and method(s) for delivery of payment information from a list of formats and methods the payment office is capable of executing. However, the Government does not guarantee that any particular format or method of delivery is available at any particular payment office and retains the latitude to use the format and delivery method most convenient to the Government. If the Government makes payment by check in accordance with paragraph (a) of this clause, the Government shall mail the payment information to the remittance address contained in SAM.

(End of clause)

52.232-34 Payment by Electronic Funds Transfer-Other than System for Award Management.

As prescribed in 32.1110(a)(2), insert the following clause:

PAYMENT BY ELECTRONIC FUNDS TRANSFER-OTHER THAN SYSTEM FOR AWARD MANAGEMENT (JUL 2013)

(a) Method of payment. (1) All payments by the Government under this contract shall be made by electronic funds transfer (EFT) except as provided in paragraph (a)(2) of this clause. As used in this clause, the term "EFT" refers to the funds transfer and may also include the payment information transfer.

(2) In the event the Government is unable to release one or more payments by EFT, the Contractor agrees to either-

(i) Accept payment by check or some other mutually agreeable method of payment; or

(ii) Request the Government to extend payment due dates until such time as the Government makes payment by EFT (but see paragraph (d) of this clause).

(b) Mandatory submission of Contractor's EFT information. (1) The Contractor is required to provide the Government with the information required to make payment by EFT (see paragraph (j) of this clause). The Contractor shall provide this information directly to the office designated in this contract to receive that information (hereafter: "designated office") by _____ *[the Contracting Officer shall insert date, days after award, days before first request, the date specified for receipt of offers if the provision at 52.232-38 is utilized, or "concurrent with first reques"t as prescribed by the head of the agency; if not prescribed, insert "no later than 15 days prior to submission of the first request for paymen"t]*. If not otherwise specified in this contract, the payment office is the designated office for receipt of the Contractor's EFT information. If more than one designated office is named for the contract, the Contractor shall provide a separate notice to each office. In the event that the EFT information changes, the Contractor shall be responsible for providing the updated information to the designated office(s).

(2) If the Contractor provides EFT information applicable to multiple contracts, the Contractor shall specifically state the applicability of this EFT information in terms acceptable to the designated office. However, EFT information supplied to a designated office shall be applicable only to contracts that identify that designated office as the office to receive EFT information for that contract.

(c) *Mechanisms for EFT payment*. The Government may make payment by EFT through either the Automated Clearing House (ACH) network, subject to the rules of the National Automated Clearing House Association, or the Fedwire Transfer System. The rules governing Federal payments through the ACH are contained in 31 CFR part 210.

(d) Suspension of payment. (1) The Government is not required to make any payment under this contract until after receipt, by the designated office, of the correct EFT payment information from the Contractor. Until receipt of the correct EFT information, any invoice or contract financing request shall be deemed not to be a proper invoice for the purpose of prompt payment under this contract. The prompt payment terms of the contract regarding notice of an improper invoice and delays in accrual of interest penalties apply.

(2) If the EFT information changes after submission of correct EFT information, the Government shall begin using the changed EFT information no later than 30 days after its receipt by the designated office to the extent payment is made by EFT. However, the Contractor may request that no further payments be made until the updated EFT information is implemented by the payment office. If such suspension would result in a late payment under the prompt payment terms of this contract, the Contractor's request for suspension shall extend the due date for payment by the number of days of the suspension.

(e) Liability for uncompleted or erroneous transfers. (1) If an uncompleted or erroneous transfer occurs because the Government used the Contractor's EFT information incorrectly, the Government remains responsible for-

(i) Making a correct payment;

(ii) Paying any prompt payment penalty due; and

(iii) Recovering any erroneously directed funds.

(2) If an uncompleted or erroneous transfer occurs because the Contractor's EFT information was incorrect, or was revised within 30 days of Government release of the EFT payment transaction instruction to the Federal Reserve System, and-

(i) If the funds are no longer under the control of the payment office, the Government is deemed to have made payment and the Contractor is responsible for recovery of any erroneously directed funds; or

(ii) If the funds remain under the control of the payment office, the Government shall not make payment and the provisions of paragraph (d) shall apply.

(f) *EFT and prompt payment*. A payment shall be deemed to have been made in a timely manner in accordance with the prompt payment terms of this contract if, in the EFT payment transaction instruction released to the Federal Reserve System, the date specified for settlement of the payment is on or before the prompt payment due date, provided the specified payment date is a valid date under the rules of the Federal Reserve System.

(g) *EFT and assignment of claims*. If the Contractor assigns the proceeds of this contract as provided for in the assignment of claims terms of this contract, the Contractor shall require as a condition of any such assignment, that the assignee shall provide the EFT information required by paragraph (j) of this clause to the designated office, and shall be paid by EFT in accordance with the terms of this clause. In all respects, the requirements of this clause shall apply to the assignee as if it were the Contractor. EFT information that shows the ultimate recipient of the transfer to be other than the Contractor, in the absence of a proper assignment of claims acceptable to the Government, is incorrect EFT information within the meaning of paragraph (d) of this clause.

(h) *Liability for change of EFT information by financial agent*. The Government is not liable for errors resulting from changes to EFT information provided by the Contractor's financial agent.

(i) *Payment information*. The payment or disbursing office shall forward to the Contractor available payment information that is suitable for transmission as of the date of release of the EFT instruction to the Federal Reserve System. The Government may request the Contractor to designate a desired format and method(s) for delivery of payment information from a list of formats and methods the payment office is capable of executing. However, the Government does not guarantee that any particular format or method of delivery is available at any particular payment office and retains the latitude to use the format and delivery method most convenient to the Government. If the Government makes payment by check in accordance with paragraph (a) of this clause, the Government shall mail the payment information to the remittance address in the contract.

(j) *EFT information*. The Contractor shall provide the following information to the designated office. The Contractor may supply this data for this or multiple contracts (see paragraph (b) of this clause). The Contractor shall designate a single financial agent per contract capable of receiving and processing the EFT information using the EFT methods described in paragraph (c) of this clause.

(1) The contract number (or other procurement identification number).

(2) The Contractor's name and remittance address, as stated in the contract(s).

(3) The signature (manual or electronic, as appropriate), title, and telephone number of the Contractor official authorized to provide this information.

(4) The name, address, and 9-digit Routing Transit Number of the Contractor's financial agent.

(5) The Contractor's account number and the type of account (checking, saving, or lockbox).

(6) If applicable, the Fedwire Transfer System telegraphic abbreviation of the Contractor's financial agent.

(7) If applicable, the Contractor shall also provide the name, address, telegraphic abbreviation, and 9-digit Routing Transit Number of the correspondent financial institution receiving the wire transfer payment if the Contractor's financial agent is not directly on-line to the Fedwire Transfer System; and, therefore, not the receiver of the wire transfer payment.

(End of clause)

52.232-35 Designation of Office for Government Receipt of Electronic Funds Transfer Information.

As prescribed in 32.1110(c), insert the following clause:

DESIGNATION OF OFFICE FOR GOVERNMENT RECEIPT OF ELECTRONIC FUNDS TRANSFER INFORMATION (JUL 2013)

(a) As provided in paragraph (b) of the clause at 52.232-34, Payment by Electronic Funds Transfer-Other than System for Award Management, the Government has designated the office cited in paragraph (c) of this clause as the office to receive the Contractor's electronic funds transfer (EFT) information, in lieu of the payment office of this contract.

(b) The Contractor shall send all EFT information, and any changes to EFT information to the office designated in paragraph (c) of this clause. The Contractor shall not send EFT information to the payment office, or any other office than that designated in paragraph (c). The Government need not use any EFT information sent to any office other than that designated in paragraph (c).

(c) Designated Office:

Name:

_____

_____

Mailing Address:

_____

_____

_____

Telephone Number:

_____

Person to Contact:

_____

Electronic Address:

_____

(End of clause)

52.232-36 Payment by Third Party.

As prescribed in 32.1110(d), insert the following clause:

PAYMENT BY THIRD PARTY (DEVIATION DATE)

(a) *General*. (1) Except as provided in paragraph (a)(2) of this clause, the Contractor agrees to accept payments due under this contract, through payment by a third party in lieu of payment directly from the Government, in accordance with the terms of this clause. The third party and, if applicable, the particular Governmentwide commercial purchase card to be used are identified elsewhere in this contract.

(2) The Governmentwide commercial purchase card is not authorized as a method of payment during any period the System for Award Management (SAM) indicates that the Contractor has delinquent debt that is subject to collection under the Treasury Offset Program (TOP). Information on TOP is available at https://www.fiscal.treasury.gov/TOP/. If the SAM subsequently indicates that the Contractor no longer has delinquent debt, the Contractor may request the Contracting Officer to authorize payment by Governmentwide commercial purchase card.

(b) *Contractor payment request*. (1) Except as provided in paragraph (b)(2) of this clause, the Contractor shall make payment requests through a charge to the Government account with the third party, at the time and for the amount due in accordance with those clauses of this contract that authorize the Contractor to submit invoices, contract financing requests, other payment requests, or as provided in other clauses providing for payment to the Contractor.

(2) When the Contracting Officer has notified the Contractor that the Governmentwide commercial purchase card is no longer an authorized method of payment, the Contractor shall make such payment requests in accordance with instructions provided by the Contracting Officer during the period when the purchase card is not authorized.

(c) *Payment*. The Contractor and the third party shall agree that payments due under this contract shall be made upon submittal of payment requests to the third party in accordance with the terms and conditions of an agreement between the Contractor, the Contractor's financial agent (if any), and the third party and its agents (if any). No payment shall be due the Contractor until such agreement is made. Payments made or due by the third party under this clause are not payments made by the Government and are not subject to the Prompt Payment Act or any implementation thereof in this contract.

(d) *Documentation*. Documentation of each charge against the Government's account shall be provided to the Contracting Officer upon request.

(e) *Assignment of claims*. Notwithstanding any other provision of this contract, if any payment is made under this clause, then no payment under this contract shall be assigned under the provisions of the assignment of claims terms of this contract or the Assignment of Claims Act of 1940, (31 U.S.C. 3727, 41 U.S.C. 6305).

(f) *Other payment terms*. The other payment terms of this contract shall govern the content and submission of payment requests. If any clause requires information or documents in or with the payment request, that is not provided in the third party agreement referenced in paragraph (c) of this clause, the Contractor shall obtain instructions from the Contracting Officer before submitting such a payment request.

(End of clause)

52.232-37 Multiple Payment Arrangements.

As prescribed in 32.1110(e), insert the following clause:

MULTIPLE PAYMENT ARRANGEMENTS (MAY 1999)

This contract or agreement provides for payments to the Contractor through several alternative methods. The applicability of specific methods of payment and the designation of the payment office(s) are either stated-

(a) Elsewhere in this contract or agreement; or
(b) In individual orders placed under this contract or agreement.

(End of clause)

52.232-38 Submission of Electronic Funds Transfer Information with Offer.
As prescribed in 32.1110(g), insert the following provision:

SUBMISSION OF ELECTRONIC FUNDS TRANSFER INFORMATION WITH OFFER (JUL 2013)

The offeror shall provide, with its offer, the following information that is required to make payment by electronic funds transfer (EFT) under any contract that results from this solicitation. This submission satisfies the requirement to provide EFT information under paragraphs (b)(1) and (j) of the clause at 52.232-34, Payment by Electronic Funds Transfer-Other than System for Award Management.

(1) The solicitation number (or other procurement identification number).
(2) The offeror's name and remittance address, as stated in the offer.
(3) The signature (manual or electronic, as appropriate), title, and telephone number of the offeror's official authorized to provide this information.
(4) The name, address, and 9-digit Routing Transit Number of the offeror's financial agent.
(5) The offeror's account number and the type of account (checking, savings, or lockbox).
(6) If applicable, the Fedwire Transfer System telegraphic abbreviation of the offeror's financial agent.
(7) If applicable, the offeror shall also provide the name, address, telegraphic abbreviation, and 9-digit Routing Transit Number of the correspondent financial institution receiving the wire transfer payment if the offeror's financial agent is not directly on-line to the Fedwire and, therefore, not the receiver of the wire transfer payment.

(End of provision)

52.232-39 Unenforceability of Unauthorized Obligations.
As prescribed in 32.706-3 , insert the following clause:

UNENFORCEABILITY OF UNAUTHORIZED OBLIGATIONS (JUN 2013)

(a) Except as stated in paragraph (b) of this clause, when any supply or service acquired under this contract is subject to any End User License Agreement (EULA), Terms of Service (TOS), or similar legal instrument or agreement, that includes any clause requiring the Government to indemnify the Contractor or any person or entity for damages, costs, fees, or any other loss or liability that would create an Anti-Deficiency Act violation (31 U.S.C. 1341), the following shall govern:

(1) Any such clause is unenforceable against the Government.
(2) Neither the Government nor any Government authorized end user shall be deemed to have agreed to such clause by virtue of it appearing in the EULA, TOS, or similar legal instrument or agreement. If the EULA, TOS, or similar legal instrument or agreement is invoked through an "I agree" click box or other comparable mechanism (e.g., "click-wrap" or "browse-wrap" agreements), execution does not bind the Government or any Government authorized end user to such clause.
(3) Any such clause is deemed to be stricken from the EULA, TOS, or similar legal instrument or agreement.

(b) Paragraph (a) of this clause does not apply to indemnification by the Government that is expressly authorized by statute and specifically authorized under applicable agency regulations and procedures.

(End of clause)

52.232-40 Providing Accelerated Payments to Small Business Subcontractors.
As prescribed in 32.009-2 , insert the following clause:

PROVIDING ACCELERATED PAYMENTS TO SMALL BUSINESS SUBCONTRACTORS (MAR 2023)

(a) (1) In accordance with 31 U.S.C. 3903 and 10 U.S.C. 3801, within 15 days after receipt of accelerated payments from the Government, the Contractor shall make accelerated payments to its small business subcontractors under this contract, to the maximum extent practicable and prior to when such payment is otherwise required under the applicable contract or subcontract, after receipt of a proper invoice and all other required documentation from the small business subcontractor.

(2) The Contractor agrees to make such payments to its small business subcontractors without any further consideration from or fees charged to the subcontractor.

(b) The acceleration of payments under this clause does not provide any new rights under the Prompt Payment Act.

(c) Include the substance of this clause, including this paragraph (c), in all subcontracts with small business concerns, including subcontracts with small business concerns for the acquisition of commercial products or commercial services.

(End of clause)

52.232-90 Fast Payment Procedure.

As prescribed in 32.1204, insert the following clause:

FAST PAYMENT PROCEDURE (DEVIATION DATE)

(a) General. The Government will pay invoices based on the Contractor's delivery to a post office or common carrier (or, if shipped by other means, to the point of first receipt by the Government).

(b) *Responsibility for supplies*.

(1) Title to the supplies passes to the Government upon delivery to—

(i) A post office or common carrier for shipment to the specific destination; or

(ii) The point of first receipt by the Government, if shipment is by means other than Postal Service or common carrier.

(2) Notwithstanding any other provision of the contract, order, or blanket purchase agreement, the Contractor shall—

(i) Assume all responsibility and risk of loss for supplies not received at destination, damaged in transit, or not conforming to purchase requirements; and

(ii) Replace, repair, or correct those supplies promptly at the Contractor's expense, if instructed to do so by the Contracting Officer within 180 days from the date title to the supplies vests in the Government.

(c) *Preparation of invoice*.

(1) Upon delivery to a post office or common carrier (or, if shipped by other means, the point of first receipt by the Government), the Contractor shall—

(i) Prepare an invoice as provided in this contract, order, or blanket purchase agreement; and

(ii) Display prominently on the invoice "FAST PAY." Invoices not prominently marked "FAST PAY" via manual or electronic means may be accepted by the payment office for fast payment. If the payment office declines to make fast payment, the Contractor shall be paid in accordance with procedures applicable to invoices to which the Fast Payment clause does not apply.

(2) If the purchase price excludes the cost of transportation, the Contractor shall enter the prepaid shipping cost on the invoice as a separate item. The Contractor shall not include the cost of parcel post insurance. If transportation charges are stated separately on the invoice, the Contractor shall retain related paid freight bills or other transportation billings paid separately for a period of three years and shall furnish the bills to the Government upon request.

(3) If this contract, order, or blanket purchase agreement requires the preparation of a receiving report, the Contractor shall either—

(i) Submit the receiving report on the prescribed form with the invoice; or

(ii) Include the following information on the invoice:

(A) Shipment number.

(B) Mode of shipment.

(C) At line item level—

(1) National stock number and/or manufacturer's part number;

(2) Unit of measure;

(3) Ship-To Point;

(4) Mark-For Point, if in the contract; and

(5) FEDSTRIP/MILSTRIP document number, if in the contract.

(4) If this contract, order, or blanket purchase agreement does not require preparation of a receiving report on a prescribed form, the Contractor shall include on the invoice the following information at the line item level, in addition to that required in paragraph (c)(1) of this clause:

(i) Ship-To Point.

(ii) Mark-For Point.

(iii) FEDSTRIP/MILSTRIP document number, if in the contract.

(5) Where a receiving report is not required, the Contractor shall include a copy of the invoice in each shipment.

(d) *Certification of invoice*. The Contractor certifies by submitting an invoice to the Government that the supplies being billed to the Government have been shipped or delivered in accordance with shipping instructions issued by the ordering officer, in the quantities shown on the invoice, and that the supplies are in the quantity and of the quality designated by the contract, order, or blanket purchase agreement.

(e) *FAST PAY container identification*. The Contractor shall mark all outer shipping containers "FAST PAY." When outer shipping containers are not marked "FAST PAY," the payment office may make fast payment. If the payment office declines to make fast payment, the Contractor shall be paid in accordance with procedures applicable to invoices to which the Fast Payment clause does not apply.

(End of clause)

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52.233 [Reserved]

52.233-1 Disputes.

As prescribed in 33.205-9(a) , insert the following clause:

DISPUTES (DEVIATION DATE)

(a) Definitions. As used in this clause-

Claim means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding $100,000 is not a claim under 41 U.S.C. chapter 71 until certified. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under 41 U.S.C. chapter 71. The submission may be converted to a claim under 41 U.S.C. chapter 71, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

Defective certification means a certification that alters or otherwise deviates from the language in paragraph (d)(2)(iii) of this clause or which is not executed by a person authorized to bind the contractor with respect to the claim. Failure to certify must not be deemed to be a defective certification.

(b) This contract is subject to 41 U.S.C. chapter 71, Contract Disputes.

(c) Except as provided in 41 U.S.C. chapter 71, all disputes arising under or relating to this contract must be resolved under this clause.

(d) (1) A claim by the Contractor must be made in writing and, unless otherwise stated in this contract, submitted within 6 years after accrual of the claim to the Contracting Officer for a written decision. A claim by the Government against the Contractor must be subject to a written decision by the Contracting Officer.

(2) (i) The Contractor must provide the certification specified in paragraph (d)(2)(iii) of this clause when submitting any claim exceeding $100,000.

(ii) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.

(iii) The certification must state as follows: “I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am authorized to certify the claim on behalf of the Contractor.”

(3) The certification may be executed by any person authorized to bind the Contractor with respect to the claim.

(e) For Contractor claims of $100,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over $100,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.

(f) The Contracting Officer's decision must be final unless the Contractor appeals or files a suit as provided in 41 U.S.C. chapter 71.

(g) If the claim by the Contractor is submitted to the Contracting Officer or a claim by the Government is presented to the Contractor, the parties, by mutual consent, may agree to use alternative dispute resolution (ADR). If the Contractor refuses an offer for ADR, the Contractor must inform the Contracting Officer, in writing, of the Contractor's specific reasons for rejecting the offer.

(h) (1) The Government must pay interest on the amount found due and unpaid from the date that-

(i) The Contracting Officer receives the claim (certified, if required); or

(ii) Payment otherwise would be due, if that date is later, until the date of payment.

(2) For claims having defective certifications, interest must be paid from the date that the Contracting Officer initially receives the claim. Simple interest on claims must be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which applies to the period during which the Contracting Officer receives the claim and then at the rate that applies for each 6-month period as fixed by the Treasury Secretary while the claim is pending.

(i) The Contractor must proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract. The Contractor must comply with any decision of the Contracting Officer.

(End of clause)

Alternate I (DEVIATION DATE). As prescribed in 33.205-9(a), substitute the following paragraph (i) for paragraph (i) of the basic clause:

(i) The Contractor must proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under or relating to the contract, and comply with any decision of the Contracting Officer.

52.233-2 Service of Protest.

As prescribed in 33.107(a), insert the following provision:

SERVICE OF PROTEST (DEVIATION DATE)

(a) Protests, (as defined in FAR 33.102), that are filed directly with an agency, and copies of any protests that are filed with the Government Accountability Office (GAO), must be served on the Contracting Officer identified in the solicitation by obtaining written and dated acknowledgment of receipt from them.

(b) The copy of any protest must be received in the office designated above within one day of filing a protest with the GAO.

(End of provision)

52.233-3 Protest after Award.

As prescribed in 33.107(b), insert the following clause:

PROTEST AFTER AWARD (DEVIATION DATE)

(a) Upon receipt of a stop-work order, the Contractor must immediately comply with its terms and take all reasonable steps to minimize incurring costs allocable to the work covered by the order during the period of work stoppage. After receiving the final decision in the protest, the Contracting Officer must either—

(1) Cancel the stop-work order; or

(2) Terminate the work covered by the order as provided in the Default, or the Termination for Convenience of the Government, clause of this contract.

(b) If a stop-work order issued under this clause is canceled either before or after a final decision in the protest, the Contractor must resume work. The Contracting Officer must make an equitable adjustment in the delivery schedule or contract price, or both, and the contract must be modified, in writing, accordingly, if—

(1) The stop-work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract; and

(2) The Contractor asserts its right to an adjustment within 30 days after the end of the period of work stoppage; provided, that if the Contracting Officer decides the facts justify the action, the Contracting Officer may receive and act upon a proposal submitted at any time before final payment under this contract.

(c) If a stop-work order is not canceled and the work covered by the order is terminated for the convenience of the Government, the Contracting Officer must allow reasonable costs resulting from the stop-work order in arriving at the termination settlement.

(d) If a stop-work order is not canceled and the work covered by the order is terminated for default, the Contracting Officer must allow, by equitable adjustment or otherwise, reasonable costs resulting from the stop-work order.

(e) The Government's rights to terminate this contract at any time are not affected by action taken under this clause.

(f) If, as the result of the Contractor's intentional or negligent misstatement, misrepresentation, or miscertification, a protest related to this contract is sustained, and the Government pays costs, the Government may require the Contractor to reimburse the Government the amount of such costs. In addition to any other remedy available, and pursuant to the

requirements of subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the Contractor under any contract between the Contractor and the Government.

(End of clause)

Alternate I (Deviation Date). As prescribed in 33.107(b), substitute in paragraph (a)(2) the words "the Termination clause of this contract" for the words "the Default, or the Termination for Convenience of the Government clause of this contract." In paragraph (b) substitute the words "an equitable adjustment in the delivery schedule, the estimated cost, the fee, or a combination thereof, and in any other terms of the contract that may be affected" for the words "an equitable adjustment in the delivery schedule or contract price, or both."

52.233-4 Applicable Law for Breach of Contract Claim.

As prescribed in 33.205-9(b), insert the following clause:

APPLICABLE LAW FOR BREACH OF CONTRACT CLAIM (DEVIATION DATE)

United States law will apply to resolve any claim of breach of this contract.

(End of clause)

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52.234 [Reserved]

52.234-1 Industrial Resources Developed Under Title III of the Defense Production Act.

As prescribed at 34.105 , insert the following clause:

INDUSTRIAL RESOURCES DEVELOPED UNDER TITLE III OF THE DEFENSE PRODUCTION ACT (DEVIATION DATE)

(a) *Definitions*.

Title III industrial resource means materials, services, processes, or manufacturing equipment (including the processes, technologies, and ancillary services for the use of such equipment) established or maintained under the authority of Title III of the Defense Production Act (50 U.S.C. 4531 *et seq*.).

Title III project contractor means a contractor that has received assistance for the development or manufacture of an industrial resource under Title III of the Defense Production Act (50 U.S.C. 4531 *et seq*.).

(b) The Contractor must refer any request from a Title III project contractor for testing and qualification of a Title III industrial resource to the Contracting Officer.

(c) The Contracting Officer will modify the contract to—

(1) Authorize testing and qualification of the Title III industrial resource; and

(2) Provide an equitable adjustment for the costs to test and qualify the Title III industrial resource.

(d) Upon receipt of a contract modification and the Title III industrial resources, the Contractor must—

(1) Test the Title III industrial resources for qualification; and,

(2) Provide the test results to the Defense Production Act Office, Title III Program, located at Wright Patterson Air Force Base, Ohio 45433-7739.

(e) The Contractor agrees to insert the substance of this clause, including paragraph (e), in every subcontract issued in performance of this contract.

(End of clause)

52.234-2 [Reserved]

(DEVIATION DATE)

52.234-3 [Reserved]

(DEVIATION DATE)

52.234-4 Earned Value Management System.

As prescribed in 34.203 , insert the following clause:

EARNED VALUE MANAGEMENT SYSTEM (DEVIATION DATE)

(a) The Contractor must use an earned value management system (EVMS) that has been determined by the Cognizant Federal Agency (CFA) to be compliant with the guidelines in Electronic Industries Alliance Standard 748 (EIA-748) (current version at the time of award) to manage this contract. If the Contractor's current EVMS has not been determined compliant at the time of award, see paragraph (b) of this clause. The Contractor must submit EVMS reports as required by the contract.

(b) If the Contractor's EVM System is not compliant with the requirements in paragraph (a) of this clause, or the Contractor’s existing cost/schedule control system is not compliant with the guidelines in EIA-748 (current version at time of award), the Contractor must—

(1) Apply the current system to the contract; and

(2) Take necessary actions to meet the milestones in the Contractor's approved EVMS plan.

(c) When an EVMS is required, the Government will conduct an Integrated Baseline Review (IBR). Agencies may require an additional IBR at—

(1) Exercise of significant options; or

(2) Incorporation of major modifications.

(d) Unless the CFA grants a waiver, Contractor-proposed EVMS changes require CFA approval prior to implementation.

(1) The CFA will notify the Contractor of its acceptance or rejection of the proposed EVMS changes within 30 days of receipt.

(2) If the CFA waives the advance approval requirements, the Contractor must disclose EVMS changes to the CFA at least 14 days prior to the effective date of implementation.

(e) The Contractor must provide the Government access to all pertinent records and data necessary to conduct surveillance and validate that the EVMS complies with the requirements in paragraph (a) of this clause for the duration of the contract.

(f) The Contractor must require the subcontractors specified below to comply with the requirements of this clause: [Insert list of applicable subcontractors.]

(End of clause)

52.235 [Reserved]

52.236 [Reserved]

52.236-1 [Reserved]

(DEVIATION DATE)

52.236-2 Differing Site Conditions.

As prescribed in 36.101-7(a), insert the following clause:

DIFFERING SITE CONDITIONS (DEVIATION DATE)

(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of

(1) Latent physical conditions or subsurface conditions at the site which differ materially from those indicated in this contract; or

(2) Unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.

(b) (1) The Contracting Officer will investigate the site conditions promptly after receiving such a notice.

(2) If the conditions materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract an equitable adjustment must be made under this clause.

(c) No request for an equitable adjustment to the contract under this clause will be allowed, unless the Contractor has given the written notice required.

(d) No request for an equitable adjustment to the contract for differing site conditions will be allowed if made after final payment under this contract.

(End of clause)

52.236-3 Site Investigation and Conditions Affecting the Work.

As prescribed in 36.101-7(a), insert the following clause:

SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (DEVIATION DATE)

(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including—

(1) Conditions bearing upon transportation, disposal, handling, and storage of materials;

(2) The availability of labor, water, electric power, and roads;

(3) Uncertainties of weather, river stages, tides, or similar physical conditions at the site;

(4) The conformation and conditions of the ground; and

(5) The character of equipment and facilities needed preliminary to and during work performance.

(b) The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

(c) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government. Nor does the Government assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

(End of clause)

52.236-4 [Reserved]

(DEVIATION DATE)

52.236-5 Material and Workmanship.

As prescribed in 36.101-7(b), insert the following clause:

MATERIAL AND WORKMANSHIP (DEVIATION DATE)

(a) (1) Equipment, material, and articles incorporated into the work covered by this contract shall be new and of the most suitable grade for the purpose intended, unless otherwise specifically provided in this contract.

(2) References in the specifications to equipment, material, articles, or patented processes by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition.

(3) The Contractor may, at its option, use any equipment, material, article, or process that, in the judgment of the Contracting Officer, is equal to that named in the specifications, unless otherwise specifically provided in this contract.

(b) The Contractor shall obtain the Contracting Officer's approval of the machinery, mechanical, and other equipment to be incorporated into the work.

(1) When requesting approval, the Contractor shall furnish to the Contracting Officer the name of the manufacturer, the model number, and other information concerning the performance, capacity, nature, and rating of the machinery and mechanical and other equipment.

(2) When required by this contract or by the Contracting Officer, the Contractor shall also obtain the Contracting Officer's approval of the material or articles which the Contractor contemplates incorporating into the work.

(i) When requesting approval, the Contractor shall provide appropriate and required information concerning the material or articles.

(ii) When directed to do so, the Contractor shall submit samples for approval at the Contractor’s expense, with shipping charges prepaid. Machinery, equipment, material, and articles that do not have the required approval are installed or used at the risk of subsequent rejection.

(c) Work under this contract shall be performed in a skillful and workmanlike manner. The Contracting Officer may require, in writing, that the Contractor remove from the work any employee the Contracting Officer deems incompetent, careless, or otherwise objectionable.

(End of clause)

52.236-6 Superintendence by the Contractor.

As prescribed in 36.101-7(a), insert the following clause:

SUPERINTENDENCE BY THE CONTRACTOR (DEVIATION DATE)

During performance of this contract and until the work is completed and accepted, the Contractor shall directly superintend the work or assign and have on site a competent superintendent who is satisfactory to the Contracting Officer and has authority to act for the Contractor.

(End of clause)

52.236-7 Permits and Responsibilities.

As prescribed in 36.101-7(c), insert the following clause:

PERMITS AND RESPONSIBILITIES (DEVIATION DATE)

(a) The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work.

(b) The Contractor shall be responsible for all damages to persons or property that occur as a result of the Contractor's fault or negligence.

(c) The Contractor shall be responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit of work which may have been accepted under the contract.

(End of clause)

52.236-8 Other Contracts.

As prescribed in 36.101-7(a), insert the following clause:

OTHER CONTRACTS (DEVIATION DATE)

(a) The Government may award other contracts for work at or near the site of the work under this contract. The Contractor shall cooperate and coordinate with—

(1) Other contractors; and

(2) Government employees.

(b) The Contractor shall adapt scheduling and performance of the work under this contract to accommodate the performance of other contractors. The Contractor's scheduling and performance shall not delay or interfere with the performance of work by other contractors or Government employees.

(End of clause)

52.236-9 Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements.

As prescribed in 36.101-7(a), insert the following clause:

PROTECTION OF EXISTING VEGETATION, STRUCTURES, EQUIPMENT, UTILITIES, AND IMPROVEMENTS (DEVIATION DATE)

(a) The Contractor shall preserve and protect structures, equipment, and vegetation (such as trees, shrubs, and grass) on or adjacent to the work site, which are not to be removed, and which do not unreasonably interfere with the work required under this contract. The Contractor shall only remove trees when specifically authorized to do so. If any limbs or branches of trees are broken during contract performance, the Contractor shall trim those limbs or branches with a clean cut and paint the cut with a tree-pruning compound as directed by the Contracting Officer.

(b) The Contractor shall protect from damage and, in the event of damage resulting from non-compliance with this contract or failure to exercise reasonable care in performing the work, shall promptly repair existing improvements and utilities at or near the work site, on adjacent property of a third party, and on or near transportation paths and routes. The Contractor shall repair any damage, including those that are the property of a third party.

(c) If the Contractor fails or refuses to repair the damage promptly, the Contracting Officer may have the necessary work performed and charge the cost to the Contractor.

(End of clause)

52.236-10 Operations and Storage Areas.

As prescribed in 36.101-7(a), insert the following clause:

OPERATIONS AND STORAGE AREAS (DEVIATION DATE)

(a) The Contractor shall confine all activities and operations on site to areas authorized or approved by the Contracting Officer. The Contractor shall hold and save the Government, its officers and agents, free and harmless from liability of any nature occasioned by the Contractor's performance.

(b) (1) Temporary buildings (*e.g.*, storage sheds, shops, offices) and utilities—

(i) May be erected by the Contractor only with the approval of the Contracting Officer; and

(ii) Shall only be built with labor and materials furnished by the Contractor without additional expense to the Government.

(2) The temporary buildings and utilities are the property of the Contractor and shall be removed by the Contractor at its expense upon completion of the work.

(3) The temporary buildings and utilities may be abandoned and need not be removed, with written consent of the Contracting Officer.

(c) The Contractor shall, as prescribed by the Contracting Officer, use only established roadways, or use temporary roadways constructed by the Contractor when and as authorized by the Contracting Officer. When materials are transported in prosecuting the work, vehicles shall not be loaded beyond the loading capacity recommended by the manufacturer of the vehicle or prescribed by any Federal, State, or local law or regulation.

(End of clause)

52.236-11 Use and Possession Prior to Completion.

As prescribed in 36.101-7(d), insert the following clause:

USE AND POSSESSION PRIOR TO COMPLETION (DEVIATION DATE)

(a) The Government has the right to take possession of or use any completed or partially completed part of the work.

(1) Before taking possession of or using any work, the Contracting Officer will furnish the Contractor a list of items of work remaining to be performed or corrected on those portions of the work that the Government intends to take possession of or use.

(2) Failure of the Contracting Officer to list any item of work shall not relieve the Contractor of responsibility for complying with the terms of the contract.

(3) The Government's possession or use shall not be deemed an acceptance of any work under the contract.

(b) (1) While the Government has such possession or use, the Contractor is relieved of the responsibility for the loss of or damage to the work resulting from the Government's possession or use, notwithstanding the terms of the clause in this contract entitled "Permits and Responsibilities".

(2) If prior possession or use by the Government delays the progress of the work or causes additional expense to the Contractor, an equitable adjustment shall be made in the contract price or the time of completion, and the contract shall be modified in writing accordingly.

(End of clause)

52.236-12 Cleaning Up.

As prescribed in 36.101-7(a), insert the following clause:

CLEANING UP (DEVIATION DATE)

(a) The Contractor shall keep the work area, including storage areas, in a clean, neat, orderly condition, and free from accumulations of waste materials.

(b) Before completing the work, the Contractor shall remove from the site any rubbish, tools, scaffolding, equipment, and materials that are not the property of the Government.

(End of clause)

52.236-13 Accident Prevention.

As prescribed in 36.101-7(e), insert the following clause:

ACCIDENT PREVENTION (DEVIATION DATE)

(a) The Contractor shall provide and maintain work environments and procedures that—

(1) Safeguard the public and Government personnel, property, materials, supplies, and equipment exposed to Contractor operations and activities;

(2) Avoid interruptions of Government operations and delays in project completion dates; and

(3) Control costs in the performance of this contract.

(b) In addition, for contracts for construction or dismantling, demolition, or removal of improvements, the Contractor shall —

(1) Provide appropriate safety barricades, signs, and signal lights;

(2) Comply with the standards issued by the Secretary of Labor at 29 CFR part 1926 and 29 CFR part 1910 ; and

(3) Ensure that any additional measures the Contracting Officer determines to be reasonably necessary for the purposes are taken.

(c) If this contract is for construction or dismantling, demolition or removal of improvements with any Department of Defense agency or component, the Contractor shall comply with all pertinent provisions of the latest version of U.S. Army Corps of Engineers Safety and Health Requirements Manual, EM 385-1-1, in effect on the date of the solicitation.

(d) (1) If the Contracting Officer becomes aware of any noncompliance with these requirements or any condition that poses a serious or imminent danger to the health or safety of the public or Government personnel, the Contracting Officer will notify the Contractor orally, with written confirmation, and request immediate initiation of corrective action.

(2) This notice, when delivered to the Contractor or the Contractor's representative at the work site, shall be deemed sufficient notice of the noncompliance and that corrective action is required.

(3) After receiving the notice, the Contractor shall immediately take corrective action.

(4) If the Contractor fails or refuses to promptly take corrective action, the Contracting Officer may issue an order stopping all or part of the work until satisfactory corrective action has been taken.

(5) The Contractor shall not be entitled to any equitable adjustment of the contract price or extension of the performance schedule on any stop-work order issued under this clause.

(e) The Contractor shall insert the substance of this clause, including this paragraph (e), in subcontracts.

(End of clause)

Alternate I (Nov 1991). If the contract will involve (a) work of a long duration or hazardous nature, or (b) performance on a Government facility that on the advice of technical representatives involves hazardous materials or operations that might endanger the safety of the public and/or Government personnel or property, add the following paragraph (f) to the basic clause:

(f) Before commencing the work, the Contractor shall-

(1) Submit a written proposed plan for implementing this clause. The plan shall include an analysis of the significant hazards to life, limb, and property inherent in contract work performance and a plan for controlling these hazards; and

(2) Meet with representatives of the Contracting Officer to discuss and develop a mutual understanding relative to administration of the overall safety program.

52.236-14 Availability and Use of Utility Services.

As prescribed in 36.101-7(f), insert the following clause:

AVAILABILITY AND USE OF UTILITY SERVICES (DEVIATION DATE)

(a) The Government will make all reasonably required utilities available to the Contractor from existing outlets and supplies, as specified in the contract.

(b) Unless otherwise provided in the contract, the Contractor shall pay for all utility costs.

(c) The Contractor, at its expense and in a workmanlike manner, shall install and maintain all necessary temporary connections, distribution lines, and all meters required to measure the amount of each utility used for the purpose of determining charges.

(d) Before final acceptance by the Government, the Contractor shall remove the temporary connections, distribution lines, meters, and associated paraphernalia.

(End of clause)

52.236-15 Schedules for Construction Contracts.

As prescribed in 36.101-7(g), insert the following clause:

SCHEDULES FOR CONSTRUCTION CONTRACTS (DEVIATION DATE)

(a) (1) Within five days after the work commences on the contract or another period of time determined by the Contracting Officer, the Contractor shall prepare and submit to the Contracting Officer for approval a practicable schedule showing the order in which the Contractor proposes to perform the work, and the dates on which the Contractor contemplates starting and completing the work (including acquiring materials, plant, and equipment).

(2) The schedule shall be in the form of a progress chart of suitable scale to indicate appropriately the percentage of work scheduled for completion by any given date during the period.

(3) If the Contractor fails to submit a schedule within the time prescribed, the Contracting Officer may withhold approval of progress payments until the Contractor submits the required schedule.

(b) The Contractor shall continually update the actual progress in the schedule and shall submit it to the Contracting Officer by the means prescribed in the contract for transmittals or as directed by the Contracting Officer.

(c) (1) If the Contractor falls behind the approved schedule, the Contractor shall take steps necessary to recover lost time and execute in accordance with the approved schedule, without additional cost to the Government.

(2) Such steps may include increasing the number of shifts, overtime operations, days of work, and/or the amount of construction plant.

(3) The Contractor shall submit, for approval, supplementary schedule(s) that demonstrate how the lost time will be recovered.

(d) If the Contractor does not recover the lost time, the Contracting Officer may determine that the Contractor is not prosecuting the work with sufficient diligence to ensure completion within the time specified in the contract. Upon making this determination, the Contracting Officer may terminate the Contractor's right to proceed with the work, or any separable part of it, in accordance with the default terms of this contract.

(End of clause)

52.236-16 Quantity Surveys.

As prescribed in 36.101-7(h), insert the following clause:

QUANTITY SURVEYS (DEVIATION DATE)

(a) Quantity surveys shall be conducted, and the data derived from these surveys shall be used in computing the quantities of work performed and the actual construction completed and in place.

(1) The Government will conduct the original and final surveys and make the computations based on them.

(2) (i) The Contractor shall conduct the surveys for any periods for which progress payments are requested and shall make the computations based on these surveys.

(ii) All surveys conducted by the Contractor shall be conducted under the direction of a representative of the Contracting Officer, unless the Contracting Officer waives this requirement in a specific instance.

(b) Upon completing a survey, the Contractor shall promptly provide the originals of all field notes and all other records relating to the survey or to the layout of the work to the Contracting Officer, which may be used by the Contracting Officer to determine the amount of progress payments.

(c) The Contractor shall retain copies of all such material furnished to the Contracting Officer.

(End of clause)

Alternate I (APR 1984). If it is determined at a level above that of the Contracting Officer that it is impracticable for Government personnel to perform the original and final surveys, and the Government wishes the Contractor to perform these surveys, substitute the following paragraph (b) for paragraph (b) of the basic clause:

(b) The Contractor shall conduct the original and final surveys and surveys for any periods for which progress payments are requested. All these surveys shall be conducted under the direction of a representative of the Contracting Officer, unless the Contracting Officer waives this requirement in a specific instance. The Government shall make such computations as are necessary to determine the quantities of work performed or finally in place. The Contractor shall make the computations based on the surveys for any periods for which progress payments are requested.

52.236-17 Layout of Work.

As prescribed in 36.101-7(i), insert the following clause:

LAYOUT OF WORK (DEVIATION DATE)

(a) The Contractor shall lay out its work from Government-established base lines and benchmarks provided on the drawings.

(b) The Contractor shall be responsible for all measurements in connection with the layout.

(c) The Contractor shall furnish, at its own expense, all stakes, templates, platforms, equipment, tools, materials, and labor required for the layout.

(d) The Contractor shall be responsible for executing the work to the lines and grades that may be established or indicated by the Contracting Officer.

(e) (1) The Contractor shall be responsible for maintaining and preserving all stakes and other marks established by the Contracting Officer until authorized to remove them.

(2) If such marks are destroyed by the Contractor, the Contracting Officer may replace them and deduct the expense of the replacement from any amounts due or to become due to the Contractor.

(End of clause)

52.236-18 Work Oversight in Cost-Reimbursement Construction Contracts.

As prescribed in 36.101-7(j), insert the following clause:

WORK OVERSIGHT IN COST-REIMBURSEMENT CONSTRUCTION CONTRACTS (APR 1984)

The extent and character of the work to be done by the Contractor shall be subject to the general supervision, direction, control, and approval of the Contracting Officer.

(End of clause)

52.236-19 [Reserved]

(DEVIATION DATE)

52.236-20 [Reserved]

52.236-21 Specifications and Drawings for Construction.

As prescribed in 36.101-7(k), insert the following clause:

SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (DEVIATION DATE)

(a) The Contractor shall keep at the site a copy of the drawings and specifications and shall at all times give the Contracting Officer access thereto.

(b) Anything mentioned in the specifications and not shown on the drawings or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both.

(1) In case of difference between drawings and specifications, the specifications shall govern.

(2) In case of discrepancy in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing.

(3) Any adjustment by the Contractor without such a determination shall be at its own risk and expense.

(c) The Contracting Officer will furnish from time to time such detailed drawings and other information as considered necessary, unless otherwise provided.

(d) (1) Words, such as, “directed”, “required”, “ordered”, “designated”, “prescribed”, or words of like import when used, in the specifications or on the drawings are intended to mean the “direction”, “requirement”, “order”, “designation”, or “prescription”, of the Contracting Officer.

(2) Words, such as, “approved”, “acceptable”, “satisfactory”, or words of like import shall mean “approved by”, or ‘acceptable to”, or “satisfactory to” the Contracting Officer, unless otherwise expressly stated.

(e) Where “as shown”, “as indicated”, “as detailed”, or words of similar import are used, it shall be understood that the reference is made to the drawings accompanying this contract unless stated otherwise. The word “provided” as used herein shall be understood to mean “provide complete in place”, that is “furnished and installed”.

(f) Shop drawings means drawings, submitted to the Government by the Contractor, subcontractor, or any lower tier subcontractor pursuant to a construction contract, showing in detail (1) the proposed fabrication and assembly of structural elements and (2) the installation (i.e., form, fit, and attachment details) of materials or equipment. It includes drawings, diagrams, layouts, schematics, descriptive literature, illustrations, schedules, performance and test data, and similar materials furnished by the contractor to explain in detail specific portions of the work required by the contract. The Government may duplicate, use, and disclose in any manner and for any purpose shop drawings delivered under this contract.

(g) (1) If this contract requires shop drawings, the Contractor shall coordinate all such drawings, and review them for accuracy, completeness, and compliance with contract requirements and shall indicate its approval thereon as evidence of such coordination and review.

(2) Shop drawings submitted to the Contracting Officer without evidence of the Contractor's approval may be returned for resubmission.

(h) The Contracting Officer will indicate an approval or disapproval of the shop drawings and if not approved as submitted shall indicate the Government's reasons therefor.

(1) Any work done before such approval shall be at the Contractor's risk.

(2) Approval by the Contracting Officer shall not relieve the Contractor from responsibility for any errors or omissions in such drawings, nor from responsibility for complying with the requirements of this contract, except with respect to variations described and approved in accordance with paragraph (i) of this clause.

(i) (1) If shop drawings show variations from the contract requirements, the Contractor shall describe such variations in writing, separate from the drawings, at the time of submission.

(2) If the Contracting Officer approves any such variation, the Contracting Officer will issue an appropriate contract modification, except that, if the variation is minor or does not involve a change in price or in time of performance, a modification need not be issued.

(j) The Contractor shall submit to the Contracting Officer for approval four copies (unless otherwise indicated) of all shop drawings as called for under the various headings of these specifications. Three sets (unless otherwise indicated) of all shop drawings, will be retained by the Contracting Officer and one set will be returned to the Contractor.

(End of clause)

Alternate I (APR 1984). When record shop drawings are required and reproducible shop drawings are needed, add the following sentences to paragraph (j) of the basic clause:

Upon completing the work under this contract, the Contractor shall furnish a complete set of all shop drawings as finally approved. These drawings shall show all changes and revisions made up to the time the equipment is completed and accepted.

Alternate II (APR 1984). When record shop drawings are required and reproducible shop drawings are not needed, the following sentences shall be added to paragraph (j) of the basic clause:

Upon completing the work under this contract, the Contractor shall furnish _____ *[Contracting Officer complete by inserting desired amount]* sets of prints of all shop drawings as finally approved. These drawings shall show changes and revisions made up to the time the equipment is completed and accepted.

52.236-22 Design Within Funding Limitations.

As prescribed in 36.102-4(a), insert the following clause:

DESIGN WITHIN FUNDING LIMITATIONS (DEVIATION DATE)

(a) The Contractor shall accomplish the design services required under this contract to permit the award of a contract, using standard Federal Acquisition Regulation procedures for the construction of the facilities designed at a price that does not exceed the estimated construction contract price as set forth in paragraph (d) of this clause.

(1) When bids or proposals for the construction contract are received that exceed the estimated price, the Contractor shall perform such redesign and other services as are necessary to permit contract award within the funding limitation.

(2) These additional services shall be performed at no increase in the price of this contract.

(3) The Contractor shall not be required to perform such additional services at no cost to the Government if the unfavorable bids or proposals are the result of conditions beyond its reasonable control.

(b) The Contractor will promptly provide written notice to the Contracting Officer if it finds that the project will exceed or is likely to exceed the funding limitations and it is unable to design a usable facility within these limitations.

(1) Upon receipt of such written notice, the Contracting Officer will review the Contractor's revised estimate of construction cost.

(2) The Government may, if it determines that the estimated construction contract price set forth in this contract is so low that award of a construction contract not in excess of such estimate is improbable,—

(i) Authorize a change in scope or materials as required to reduce the estimated construction cost to an amount within the estimated construction contract price set forth in paragraph (d) of this clause; or

(ii) The Government may adjust such estimated construction contract price.

(c) When bids or proposals are not solicited or are unreasonably delayed, the Government shall prepare an estimate of constructing the design submitted and such estimate shall be used in lieu of bids or proposals to determine compliance with the funding limitation.

(d) The estimated construction contract price for the project described in this contract is $_____.

(End of clause)

52.236-23 Responsibility of the Architect-Engineer Contractor.

As prescribed in 36.102-4(b), insert the following clause:

RESPONSIBILITY OF THE ARCHITECT-ENGINEER CONTRACTOR (DEVIATION DATE)

(a) The Contractor shall be responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and other services furnished by the Contractor under this contract.

(b) The Contractor shall, without additional compensation, correct or revise any errors or deficiencies in its designs, drawings, specifications, and other services.

(c) Neither the Government’s review, approval or acceptance of, nor payment for, the services required under this contract shall be construed to operate as a waiver of any rights under this contract or of any cause of action arising out of the performance of this contract.

(d) The Contractor shall be and remain liable to the Government, in accordance with applicable law, for all damages to the Government caused by the Contractor’s negligent performance of any of the services provided under this contract.

(e) The rights and remedies of the Government provided for under this contract are in addition to any other rights and remedies provided by law.

(f) If the Contractor is comprised of more than one legal entity, each such entity shall be jointly and severally liable hereunder.

(End of clause)

52.236-24 Work Oversight in Architect-Engineer Contracts.

As prescribed in 36.102-4(c), insert the following clause:

WORK OVERSIGHT IN ARCHITECT-ENGINEER CONTRACTS (APR 1984)

The extent and character of the work to be done by the Contractor shall be subject to the general oversight, supervision, direction, control, and approval of the Contracting Officer.

(End of clause)

52.236-25 Requirements for Registration of Designers.

As prescribed in 36.102-4(d), insert the following clause:

REQUIREMENTS FOR REGISTRATION OF DESIGNERS (JUNE 2003)

Architects or engineers registered to practice in the particular professional field involved in a State, the District of Columbia, or an outlying area of the United States shall prepare or review and approve the design of architectural, structural, mechanical, electrical, civil, or other engineering features of the work.

(End of clause)

52.236-26 [Reserved]

(DEVIATION DATE)

52.236-27 [Reserved]

(DEVIATION DATE)

52.236-28 [Reserved]

(DEVIATION DATE)

52.237 [Reserved]

52.237-1 Site Visit.

As prescribed in 37.802-5(a), insert the following provision:

SITE VISIT (APR 1984)

Offerors or quoters are urged and expected to inspect the site where services are to be performed and to satisfy themselves regarding all general and local 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 site constitute grounds for a claim after contract award.

(End of provision)

52.237-2 Protection of Government Buildings, Equipment, and Vegetation.

As prescribed in 37.802-5(b), insert the following clause in solicitations and contracts for services to be performed on Government installations, unless a construction contract is contemplated:

PROTECTION OF GOVERNMENT BUILDINGS, EQUIPMENT, AND VEGETATION (APR 1984)

The Contractor shall use reasonable care to avoid damaging existing buildings, equipment, and vegetation on the Government installation. If the Contractor's failure to use reasonable care causes damage to any of this property, the Contractor shall replace or repair the damage at no expense to the Government as the Contracting Officer directs. If the Contractor fails or refuses to make such repair or replacement, the Contractor shall be liable for the cost, which may be deducted from the contract price.

(End of clause)

52.237-3 Continuity of Services.

As prescribed in 37.802-5(c), insert the following clause:

CONTINUITY OF SERVICES (JAN 1991)

(a) The Contractor recognizes that the services under this contract are vital to the Government and must be continued without interruption and that, upon contract expiration, a successor, either the Government or another contractor, may continue them. The Contractor agrees to-

(1) Furnish phase-in training; and

(2) Exercise its best efforts and cooperation to effect an orderly and efficient transition to a successor.

(b) The Contractor shall, upon the Contracting Officer's written notice, (1) furnish phase-in, phase-out services for up to 90 days after this contract expires and (2) negotiate in good faith a plan with a successor to determine the nature and extent of phase-in, phase-out services required. The plan shall specify a training program and a date for transferring responsibilities for each division of work described in the plan, and shall be subject to the Contracting Officer's approval. The Contractor shall provide sufficient experienced personnel during the phase-in, phase-out period to ensure that the services called for by this contract are maintained at the required level of proficiency.

(c) The Contractor shall allow as many personnel as practicable to remain on the job to help the successor maintain the continuity and consistency of the services required by this contract. The Contractor also shall disclose necessary personnel records and allow the successor to conduct on-site interviews with these employees. If selected employees are agreeable to the change, the Contractor shall release them at a mutually agreeable date and negotiate transfer of their earned fringe benefits to the successor.

(d) The Contractor shall be reimbursed for all reasonable phase-in, phase-out costs (*i.e.,* costs incurred within the agreed period after contract expiration that result from phase-in, phase-out operations) and a fee (profit) not to exceed a pro rata portion of the fee (profit) under this contract.

(End of clause)

52.237-4 Payment by Government to Contractor.

As prescribed in 37.701-4(a), insert the following clause in solicitations and contracts solely for dismantling, demolition, or removal of improvements whenever the contracting officer determines that the Government shall make payment to the contractor in addition to any title to property that the contractor may receive under the contract:

PAYMENT BY GOVERNMENT TO CONTRACTOR (APR 1984)

(a) In _____ *[insert "ful"l if Alternate I is used; otherwise insert "partia"l]* consideration of the performance of the work called for in the Schedule, the Government will pay to the Contractor _____ *[fill in amount]*.

(b) The Government shall make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates approved by the Contracting Officer. Except as provided in paragraph (c) of this clause, in making progress payments the Contracting Officer shall retain 10 percent of the estimated payment until final completion and acceptance of the contract work. However, if the Contracting Officer finds that satisfactory progress was achieved during any period for which a progress payment is to be made, the Contracting Officer may authorize such payment in full, without retaining a percentage. Also, on completion and acceptance of each unit or division for which the price is stated separately, the Contracting Officer may authorize full payment for that unit or division without retaining a percentage.

(c) When the work is substantially completed, the Contracting Officer shall retain an amount considered adequate for the protection of the Government and, at the Contracting Officer's discretion, may release all or a portion of any excess amount.

(d) In further consideration of performance, the Contractor shall receive title to all property to be dismantled or demolished that is not specifically designated as being retained by the Government. The title shall vest in the Contractor immediately upon the Government's issuing the notice of award, or if a performance bond is to be furnished after award, upon the Government's issuance of a notice to proceed with the work. The Government shall not be responsible for the condition of, or any loss or damage to, the property. If the Contractor does not wish to remove from the site any of the property acquired, the Contracting Officer may, upon written request, grant the Contractor permission to leave the property on the premises. As a condition to the granting of this permission, the Contractor agrees to waive any right, title, claim, or interest in and to the property.

(e) Upon completion and acceptance of all work and receipt of a properly executed voucher, the Government shall make final payment of the amount due the Contractor under this contract. If requested, the Contractor shall release all claims against the Government arising under this contract, other than any claims the Contractor specifically excepts, in stated amounts, from operation of this release.

(End of clause)

Alternate I (APR 1984). If the contracting officer determines that the Government shall retain all material resulting from the dismantling or demolition work, delete paragraph (d) from the basic clause and renumber the remaining paragraphs.

52.237-5 Payment by Contractor to Government.

As prescribed in 37.701-4(b), insert the following clause in solicitations and contracts for dismantling, demolition, or removal of improvements whenever the contractor is to receive title to dismantled or demolished property and a net amount of compensation is due to the Government, except if the contracting officer determines that it would be advantageous to the Government for the contractor to pay in increments and the Government to transfer title to the contractor for increments of property only upon receipt of those payments:

PAYMENT BY CONTRACTOR TO GOVERNMENT (APR 1984)

(a) The Contractor shall receive title to all property to be dismantled, demolished, or removed under this contract and not specifically designated in the Schedule as being retained by the Government. The title shall vest in the Contractor immediately upon the Government's issuing the notice of award, or if a performance bond is to be furnished, upon the Government's issuing a notice to proceed with the work. The Government shall not be responsible for the condition of, or any loss or damage to, the property.

(b) The Contractor shall promptly remove from the site all property acquired by the Contractor. The Government shall not permit storage of property on the site beyond the completion date. If the Contractor does not wish to remove from the site any of the property acquired, the Contracting Officer may, upon written request, grant the Contractor permission to leave

the property on the premises. As a condition of the granting of the permission, the Contractor agrees to waive any right, title, claim, or interest in and to the property.

(c) The Contractor shall perform the work called for under this contract and within _____ days of receipt of notice of award, unless otherwise provided in the Schedule and before proceeding with the work, shall pay _____ *[fill in amount]*. Checks shall be made payable to the office designated in the contract and shall be forwarded to the Contracting Officer.

(End of clause)

52.237-6 Incremental Payment by Contractor to Government.

As prescribed in 37.701-4(c), insert the following clause in solicitations and contracts for dismantling, demolition, or removal of improvements (a) if the Contractor is to receive title to dismantled or demolished property and a net amount of compensation is due the Government; and (b) if the Contracting Officer determines that it would be advantageous to the Government for the Contractor to pay in increments, and for the Government to transfer title to the Contractor for increments of property, only upon receipt of those payment:

INCREMENTAL PAYMENT BY CONTRACTOR TO GOVERNMENT (APR 1984)

(a) The Contractor shall perform the work called for under this contract and within _____ days of receipt of notice of award, unless otherwise provided in the Schedule, and before proceeding with the work, shall pay _____ *[fill in amount]*. Thereafter, the Contractor shall make payment to the Government in the amount and frequency specified in the Schedule. Checks shall be made payable to the office designated in the contract and shall be forwarded to the Contracting Officer.

(b) Upon the Government's receipt of each increment of payment, the Contractor shall receive title to such property as the Contracting Officer determines to be fair and reasonable for that increment of payment. Upon receipt of the Contractor's final payment, all title that has not passed to the Contractor shall vest in the Contractor, unless specifically designated in the Schedule as being retained by the Government. The Government shall not be responsible for the condition of, or any loss or damage to, the property.

(c) The Contractor shall promptly remove from the site all property acquired by the Contractor. The Government will not permit storage of property on the site beyond the completion date. If the Contractor does not wish to remove from the site any of the property acquired, the Contracting Officer may, upon written request, grant the Contractor permission to leave the property on the premises. As a condition of the granting of this permission, the Contractor agrees to waive any right, title, claim, or interest in and to the property.

(End of clause)

52.237-7 Indemnification and Medical Liability Insurance.

As prescribed in 37.601-3, insert the following clause:

INDEMNIFICATION AND MEDICAL LIABILITY INSURANCE (DEVIATION DATE)

(a) It is expressly agreed and understood that this is a nonpersonal services contract, under which the professional services rendered by the Contractor are rendered in its capacity as an independent contractor. The Government may evaluate the quality of professional and administrative services provided, but retains no control over professional aspects of the services rendered, including by example, the Contractor's professional medical judgment, diagnosis, or specific medical treatments. The Contractor shall be solely liable for and expressly agrees to indemnify the Government with respect to any liability producing acts or omissions by it or by its employees or agents. The Contractor shall maintain during the term of this contract liability insurance issued by a responsible insurance carrier of not less than the following amount(s) per specialty per occurrence: _____.

(b) An apparently successful offeror, upon request by the Contracting Officer, shall furnish prior to contract award evidence of its insurability concerning the medical liability insurance required by paragraph (a) of this clause.

(c) Liability insurance may be on either an occurrences basis or on a claims-made basis. If the policy is on a claims-made basis, an extended reporting endorsement (tail) for a period of not less than 3 years after the end of the contract term must also be provided.

(d) Evidence of insurance documenting the required coverage for each health care provider who will perform under this contract shall be provided to the Contracting Officer prior to the commencement of services under this contract. If the insurance is on a claims-made basis and evidence of an extended reporting endorsement is not provided prior to the commencement of services, evidence of such endorsement shall be provided to the Contracting Officer prior to the expiration of this contract. Final payment under this contract shall be withheld until evidence of the extended reporting endorsement is provided to the Contracting Officer.

(e) The policies evidencing required insurance shall also contain an endorsement to the effect that any cancellation or material change adversely affecting the Government's interest shall not be effective until 30 days after the insurer or the Contractor gives written notice to the Contracting Officer. If during the performance period of the contract the Contractor changes insurance providers, the Contractor must provide evidence that the Government will be indemnified to the limits specified in paragraph (a) of this clause, for the entire period of the contract, either under the new policy, or a combination of old and new policies.

(f) The Contractor shall insert the substance of this clause, including this paragraph (f), in all subcontracts under this contract for health care services and shall require such subcontractors to provide evidence of and maintain insurance in accordance with paragraph (a) of this clause. At least 5 days before the commencement of work by any subcontractor, the Contractor shall furnish to the Contracting Officer evidence of such insurance.

(End of clause)

52.237-8 Restriction on Severance Payments to Foreign Nationals.

As prescribed in 37.802-5(d), use the following provision:

RESTRICTION ON SEVERANCE PAYMENTS TO FOREIGN NATIONALS (DEVIATION DATE)

(a) The Federal Acquisition Regulation (FAR), at 31.205-6(f)(6), limits the cost allowability of severance payments to foreign nationals employed under a service contract performed outside the United States unless the agency grants a waiver pursuant to FAR 37.802-3 before contract award.

(b) In making the determination concerning the granting of a waiver, the agency will determine that—

(1) The application of the severance pay limitations to the contract would adversely affect the continuation of a program, project, or activity that provides significant support services for (i) members of the armed forces stationed or deployed outside the United States, or (ii) employees of an executive agency posted outside the United States;

(2) The Contractor has taken (or has established plans to take) appropriate actions within its control to minimize the amount and number of incidents of the payment of severance pay to employees under the contract who are foreign nationals; and

(3) The payment of severance pay is necessary in order to comply with a law that is generally applicable to a significant number of businesses in the country in which the foreign national receiving the payment performed services under the contract, or is necessary to comply with a collective bargaining agreement.

(End of provision)

52.237-9 Waiver of Limitation on Severance Payments to Foreign Nationals.

As prescribed in 37.802-5(e), use the following clause:

WAIVER OF LIMITATION ON SEVERANCE PAYMENTS TO FOREIGN NATIONALS (DEVIATION DATE)

(a) Pursuant to 10 U.S.C. 3744(b) or 41 U.S.C. 4304(b)(1), as applicable, the cost allowability limitations in FAR 31.205-6(f)(6) are waived.

(b) This clause may be incorporated into subcontracts issued under this contract, if approved by the Contracting Officer.

(End of clause)

52.237-10 Identification of Uncompensated Overtime.

As prescribed in 37.802-5(f), insert the following provision:

IDENTIFICATION OF UNCOMPENSATED OVERTIME (MAR 2015)

(a) *Definitions*. As used in this provision-

Adjusted hourly rate (including uncompensated overtime) is the rate that results from multiplying the hourly rate for a 40-hour work week by 40, and then dividing by the proposed hours per week which includes uncompensated overtime hours over and above the standard 40-hour work week. For example, 45 hours proposed on a 40-hour work week basis at $20 per hour would be converted to an uncompensated overtime rate of $17.78 per hour ($20.00 x 40 divided by 45 = $17.78).

Uncompensated overtime means the hours worked without additional compensation in excess of an average of 40 hours per week by direct charge employees who are exempt from the Fair Labor Standards Act. Compensated personal absences such as holidays, vacations, and sick leave shall be included in the normal work week for purposes of computing uncompensated overtime hours.

(b) (1) Whenever there is uncompensated overtime, the adjusted hourly rate (including uncompensated overtime), rather than the hourly rate, shall be applied to all proposed hours, whether regular or overtime hours.

(2) All proposed labor hours subject to the adjusted hourly rate (including uncompensated overtime) shall be identified as either regular or overtime hours, by labor categories, and described at the same level of detail. This is applicable to all proposals whether the labor hours are at the prime or subcontract level. This includes uncompensated overtime hours that are in indirect cost pools for personnel whose regular hours are normally charged direct.

(c) The offeror's accounting practices used to estimate uncompensated overtime must be consistent with its cost accounting practices used to accumulate and report uncompensated overtime hours.

(d) Proposals that include unrealistically low labor rates, or that do not otherwise demonstrate cost realism, will be considered in a risk assessment and will be evaluated for award in accordance with that assessment.

(e) The offeror shall include a copy of its policy addressing uncompensated overtime with its proposal.

(End of provision)

52.238 [Reserved]

52.239 [Reserved]

52.239-1 [Reserved]

(DEVIATION DATE)

52.240 [Reserved]

52.240-1 [Reserved]

(DEVIATION DATE)

52.240-90 Security Prohibitions and Exclusions Representations and Certifications.

As prescribed in 40.205(a), insert the following provision:

SECURITY PROHIBITIONS AND EXCLUSIONS REPRESENTATIONS AND CERTIFICATIONS (DEVIATION DATE)

(a) *Definitions.* As used in this provision-—

Backhaul, covered article, covered telecommunications equipment or services, critical technology, FASCSA order, Intelligence community, interconnection arrangements, national security system, roaming, sensitive compartmented information, sensitive compartmented information system, source, and substantial or essential component have the meanings provided in the clause 52.240-91, Security Prohibitions and Exclusions.

Business operations means engaging in commerce in any form, including by acquiring, developing, maintaining, owning, selling, possessing, leasing, or operating equipment, facilities, personnel, products, services, personal property, real property, or any other apparatus of business or commerce.

Marginalized populations of Sudan means—

(1) Adversely affected groups in regions authorized to receive assistance under section 8(c) of the Darfur Peace and Accountability Act (Pub. L. 109-344) (50 U.S.C. 1701 note); and

(2) Marginalized areas in Northern Sudan described in section 4(9) of such Act.

Restricted business operations means business operations in Sudan that include power production activities, mineral extraction activities, oil-related activities, or the production of military equipment, as those terms are defined in the Sudan Accountability and Divestment Act of 2007 (Pub. L. 110-174). Restricted business operations do not include business operations that the person (as that term is defined in Section 2 of the Sudan Accountability and Divestment Act of 2007) conducting the business can demonstrate—

(1) Are conducted under contract directly and exclusively with the regional government of southern Sudan;

(2) Are conducted under specific authorization from the Office of Foreign Assets Control in the Department of the Treasury, or are expressly exempted under Federal law from the requirement to be conducted under such authorization;

(3) Consist of providing goods or services to marginalized populations of Sudan;

(4) Consist of providing goods or services to an internationally recognized peacekeeping force or humanitarian organization;

(5) Consist of providing goods or services that are used only to promote health or education; or

(6) Have been voluntarily suspended.

Sensitive technology—

(1) Means hardware, software, telecommunications equipment, or any other technology that is to be used specifically—

(i) To restrict the free flow of unbiased information in Iran; or

(ii) To disrupt, monitor, or otherwise restrict speech of the people of Iran; and

(2) Does not include information or informational materials the export of which the President does not have the authority to regulate or prohibit pursuant to section 203(b)(3) of the International Emergency Economic Powers Act (50 U.S.C. 1702(b)(3)).

(b) *Procedures*.

(1) *Covered telecommunications and video surveillance*. The Offeror shall review the list of excluded parties in the System for Award Management (SAM) at https://www.sam.gov for entities excluded from receiving federal awards for "covered telecommunications equipment or services."

(2) *FASCSA Orders*.

(i) The Offeror shall search in SAM for the phrase "FASCSA order" for any covered article, or any products or services produced or provided by a source, if there is an applicable FASCSA order described in paragraph (e) of FAR 52.240-91, Security Prohibitions and Exclusions.

(ii) The Offeror shall review the solicitation for any FASCSA orders that are not in SAM but are effective and apply to the solicitation and resultant contract (see FAR 40.204-1(c)(2)).

(iii) FASCSA orders issued after the date of solicitation do not apply unless added by an amendment to the solicitation.

(c) *Covered telecommunications equipment or services representations*. By submission of its offer, the Offeror represents that, after conducting a reasonable inquiry (that looks at any information in the Offeror's possession but does not need to include an internal or third-party audit)—

(1) It will not provide covered telecommunications equipment or services to the Government in the performance of any contract, subcontract or other contractual instrument resulting from this solicitation, except as waived by the solicitation, or as disclosed in paragraph (g); and

(2) It does not use covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services, except as waived by the solicitation, or as disclosed in paragraph (g).

(d) *FASCSA Representation*. By submission of this offer, the offeror represents that it has conducted a reasonable inquiry, and that the offeror does not propose to provide or use in response to this solicitation any covered article, or any products or services produced or provided by a source, if the covered article or the source is prohibited by an applicable FASCSA order in effect on the date the solicitation was issued, except as waived by the solicitation, or as disclosed in paragraph (g). A reasonable inquiry will look at any information in the offeror's possession but does not need to include an internal or third-party audit.

(e) *Sudan certification*. By submission of its offer, the offeror certifies, after conducting a reasonable inquiry (that looks at any information in the offeror's possession but does not need to include an internal or third-party audit), that the offeror does not conduct any restricted business operations in Sudan.

(f) *Iran Representation and Certifications*.

(1) Except as provided in paragraph (f)(2) of this provision or if a waiver has been granted in accordance with FAR 40.203-3, the offeror, after conducting a reasonable inquiry (that looks at any information in the offeror's possession but does not need to include an internal or third-party audit), by submission of its offer—

(i) Represents, to the best of its knowledge and belief, that the offeror does not export any sensitive technology to the government of Iran or any entities or individuals owned or controlled by, or acting on behalf or at the direction of, the government of Iran;

(ii) Certifies that the offeror, or any person (as defined at section 15 of the Iran Sanctions Act of 1996, Pub. L. 104-172, 50 U.S.C. 1701 note) owned or controlled by the offeror, does not engage in any activities for which sanctions may be imposed under section 5 of the Act. These sanctioned activities are in the areas of development of the petroleum resources of Iran, production of refined petroleum products in Iran, sale and provision of refined petroleum products to Iran, and contributing to Iran's ability to acquire or develop certain weapons or technologies; and

(iii) Certifies that the offeror, and any person owned or controlled by the offeror, does not knowingly engage in any transaction that exceeds $15,000 with Iran's Revolutionary Guard Corps or any of its officials, agents, or affiliates, the property and interests in property of which are blocked pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (see OFAC's Specially Designated Nationals and Blocked Persons List at https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx)

(2) Exception for trade agreements. The representation and certification requirements of paragraph (f)(1) of this provision do not apply if—

(i) This solicitation includes a trade agreements notice or certification (e.g., 52.225-6, Trade Agreements Certificate); and

(ii) The offeror has certified that all the offered products to be supplied are designated country end products or designated country construction material.

(iii) The offeror shall email questions concerning sensitive technology to the Department of State at CISADA106@state.gov.

(g) *Disclosure*.

(1) If the Offeror is not able to represent compliance with the prohibitions in paragraphs (c) or (d), then the Offeror shall disclose within 72 hours to the contracting office identified in paragraph (g)(2) the following information for each product or service not compliant:

(i) Contract number and order number, if applicable;

(ii) Identification of whether this disclosure relates to paragraph (c) on covered telecommunication equipment or services, or to paragraph (d) on FASCSA orders;

(iii) A description of the products or services that the Contractor identifies or has reason to suspect is prohibited (include brand; model number, such as the original equipment manufacturer (OEM) number, manufacturer part number, or wholesaler number; and item description, as applicable);

(iv) The entity that produced the product or service (include entity name, unique entity identifier, Contractor and Government Entity (CAGE) code, facilities responsible for design, fabrication, assembly, packaging, and test of the product, and whether the entity was the OEM or a distributor (provide manufacturer codes and distributor codes used for the product));

(v) Description of the functionality of the product or service and how that functionality impacts the risk to the product or service;

(vi) An explanation of any factors relevant to determining if the product or service should be permitted by an applicable exception, exemption, or waiver (if the offeror would like the Government to consider a waiver);

(vii) Whether alternative products or services are available that would be compliant with the prohibition;

(viii) If the product or service is related to item maintenance, include the following information on the item being maintained:

(A) Brand;

(B) Model number, OEM number, manufacturer part number, or wholesaler number; and

(C) Item description, as applicable.

(ix) Any readily available information about mitigation actions undertaken or recommended.

(2) If a disclosure is required to be submitted to a contracting office, the offeror shall submit the disclosure as follows:

(i) If a Department of Defense contracting office, the offeror shall submit the disclosure to the website at https://dibnet.dod.mil.

(ii) For all other contracting offices, the Offeror shall submit the disclosure to the Contracting Officer.

(3) If the disclosure provided does not contain any of the information required by paragraph (1), and the Offeror later discovers new information that is required by paragraph (1), then the Offeror shall submit a subsequent disclosure within 72 hours of discovering the new information.

(h) *Executive agency review of disclosures*. The Contracting Officer will review disclosures provided in paragraph (g) to determine if any applicable waiver may be sought. The Contracting Officer may choose not to pursue a waiver and may instead make an award to an Offeror that does not require a waiver.

(End of provision)

52.240-91 Security Prohibitions and Exclusions.

As prescribed in 40.205(b), insert the following clause:

SECURITY PROHIBITIONS AND EXCLUSIONS (DEVIATION DATE)

(a) *Definitions.* As used in this clause—

American Security Drone Act-covered foreign entity means an entity included on a list that the Federal Acquisition Security Council (FASC) develops and maintains and publishes in the System for Award Management (SAM) at https://www.sam.gov (section 1822 of Pub. L. 118-31, 41 U.S.C. 3901 note prec.).

Backhaul means intermediate links between the core network, or backbone network, and the small subnetworks at the edge of the network (e.g., connecting cell phones/towers to the core telephone network). Backhaul can be wireless (e.g., microwave) or wired (e.g., fiber optic, coaxial cable, Ethernet).

Covered application means the social networking service TikTok or any successor application or service developed or provided by ByteDance Limited or an entity owned by ByteDance Limited.

Covered article, as defined in 41 U.S.C. 4713(k), means:

(1) Information technology, as defined in 40 U.S.C. 11101, including cloud computing services of all types;

(2) Telecommunications equipment or telecommunications service, as those terms are defined in section 3 of the Communications Act of 1934 (47 U.S.C. 153);

(3) The processing of information on a Federal or non-Federal information system, subject to the requirements of the Controlled Unclassified Information program (see 32 CFR part 2002); or

(4) Hardware, systems, devices, software, or services that include embedded or incidental information technology.

Covered foreign country means The People's Republic of China.

Covered telecommunications equipment or services means—

(1) Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities);

(2) For the purpose of public safety, security of Government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities);

(3) Telecommunications or video surveillance services provided by such entities or using such equipment; or

(4) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

Critical technology means—

(1) Defense articles or defense services included on the United States Munitions List set forth in the International Traffic in Arms Regulations under subchapter M of chapter I of title 22, Code of Federal Regulations;

(2) Items included on the Commerce Control List set forth in Supplement No. 1 to part 774 of the Export Administration Regulations under subchapter C of chapter VII of title 15, Code of Federal Regulations, and controlled—

(i) Pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or

(ii) For reasons relating to regional stability or surreptitious listening;

(3) Specially designed and prepared nuclear equipment, parts and components, materials, software, and technology covered by part 810 of title 10, Code of Federal Regulations (relating to assistance to foreign atomic energy activities);

(4) Nuclear facilities, equipment, and material covered by part 110 of title 10, Code of Federal Regulations (relating to export and import of nuclear equipment and material);

(5) Select agents and toxins covered by part 331 of title 7, Code of Federal Regulations, part 121 of title 9 of such Code, or part 73 of title 42 of such Code; or

(6) Emerging and foundational technologies controlled pursuant to section 1758 of the Export Control Reform Act of 2018 (50 U.S.C. 4817).

FASC-prohibited unmanned aircraft system means an unmanned aircraft system manufactured or assembled by an American Security Drone Act—covered foreign entity.

FASCSA order means any of the following orders issued under the Federal Acquisition Supply Chain Security Act (FASCSA) requiring removing covered articles from executive agency information systems or excluding one or more named sources or named covered articles from executive agency procurement actions, as described in 41 CFR 201-1.303(d) and (e):

(1) The Secretary of Homeland Security may issue FASCSA orders that apply to civilian agencies, to the extent not covered by paragraph (2) or (3) of this definition. This type of FASCSA order may be referred to as a Department of Homeland Security (DHS) FASCSA order.

(2) The Secretary of Defense may issue FASCSA orders that apply to the Department of Defense (DoD) and national security systems other than sensitive compartmented information systems. This type of FASCSA order may be referred to as a DoD FASCSA order.

(3) The Director of National Intelligence (DNI) may issue FASCSA orders that apply to the intelligence community and sensitive compartmented information systems, to the extent not covered by paragraph (2) of this definition. This type of FASCSA order may be referred to as a DNI FASCSA order.

Information technology, as defined in 40 U.S.C. 11101(6)—

(1) Means any equipment or interconnected system or subsystem of equipment, used in the automatic acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the executive agency, if the equipment is used by the executive agency directly or is used by a contractor under a contract with the executive agency that requires the use—

(i) Of that equipment; or

(ii) Of that equipment to a significant extent in the performance of a service or the furnishing of a product;

(2) 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; but

(3) Does not include any equipment acquired by a Federal contractor incidental to a Federal contract.

Intelligence community, as defined by 50 U.S.C. 3003(4), means the following—

(1) The Office of the Director of National Intelligence;

(2) The Central Intelligence Agency;

(3) The National Security Agency;

(4) The Defense Intelligence Agency;

(5) The National Geospatial-Intelligence Agency;

(6) The National Reconnaissance Office;

(7) Other offices within the Department of Defense for the collection of specialized national intelligence through reconnaissance programs;

(8) The intelligence elements of the Army, the Navy, the Air Force, the Marine Corps, the Coast Guard, the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Department of Energy;

(9) The Bureau of Intelligence and Research of the Department of State;

(10) The Office of Intelligence and Analysis of the Department of the Treasury;

(11) The Office of Intelligence and Analysis of the Department of Homeland Security; or

(12) Such other elements of any department or agency as may be designated by the President, or designated jointly by the Director of National Intelligence and the head of the department or agency concerned, as an element of the intelligence community.

Interconnection arrangements means arrangements governing the physical connection of two or more networks to allow the use of another's network to hand off traffic where it is ultimately delivered (e.g., connecting a customer of telephone provider A to a customer of telephone company B) or sharing data and other information resources.

Kaspersky Lab-covered article means any hardware, software, or service that—

(1) Is developed or provided by a Kaspersky Lab-covered entity;

(2) Includes any hardware, software, or service developed or provided in whole or in part by a Kaspersky Lab-covered entity; or

(3) Contains components using any hardware or software developed in whole or in part by a Kaspersky Lab-covered entity.

Kaspersky Lab-covered entity means—

(1) Kaspersky Lab;

(2) Any successor entity to Kaspersky Lab, including any change in name, e.g., "Kaspersky";

(3) Any entity that controls, is controlled by, or is under common control with Kaspersky Lab; or

(4) Any entity of which Kaspersky Lab has a majority ownership.

National security system, as defined in 44 U.S.C. 3552, means any information system (including any telecommunications system) used or operated by an agency or by a contractor of an agency, or other organization on behalf of an agency—

(1) The function, operation, or use of which involves intelligence activities; involves cryptologic activities related to national security; involves command and control of military forces; involves equipment that is an integral part of a weapon or weapons system; or is critical to the direct fulfillment of military or intelligence missions, but does not include a system that is to be used for routine administrative and business applications (including payroll, finance, logistics, and personnel management applications); or

(2) Is protected at all times by procedures established for information that have been specifically authorized under criteria established by an Executive order or an Act of Congress to be kept classified in the interest of national defense or foreign policy.

Roaming means cellular communications services (e.g., voice, video, data) received from a visited network when unable to connect to the facilities of the home network either because signal coverage is too weak or because traffic is too high.

Sensitive compartmented information means classified information concerning or derived from intelligence sources, methods, or analytical processes, which is required to be handled within formal access control systems established by the Director of National Intelligence.

Sensitive compartmented information system means a national security system authorized to process or store sensitive compartmented information.

Source means a non-Federal supplier, or potential supplier, of products or services, at any tier.

Subsidiary means an entity in which more than 50 percent of the entity is owned directly by a parent corporation or through another subsidiary of a parent corporation.

Substantial or essential component means any component necessary for the proper function or performance of a piece of equipment, system, or service.

Unmanned aircraft means an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft (49 U.S.C. 44801(11)).

Unmanned aircraft system means an unmanned aircraft and associated elements (including communication links and the components that control the unmanned aircraft) that are required for the operator to operate safely and efficiently in the national airspace system (49 U.S.C. 44801(12)).

(b) *Prohibitions on providing or using specific products or services in performance of contract*. Unless a waiver or exception applies, the Contractor is prohibited from providing any products or services to the Government or using in the performance of the contract any of the following:

(1) A covered application on any information technology owned or managed by the Government, or on any information technology used or provided by the Contractor under this contract, including equipment provided by the Contractor's employees (section 102 of Division R of the Consolidated Appropriations Act, 2023 (Pub. L. 117-328));

(2) A Kaspersky Lab-covered article (Section 1634 of Division A of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91));

(3) Covered telecommunications equipment or services used as a substantial or essential component of any system, or as critical technology as part of any system (paragraphs (a)(1)(A) of section 889 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232)). This does not prohibit contractors from providing—

(i) A service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or

(ii) Telecommunications equipment that cannot route or redirect user data traffic or cannot permit visibility into any user data or packets that such equipment transmits or otherwise handles.

(c) Prohibition on unmanned aircraft systems manufactured or assembled by American Security Drone Act—covered foreign entities.

(1) Prohibition. The Contractor is prohibited from—

(i) Delivering any FASC-prohibited unmanned aircraft system, which includes unmanned aircraft (i.e., drones) and associated elements (sections 1823 and 1826 of American Security Drone Act of 2023, within the National Defense Authorization Act for Fiscal Year 2024, Pub. L. 118-31, Div. A, Title XVIII, Subtitle B, 41 U.S.C. 3901 note prec.);

(ii) On or after December 22, 2025, operating a FASC-prohibited unmanned aircraft system in the performance of the contract (section 1824 of Pub. L. 118-31); and

(iii) On or after December 22, 2025, using Federal funds to procure or operate a FASC-prohibited unmanned aircraft system (section 1825 of Pub. L. 118-31).

(2) *Procedures*. The Contractor shall search SAM for the FASC-maintained list of American Security Drone Act—covered foreign entities before proposing, or using in performance of the contract, any unmanned aircraft system. Also, the Contractor shall ensure any effort or expenditure associated with a FASC-prohibited unmanned aircraft system is consistent with a corresponding exemption, exception, or waiver determination expressly stated in the contract.

(3) *Exemptions, exceptions, and waivers*. The prohibitions in paragraph (c) of this clause do not apply where the agency has determined an exemption, exception, or waiver applies, and the contract indicates that such a determination has been made. See sections 1823 through 1825 and 1832 of Public Law 118-31 for statutory requirements pertaining to exemptions, exceptions, and waivers.

(d) *Prohibition on using or providing specific products or services or conducting certain transactions regardless of connection to contract*.

(1) *Certain telecommunications and video surveillance equipment, systems, or services*.

(i) Unless an applicable waiver has been issued by the Government, the Contractor cannot use any equipment, systems, or services that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system (paragraph (a)(1)(B) of section 889 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232)).

(ii) This prohibition applies to using covered telecommunications equipment or services, regardless of whether that use is in performance of work under a Federal contract. This does not prohibit the contractor from using—

(A) A service that connects to the facilities of a third party, such as backhaul, roaming, or interconnection arrangements; or

(B) Telecommunications equipment that cannot route or redirect user data traffic or cannot permit visibility into any user data or packets that such equipment transmits or otherwise handles.

(2) *Office of Foreign Assets Control Restrictions*.

(i) Except as authorized by the Office of Foreign Assets Control (OFAC) in the Department of the Treasury, the Contractor shall not acquire, for use in the performance of this contract, any supplies or services if any proclamation, Executive order, or statute administered by OFAC, or if OFAC's implementing regulations at 31 CFR chapter V, would prohibit such a transaction by a person subject to the jurisdiction of the United States.

(ii) Except as authorized by OFAC, most transactions involving Cuba, Iran, and Sudan are prohibited, as are most imports from Burma or North Korea, into the United States or its outlying areas.

(A) For lists of entities and individuals subject to economic sanctions, see OFAC's List of Specially Designated Nationals and Blocked Persons at https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists.

(B) For more information about these restrictions, as well as updates, see OFAC's regulations at 31 CFR chapter V and at https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information.

(C) To conduct electronic screens of potential parties to regulated transactions, see the consolidated screening list at https://www.trade.gov/consolidated-screening-list, which consolidates multiple export screening lists of the Departments of Commerce, State, and the Treasury.

(3) *Sudan prohibition*. The Contractor is prohibited from conducting any restricted business operations in Sudan in accordance with Accountability and Divestment Act of 2007 (Pub. L. 110-174).

(4) *Iran prohibitions*.

(i) Unless an exception applies according to paragraph (d)(4)(iii) or the Government grants a waiver, the contractor shall not engage in certain activities or transactions relating to Iran (section 6(b)(1)(A) of Iran Sanctions Act (50 U.S.C. 1701 note).

(ii) Unless an exception applies according to paragraph (d)(4)(iii) or the Government grants a waiver, contractor shall not export certain sensitive technology to Iran, as determined by the President, and has an active exclusion in SAM (22 U.S.C. 8515).

(iii) The prohibition in paragraphs (d)(4)(i) and (d)(4)(ii) do not apply if the acquisition is subject to trade agreements and the offeror certifies that all the offered products are designated country end products or designated country construction material (see part 25).

(iv) Unless an exception applies or the Government grants a waiver, contractors are prohibited from knowingly engaging in any significant transaction (i.e., over $15,000) with Iran's Revolutionary Guard Corps or any of its officials, agents, or affiliates, the property and interests in property of which are blocked according to the International Emergency Economic Powers Act (section 6(b)(1)(B) of Iran Sanctions Act (50 U.S.C. 1701 note)).

(e) *Governmentwide exclusion and removal orders*.

(1) Unless the Government has issued an applicable waiver, contractors shall not provide or use as part of the performance of the contract any covered article, or any products or services produced or provided by a source, if the covered article or the source is prohibited by an applicable FASCSA order as follows:

(i) For solicitations and contracts awarded by a Department of Defense contracting office, DoD FASCSA orders apply.

(ii) For all other solicitations and contracts, DHS FASCSA orders apply.

(2) The Contractor shall search for the phrase "FASCSA order" in the System for Award Management (SAM) at https://www.sam.gov to locate applicable FASCSA orders.

(3) The Government may identify in the solicitation other FASCSA orders that are not in SAM, which are effective and apply to the solicitation and resulting contract.

(4) A FASCSA order issued after the date of solicitation applies to this contract only if added by an amendment to the solicitation or modification to the contract (see FAR 40.204-1(c)).

(f) *Reasonable inquiry*. The contractor shall conduct a reasonable inquiry to determine if there are any prohibited products or services. The inquiry will look at any information in the entity's possession but does not need to include an internal or third-party audit.

(g) *Removal of prohibited products and services*. For Federal Supply Schedules, Governmentwide acquisition contracts, multi-agency contracts or any other procurement instrument intended for use by multiple agencies, upon notification from the Contracting Officer, during the performance of the contract, the Contractor shall promptly make any necessary changes or modifications to remove any product or service produced or provided by a source that this clause prohibits.

(h) *General report*.

(1) If the Contractor identifies or is notified by any source, (including a subcontractor at any tier), that any product or service provided or used (or to be provided or used) during contract performance does not comply with any prohibition in this clause, then the Contractor shall report the following information, or as much information is known, in writing to the contracting office as identified in paragraph (h)(2) within 72 hours:

(i) Contract number and order number, if applicable;

(ii) The specific prohibition the product or service is not complying with;

(iii) A description of the products or services that the Contractor identifies or has reason to suspect is prohibited (include brand; model number, such as the original equipment manufacturer (OEM) number, manufacturer part number, or wholesaler number; and item description, as applicable);

(iv) The entity that produced the product or service (include entity name, unique entity identifier, Contractor and Government Entity (CAGE) code, facilities responsible for design, fabrication, assembly, packaging, and test of the product, and whether the entity was the OEM or a distributor (provide manufacturer codes and distributor codes used for the product));

(v) Description of the functionality of the product or service and how that functionality impacts the risk to the product or service;

(vi) An explanation of any factors relevant to determining if the product or service should be permitted by an applicable exception, exemption, or waiver (if the contractor would like the Government to consider a waiver, and asks for such a waiver);

(vii) Whether alternative products or services are available that would comply with the prohibition;

(viii) If the product or service is related to item maintenance, include the following information on the item being maintained:

(A) Brand;

(B) Model number, OEM number, manufacturer part number, or wholesaler number; and

(C) Item description, as applicable.

(ix) Any readily available information about mitigation actions implemented or recommended.

(2) If a report must be submitted to a contracting office, the Contractor shall submit the report as follows:

(i) If a Department of Defense contracting office, the Contractor shall report to the website at https://dibnet.dod.mil.

(ii) For all other contracting offices, the Contractor shall report to the Contracting Officer.

(iii) For indefinite delivery contracts, the Contractor shall report to both the contracting office for the indefinite delivery contract and the contracting office for any affected order.

(3) If the report provided does not contain any of the information required by paragraph (h)(1) of this clause, and the contractor later discovers new information that is required by paragraph (h)(1) of this clause, then the contractor shall submit a subsequent report within 72 hours of discovering the new information.

(4) The contractor shall also report the information in paragraph (h)(1) if the contractor wishes to ask for a waiver of the requirements of a new FASCSA order being applied through modification.

(i) *New FASCSA orders report*.

(1) During contract performance, the Contractor shall review SAM at least once every three months, or as advised by the Contracting Officer, to check for covered articles subject to FASCSA order(s), or for products or services produced by a source subject to FASCSA order(s) not currently identified under paragraph (e) of this clause.

(2) If the Contractor identifies a new FASCSA order(s) that could impact their supply chain, then the Contractor shall conduct a reasonable inquiry to identify whether a covered article or product or service produced or provided by a source subject to the FASCSA order(s) was provided to the Government or used during contract performance. The inquiry will look at any information in the entity's possession but does not need to include an internal or third-party audit.

(3) The Contractor shall submit a report to the contracting office identified in paragraph (h)(2) of this clause if the Contractor identifies, including through any notification by a subcontractor at any tier, that a covered article or product or service produced or provided by a source was provided to the Government or used during contract performance and is subject to a FASCSA order(s). For indefinite delivery contracts, the Contractor shall report to both the contracting office for the indefinite delivery contract and the contracting office for any affected order. The Contractor shall report the following information within 72 hours for each covered article or each product or service produced or provided by a source, where the covered article or source is subject to a FASCSA order:

(i) Contract number and order number, if applicable;

(ii) Name of the covered article or source subject to a FASCSA order;

(iii) The specific FASCSA order the product or service does not comply with;

(iv) The elements of (h)(1)(iii) through (ix) of this clause.

(j) Subcontracts. The Contractor shall insert the substance of this clause, including this paragraph (j) but excluding subparagraphs (d)(1) and (i)(1), in all subcontracts and other contractual instruments, including subcontracts for acquiring commercial products or commercial services.

(End of clause)

Alternate I (DATE XXXX). As prescribed in 40.205(b), substitute the following paragraph (e)(1) for paragraph (e)(1) of the basic clause:

(e) *Governmentwide exclusion and removal orders*.

(1) Contractors are prohibited from providing or using as part of the performance of the contract any covered article, or any products or services produced or provided by a source, if the covered article or the source is prohibited by any applicable FASCSA orders identified by the checkbox(es) in this paragraph (e)(1). [*Contracting Officer must select either "yes" or "no" for each of the following types of FASCSA orders*:]

Yes □ No □ DHS FASCSA Order

Yes □ No □ DoD FASCSA Order

Yes □ No □ DNI FASCSA Order

52.240-92 Security Requirements.

As prescribed in 40.302-3, insert the following clause:

SECURITY REQUIREMENTS (DEVIATION DATE)

(a) This clause applies to the extent that this contract involves access to information classified Confidential, Secret, or Top Secret.

(b) The Contractor shall comply with—

(1) The Security Agreement (DD Form 441), including the National Industrial Security Program Operating Manual (32 CFR part 117); and

(2) Any revisions to that manual, notice of which has been furnished to the Contractor.

(c) If, after the date of this contract, the security classification or security requirements under this contract are changed by the Government and if the changes cause an increase or decrease in security costs or otherwise affect any other term or condition of this contract, the contract must be subject to an equitable adjustment as if the changes were directed under the Changes clause of this contract

(d) The Contractor agrees to insert terms that conform substantially to the language of this clause, including this paragraph (d) but excluding any reference to the Changes clause of this contract, in all subcontracts under this contract that involve access to classified information.

(e) A subcontractor requiring access to classified information under a contract shall be identified with a CAGE code on the DD Form 254. The Contractor shall require a subcontractor requiring access to classified information to provide its CAGE code with its name and location address or otherwise include it prominently in the proposal. Each location of subcontractor performance listed on the DD Form 254 is required to reflect a corresponding unique CAGE code for each listed location unless the work is being performed at a Government facility, in which case the agency location code shall be used. The CAGE code must be for that name and location address. Insert the word "CAGE" before the number. The CAGE code is required prior to award. The contractor shall ensure that subcontractors maintain their CAGE code(s) throughout the life of the contract.

(End of clause)

Alternate I (DEVIATION DATE). If a cost contract for research and development with an educational institution is contemplated, add the following paragraphs (f), (g), and (h) to the basic clause:

(f)(1) If a change in security requirements, as provided in paragraphs (b) and (c), results in a change in the security classification of this contract or any of its elements from an unclassified status or a lower classification to a higher classification, or in more restrictive area controls than previously required, then the Contractor must exert every reasonable effort compatible with the Contractor's established policies to continue performing the work under the contract to comply with the change in security classification or requirements.

(2) If, despite reasonable efforts, the Contractor determines that continuing work under this contract is not practical because of the change in security classification or requirements, the Contractor shall notify the Contracting Officer in writing. Until the Contracting Officer resolves this problem, the Contractor shall continue safeguarding all classified material as required by this contract.

(g) After receiving the written notification, the Contracting Officer shall explore the circumstances surrounding the proposed change in security classification or requirements and must try to work out a mutually satisfactory method so the Contractor can continue doing the work under this contract.

(h) If, 15 days after receipt by the Contracting Officer of the notification of the Contractor's stated inability to proceed, the application to this contract of the change in security classification or requirements has not been withdrawn or a mutually satisfactory method for continuing performance of work under this contract has not been agreed upon, the Contractor may request the Contracting Officer to terminate the contract in whole or in part. The Contracting Officer shall terminate the contract in whole or in part, as may be appropriate, and the termination must be deemed a termination under the terms of the Termination for the Convenience of the Government clause.

Alternate II (DEVIATION DATE). If employee identification is required for security or other reasons in a construction contract or architect-engineer contract, add the following paragraph (f) to the basic clause:

(f) The Contractor is responsible for furnishing to each employee, and for requiring each employee engaged on the work to display, such identification as may be approved and directed by the Contracting Officer. All prescribed identification shall immediately be delivered to the Contracting Officer, for cancellation upon the release of any employee. When required by the Contracting Officer, the Contractor shall obtain and submit fingerprints of all persons employed or to be employed on the project.

52.240-93 Basic Safeguarding of Covered Contractor Information Systems.

As prescribed in 40.303-2, insert the following clause:

BASIC SAFEGUARDING OF COVERED CONTRACTOR INFORMATION SYSTEMS (DEVIATION DATE)

(a) Definitions. As used in this clause—

Covered contractor information system means an information system that is owned or operated by a contractor that processes, stores, or transmits Federal contract information.

Federal contract information—

(1) Means information, not intended for public release, that is provided by or generated for the Government under a contract to develop or deliver a product or service to the Government; but

(2) Does not include information provided by the Government to the public (such as on public websites) or simple transactional information (such as information necessary to process payments).

Information means 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 (Committee on National Security Systems Instruction (CNSSI) 4009).

Information system means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information (44 U.S.C. 3502).

Safeguarding means measures or controls that are prescribed to protect information systems.

(b) *Safeguarding requirements*.

(1) Basic requirements. The Contractor shall safeguard its covered contractor information systems by implementing, at minimum, the following security controls:

(i) Limit information system access to authorized users, processes acting on behalf of authorized users, or devices (including other information systems).

(ii) Limit information system access to the types of transactions and functions that authorized users are permitted to execute.

(iii) Verify and control/limit connections to and use of external information systems.

(iv) Control information posted or processed on publicly accessible information systems.

(v) Identify information system users, processes acting on behalf of users, or devices.

(vi) Authenticate (or verify) the identities of those users, processes, or devices, as a prerequisite to allowing access to organizational information systems.

(vii) Sanitize or destroy information system media containing Federal Contract Information before disposal or release for reuse.

(viii) Limit physical access to organizational information systems, equipment, and the respective operating environments to authorized individuals.

(ix) Escort visitors and monitor visitor activity; maintain audit logs of physical access; and control and manage physical access devices.

(x) Monitor, control, and protect organizational communications (i.e., information transmitted or received by organizational information systems) at the external boundaries and key internal boundaries of the information systems.

(xi) Implement subnetworks for publicly accessible system components that are physically or logically separated from internal networks.

(xii) Identify, report, and correct information and information system flaws in a timely manner.

(xiii) Provide protection from malicious code at appropriate locations within organizational information systems.

(xiv) Update malicious code protection mechanisms when new releases are available.

(xv) Perform periodic scans of the information system and real-time scans of files from external sources as files are downloaded, opened, or executed.

(2) Other requirements. This clause does not relieve the Contractor of any other specific safeguarding requirements specified by Federal departments and agencies relating to covered contractor information systems generally or other Federal safeguarding requirements for controlled unclassified information (CUI) as established by Executive Order 13556.

(c) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (c), in subcontracts under this contract (including subcontracts for the acquisition of commercial products, other than commercially available off-

the-shelf items, or commercial services), in which the subcontractor may have Federal contract information residing in or transiting through its information system.

(End of clause)

52.241 [Reserved]

52.241-1 Electric Service Territory Compliance Representation.

As prescribed in 41.501(b), insert a provision substantially the same as the following:

ELECTRIC SERVICE TERRITORY COMPLIANCE REPRESENTATION (MAY 1999)

(a) Section 8093 of Public Law100-202 generally requires purchases of electricity by any department, agency, or instrumentality of the United States to be consistent with State law governing the provision of electric utility service, including State utility commission rulings and electric utility franchises or service territories established pursuant to State statute, State regulation, or State-approved territorial agreements.

(b) By signing this offer, the offeror represents that this offer to sell electricity is consistent with Section 8093 of Public Law100-202.

(c) Upon request of the Contracting Officer, the offeror shall submit supporting legal and factual rationale for this representation.

(End of clause)

52.241-2 Order of Precedence-Utilities.

As prescribed in 41.501(c)(1), insert a clause substantially the same as the following:

ORDER OF PRECEDENCE-UTILITIES (FEB 1995)

In the event of any inconsistency between the terms of this contract (including the specifications) and any rate schedule, rider, or exhibit incorporated in this contract by reference or otherwise, or any of the Contractor's rules and regulations, the terms of this contract shall control.

(End of clause)

52.241-3 Scope and Duration of Contract.

As prescribed in 41.501(c)(2), insert a clause substantially the same as the following:

SCOPE AND DURATION OF CONTRACT (FEB 1995)

(a) For the period _____, *[insert period of service]* the Contractor agrees to furnish and the Government agrees to purchase _____ *[insert type of service]* utility service in accordance with the applicable tariff(s), rules, and regulations as approved by the applicable governing regulatory body and as set forth in the contract.

(b) It is expressly understood that neither the Contractor nor the Government is under any obligation to continue any service under the terms and conditions of this contract beyond the expiration date.

(c) The Contractor shall provide the Government with one complete set of rates, terms, and conditions of service which are in effect as of the date of this contract and any subsequently approved rates.

(d) The Contractor shall be paid at the applicable rate(s) under the tariff and the Government shall be liable for the minimum monthly charge, if any, specified in this contract commencing with the period in which service is initially furnished and continuing for the term of this contract. Any minimum monthly charge specified in this contract shall be equitably prorated for the periods in which commencement and termination of this contract become effective.

(End of clause)

52.241-4 Change in Class of Service.

As prescribed in 41.501(c)(3), insert a clause substantially the same as the following:

CHANGE IN CLASS OF SERVICE (FEB 1995)

(a) In the event of a change in the class of service, such service shall be provided at the Contractor's lowest available rate schedule applicable to the class of service furnished.

(b) Where the Contractor does not have on file with the regulatory body approved rate schedules applicable to services provided, no clause in this contract shall preclude the parties from negotiating a rate schedule applicable to the class of service furnished.

(End of clause)

52.241-5 Contractor's Facilities.

As prescribed in 41.501(c)(4), insert a clause substantially the same as the following:

CONTRACTOR'S FACILITIES (FEB 1995)

(a) The Contractor, at its expense, unless otherwise provided for in this contract, shall furnish, install, operate, and maintain all facilities required to furnish service hereunder, and measure such service at the point of delivery specified in the Service Specifications. Titleto all such facilities shall remain with the Contractor and the Contractor shall be responsible for loss or damage to such facilities, except that the Government shall be responsible to the extent that loss or damage has been caused by the Government's negligent acts or omissions.

(b) Notwithstanding any terms expressed in this clause, the Contractor shall obtain approval from the Contracting Officer prior to any equipment installation, construction, or removal. The Government hereby grants to the Contractor, free of any rental or similar charge, but subject to the limitations specified in this contract, a revocable permit or license to enter the service location for any proper purpose under this contract. This permit or license includes use of the site or sites agreed upon by the parties hereto for the installation, operation, maintenance, and repair of the facilities of the Contractor required to be located upon Government premises. All applicable taxes and other charges in connection therewith, together with all liability of the Contractor in construction, operation, maintenance and repair of such facilities, shall be the obligation of the Contractor.

(c) Authorized representatives of the Contractor will be allowed access to the facilities on Government premises at reasonable times to perform the obligations of the Contractor regarding such facilities. It is expressly understood that the Government may limit or restrict the right of access herein granted in any manner considered necessary (*e.g.,* national security, public safety).

(d) Unless otherwise specified in this contract, the Contractor shall, at its expense, remove such facilities and restore Government premises to their original condition as near as practicable within a reasonable time after the Government terminates this contract. In the event such termination of this contract is due to the fault of the Contractor, such facilities may be retained in place at the option of the Government for a reasonable time while the Government attempts to obtain service elsewhere comparable to that provided for hereunder.

(End of clause)

52.241-6 Service Provisions.

As prescribed in 41.501(c)(5), insert a clause substantially the same as the following:

SERVICE PROVISIONS (FEB 1995)

(a) *Measurement of service*. (1) All service furnished by the Contractor shall be measured by suitable metering equipment of standard manufacture, to be furnished, installed, maintained, repaired, calibrated, and read by the Contractor at its expense. When more than a single meter is installed at a service location, the readings thereof may be billed conjunctively, if appropriate. In the event any meter fails to register (or registers incorrectly) the service furnished, the parties shall agree upon the length of time of meter malfunction and the quantity of service delivered during such period of time. An appropriate adjustment shall be made to the next invoice for the purpose of correcting such errors. However, any meter which registers not more than ___ percent slow or fast shall be deemed correct.

(2) The Contractor shall read all meters at periodic intervals of approximately 30 days or in accordance with the policy of the cognizant regulatory body or applicable bylaws. All billings based on meter readings of less than ___ days shall be prorated accordingly.

(b) *Meter test.* (1) The Contractor, at its expense, shall periodically inspect and test Contractor-installed meters at intervals not exceeding _____ year(s). The Government has the right to have representation during the inspection and test.

(2) At the written request of the Contracting Officer, the Contractor shall make additional tests of any or all such meters in the presence of Government representatives. The cost of such additional tests shall be borne by the Government if the percentage of errors is found to be not more than ___ percent slow or fast.

(3) No meter shall be placed in service or allowed to remain in service which has an error in registration in excess of ___ percent under normal operating conditions.

(c) *Change in volume or character.* Reasonable notice shall be given by the Contracting Officer to the Contractor regarding any material changes anticipated in the volume or characteristics of the utility service required at each location.

(d) *Continuity of service and consumption.* The Contractor shall use reasonable diligence to provide a regular and uninterrupted supply of service at each service location, but shall not be liable for damages, breach of contract or otherwise, to the Government for failure, suspension, diminution, or other variations of service occasioned by or in consequence of any cause beyond the control of the Contractor, including but not limited to acts of God or of the public enemy, fires, floods, earthquakes, or other catastrophe, strikes, or failure or breakdown of transmission or other facilities. If any such failure, suspension, diminution, or other variation of service shall aggregate more than _____ hour(s) during any billing period hereunder, an equitable adjustment shall be made in the monthly billing specified in this contract (including the minimum monthly charge).

(End of clause)

52.241-7 Change in Rates or Terms and Conditions of Service for Regulated Services.

As prescribed in 41.501(d)(1), insert a clause substantially the same as the following:

CHANGE IN RATES OR TERMS AND CONDITIONS OF SERVICE FOR REGULATED SERVICES (FEB 1995)

(a) This clause applies to the extent services furnished under this contract are subject to regulation by a regulatory body. The Contractor agrees to give *_____ written notice of (1) the filing of an application for change in rates or terms and conditions of service concurrently with the filing of the application and (2) any changes pending with the regulatory body as of the date of contract award. Such notice shall fully describe the proposed change. If, during the term of this contract, the regulatory body having jurisdiction approves any changes, the Contractor shall forward to the Contracting Officer a copy of such changes within 15 days after the effective date thereof. The Contractor agrees to continue furnishing service under this contract in accordance with the amended tariff, and the Government agrees to pay for such service at the higher or lower rates as of the date when such rates are made effective.

(b) The Contractor agrees that throughout the life of this contract the applicable published and unpublished rate schedule(s) shall not be in excess of the lowest cost published and unpublished rate schedule(s) available to any other customers of the same class under similar conditions of use and service.

(c) In the event that the regulatory body promulgates any regulation concerning matters other than rates which affects this contract, the Contractor shall immediately provide a copy to the Contracting Officer. The Government shall not be bound to accept any new regulation inconsistent with Federal laws or regulations.

(d) Any changes to rates or terms and conditions of service shall be made a part of this contract by the issuance of a contract modification unless otherwise specified in the contract. The effective date of the change shall be the effective date by the regulatory body. Any factors not governed by the regulatory body will have an effective date as agreed to by the parties.

* *Note:* Insert language prescribed in 41.501(d)(1).

(End of clause)

52.241-8 Change in Rates or Terms and Conditions of Service for Unregulated Services.

As prescribed in 41.501(d)(2), insert a clause substantially the same as the following:

CHANGE IN RATES OR TERMS AND CONDITIONS OF SERVICE FOR UNREGULATED SERVICES (FEB 1995)

(a) This clause applies to the extent that services furnished hereunder are not subject to regulation by a regulatory body.

(b) After _____ *[insert date]*, either party may request a change in rates or terms and conditions of service, unless otherwise provided in this contract. Both parties agree to enter in negotiations concerning such changes upon receipt of a written request detailing the proposed changes and specifying the reasons for the proposed changes.

(c) The effective date of any change shall be as agreed to by the parties. The Contractor agrees that throughout the life of this contract the rates so negotiated will not be in excess of published and unpublished rates charged to any other customer of the same class under similar terms and conditions of use and service.

(d) The failure of the parties to agree upon any change after a reasonable period of time shall be a dispute under the Disputes clause of this contract.

(e) Any changes to rates, terms, or conditions as a result of such negotiations shall be made a part of this contract by the issuance of a contract modification.

(End of clause)

52.241-9 Connection Charge.

As prescribed in 41.501(d)(3), insert a clause substantially the same as the following:

CONNECTION CHARGE (FEB 1995)

(a) *Charge*. In consideration of the Contractor furnishing and installing at its expense the new connection facilities described herein, the Government shall pay the Contractor a connection charge. The payment shall be in the form of progress payments, advance payments or as a lump sum, as agreed to by the parties and as permitted by applicable law. The total amount payable shall be either the estimated cost of $_____ less the agreed to salvage value of $_____, or the actual cost less the salvage value, whichever is less. As a condition precedent to final payment, the Contractor shall execute a release of any claims against the Government arising under or by the virtue of such installation.

(b) *Ownership, operation, maintenance and repair of new facilities to be provided*. The facilities to be supplied by the Contractor under this clause, notwithstanding the payment by the Government of a connection charge, shall be and remain the property of the Contractor and shall, at all times during the life of this contract or any renewals thereof, be operated, maintained, and repaired by the Contractor at its expense. All taxes and other charges in connection therewith, together with all liability arising out of the construction, operations, maintenance, or repair of such facilities, shall be the obligation of the Contractor.

(c) *Credits*. (1) The Contractor agrees to allow the Government, on each monthly bill for service furnished under this contract to the service location, a credit of _____ percent of the amount of each such bill as rendered until the accumulation of credits shall equal the amount of such connection charge, provided that the Contractor may at any time allow a credit up to 100 percent of the amount of each such bill.

(2) In the event the Contractor, before any termination of this contract but after completion of the facilities provided for in this clause, serves any customer other than the Government (regardless of whether the Government is being served simultaneously, intermittently, or not at all) by means of these facilities, the Contractor shall promptly notify the Government in writing. Unless otherwise agreed by the parties in writing at that time, the Contractor shall promptly accelerate the credits provided for under paragraph (c)(1) of this clause, up to 100 percent of each monthly bill until there is refunded the amount that reflects the Government's connection costs for that portion of the facilities used in serving others.

(3) In the event the Contractor terminates this contract, or defaults in performance, prior to full credit of any connection charge paid by the Government, the Contractor shall pay to the Government an amount equal to the uncredited balance of the connection charge as of the date of the termination or default.

(d) *Termination before completion of facilities.* The Government reserves the right to terminate this contract at any time before completion of the facilities with respect to which the Government is to pay a connection charge. In the event the Government exercises this right, the Contractor shall be paid the cost of any work accomplished, including direct and indirect costs reasonably allocable to the completed work prior to the time of termination by the Government, plus the cost of removal, less the salvage value.

(e) *Termination after completion of facilities.* In the event the Government terminates this contract after completion of the facilities with respect to which the Government has paid a connection charge, but before the crediting in full by the Contractor of any connection charge in accordance with the terms of this contract, the Contractor shall have the following options:

(1) To retain in place for _____ months after the notice of termination by the Government such facilities on condition that-

(i) If, during such _____ month period, the Contractor serves any other customer by means of such facilities, the Contractor, shall, in lieu of allowing credits, pay the Government during such period installments in like amount, manner, and extent as the credit provided for under paragraph (c) of this clause before such termination; and

(ii) Immediately after such _____ month period the Contractor shall promptly pay in full to the Government the uncredited balance of the connection charge.

(2) To remove such facilities at the Contractor's own expense within _____ months after the effective date of the termination by the Government. If the Contractor elects to remove such facilities, the Government shall then have the option of purchasing such facilities at the agreed salvage value set forth herein; and provided further, that the Contractor shall, at the direction of the Government, leave in place such facilities located on Government property which the Government elects to purchase at the agreed salvage value.

(End of clause)

Alternate I (FEB 1995). If the Contracting Officer determines that a nonrefundable charge is to be paid and no credits are due the Government, delete paragraphs (c) and (e), renumber paragraph (d) as (c) and add the following as paragraph (d):

(d) *Termination after completion of facilities.* In the event the Government terminates this contract after completion of the facilities with respect to which the Government is to pay a connection charge, the Contractor shall have the following options:

(1) To retain in place for _____ months after the notice of termination by the Government. If the Contractor and the Government have not agreed on terms for retention in place beyond _____ months, then the Contractor must remove the facilities pursuant to the terms of paragraph (d)(2) of this clause.

(2) To remove such facilities at the Contractor's own expense within _____ months after the effective date of the termination by the Government. If the Contractor elects to remove such facilities, the Government shall then have the option of purchasing such facilities at the agreed salvage value set forth herein; and provided further, that the Contractor shall, at the direction of the Government, leave in place such facilities located on Government property which the Government elects to purchase at the agreed salvage value.

52.241-10 Termination Liability.

As prescribed in 41.501(d)(4), insert a clause substantially the same as the following:

TERMINATION LIABILITY (FEB 1995)

(a) If the Government discontinues utility service under this contract before completion of the facilities cost recovery period specified in paragraph (b) of this clause, in consideration of the Contractor furnishing and installing at its expense, the new facility described herein, the Government shall pay termination charges, calculated as set forth in this clause.

(b) *Facility cost recovery period.* The period of time, not exceeding the term of this contract, during which the net cost of the new facility shall be recovered by the Contractor is _____ months.[*Insert negotiated duration.*]

(c) *Net facility cost.* The cost of the new facility, less the agreed upon salvage value of such facility, is $_____. *[Insert appropriate dollar amount.]*

(d) *Monthly facility cost recovery rate.* The monthly facility cost recovery rate which the Government shall pay the Contractor whether or not service is received is $_____.*[Divide the net facility cost in paragraph (c) of this clause by the facility's cost recovery period in paragraph (b) of this clause and insert the resultant figure.]*

(e) *Termination charges.* Termination charges = $____.*[Multiply the remaining months of the facility's cost recovery period specified in paragraph (b) of this clause by the monthly facility cost recovery rate in paragraph (d) of this clause and insert the resultant figure.]*

(f) If the Contractor has recovered its capital costs at the time of termination there will be no termination liability charge.

(End of clause)

52.241-11 Multiple Service Locations.

As prescribed in 41.501(d)(5), insert a clause substantially the same as the following:

MULTIPLE SERVICE LOCATIONS (FEB 1995)

(a) At any time by written order, the Contracting Officer may designate any location within the service area of the Contractor at which utility service shall commence or be discontinued. Any changes to the service specifications shall be made a part of the contract by the issuance of a contract modification to include the name and location of the service, specifying any different rate, the point of delivery, different service specifications, and any other terms and conditions.

(b) The applicable monthly charge specified in this contract shall be equitably prorated from the period in which commencement or discontinuance of service at any service location designated under the Service Specifications shall become effective.

(End of clause)

52.241-12 Nonrefundable, Nonrecurring Service Charge.

As prescribed in 41.501(d)(6), insert a clause substantially the same as the following:

NONREFUNDABLE, NONRECURRING SERVICE CHARGE (FEB 1995)

As provided herein, the Government will pay a nonrefundable, nonrecurring charge when the rules and regulations of a Contractor require that a customer pay (1)a charge for the initiation of service, (2)a contribution in aid of construction, or (3)a nonrefundable membership fee. This charge may be in addition to or in lieu of a connection charge. Therefore, there is hereby added to the Contractor's schedule a nonrefundable, nonrecurring charge for _____ in the amount of $_____ dollars payable .[*specify dates or schedules*]

(End of clause)

52.241-13 Capital Credits.

As prescribed in 41.501(d)(7), insert a clause substantially the same as the following:

CAPITAL CREDITS (FEB 1995)

(a) The Government is a member of the _____ *[insert cooperative name]*, and as any other member, is entitled to capital credits consistent with the bylaws of the cooperative, which states the obligation of the Contractor to pay capital credits and which specifies the method and time of payment.

(b) The Contractor shall furnish to the Contracting Officer, or the designated representative of the Contracting Officer, in writing, on an _____ basis [*insert period of time*] a list of accrued credits by contract number, year, and delivery point.

(c) Payment of capital credits will be made by check, payable to the _____ *[insert agency name]*, and forwarded to the Contracting Officer at _____ *[insert agency address]*, unless otherwise directed in writing by the Contracting Officer. Checks shall cite the current or last contract number and indicate whether the check is partial or final payment for all capital credits accrued.

(End of clause)

52.242 [Reserved]

52.242-1 Notice of Intent to Disallow Costs.

As prescribed in 42.602, insert the following clause:

NOTICE OF INTENT TO DISALLOW COSTS (APR 1984)

(a) Notwithstanding any other clause of this contract-

(1) The Contracting Officer may at any time issue to the Contractor a written notice of intent to disallow specified costs incurred or planned for incurrence under this contract that have been determined not to be allowable under the contract terms; and

(2) The Contractor may, after receiving a notice under paragraph (a)(1) of this clause, submit a written response to the Contracting Officer, with justification for allowance of the costs. If the Contractor does respond within 60 days, the Contracting Officer will, within 60 days of receiving the response, either make a written withdrawal of the notice or issue a written decision.

(b) Failure to issue a notice under this Notice of Intent to Disallow Costs clause does not affect the Government's rights to take exception to incurred costs.

(End of clause)

52.242-2 Production Progress Reports.

As prescribed in 42.805(a), insert the following clause:

PRODUCTION PROGRESS REPORTS (APR 1991)

(a) The Contractor must prepare and submit to the Contracting Officer the production progress reports specified in the contract Schedule.

(b) During any delay in furnishing a production progress report required under this contract, the Contracting Officer may withhold from payment an amount not exceeding $25,000 or 5 percent of the amount of this contract, whichever is less.

(End of clause)

52.242-3 Penalties for Unallowable Costs.

As prescribed in 42.508-7, use the following clause:

PENALTIES FOR UNALLOWABLE COSTS (DEVIATION DATE)

(a) *Definition. Proposal*, as used in this clause, means either—

(1) A final indirect cost rate proposal submitted by the Contractor after the expiration of its fiscal year which—

(i) Relates to any payment made on the basis of billing rates; or

(ii) Will be used in negotiating the final contract price; or

(2) The final statement of costs incurred and estimated to be incurred under the Incentive Price Revision clause (if applicable), which is used to establish the final contract price.

(b) Contractors which include unallowable indirect costs in a proposal may be subject to penalties. The penalties are prescribed in 10 U.S.C. 3748 or 41 U.S.C. chapter 43, as applicable, which is implemented in section 42.508 of the Federal Acquisition Regulation (FAR).

(c) The Contractor must not include in any proposal any cost that is unallowable, as defined in subpart 2.1 of the FAR, or an executive agency supplement to the FAR.

(d) If the Contracting Officer determines that a cost submitted by the Contractor in its proposal is expressly unallowable under a cost principle in the FAR, or an executive agency supplement to the FAR, that defines the allowability of specific selected costs, the Contractor must be assessed a penalty equal to–

(1) The amount of the disallowed cost allocated to this contract; plus

(2) Simple interest, to be computed-

(i) On the amount the Contractor was paid (whether as a progress or billing payment) in excess of the amount to which the Contractor was entitled; and

(ii) Using the applicable rate effective for each six-month interval prescribed by the Secretary of the Treasury pursuant to 41 U.S.C. 7109.

(e) If the Contracting Officer determines that a cost submitted by the Contractor in its proposal includes a cost previously determined to be unallowable for that Contractor, then the Contractor will be assessed a penalty in an amount equal to two times the amount of the disallowed cost allocated to this contract.

(f) Determinations under paragraphs (d) and (e) of this clause are final decisions within the meaning of 41 U.S.C. chapter 71, Contract Disputes.

(g) Pursuant to the criteria in FAR 42.508-6, the Contracting Officer may waive the penalties in paragraph (d) or (e) of this clause.

(h) Payment by the Contractor of any penalty assessed under this clause does not constitute repayment to the Government of any unallowable cost which has been paid by the Government to the Contractor.

(End of clause)

52.242-4 Certification of Final Indirect Costs.

As prescribed in 42.503-2(f), insert the following clause:

CERTIFICATION OF FINAL INDIRECT COSTS (JAN 1997)

(a) The Contractor shall-

(1) Certify any proposal to establish or modify final indirect cost rates;

(2) Use the format in paragraph (c) of this clause to certify; and

(3) Have the certificate signed by an individual of the Contractor's organization at a level no lower than a vice president or chief financial officer of the business segment of the Contractor that submits the proposal.

(b) Failure by the Contractor to submit a signed certificate, as described in this clause, may result in final indirect costs at rates unilaterally established by the Contracting Officer.

(c) The certificate of final indirect costs shall read as follows:

Certificate of Final Indirect Costs

This is to certify that I have reviewed this proposal to establish final indirect cost rates and to the best of my knowledge and belief:

1. All costs included in this proposal (identify proposal and date) to establish final indirect cost rates for (identify period covered by rate) are allowable in accordance with the cost principles of the Federal Acquisition Regulation (FAR) and its supplements applicable to the contracts to which the final indirect cost rates will apply; and

2. This proposal does not include any costs which are expressly unallowable under applicable cost principles of the FAR or its supplements.

Firm: _____

Signature: _____

Name of Certifying Official: _____

Title: _____

Date of Execution: _____

(End of clause)

52.242-5 Payments to Small Business Subcontractors.

As prescribed in 42.1104 , insert the following clause:

PAYMENTS TO SMALL BUSINESS SUBCONTRACTORS (JAN 2017)

(a) *Definitions*. As used in this clause-

Reduced payment means a payment that is for less than the amount agreed upon in a subcontract in accordance with its terms and conditions, for supplies and services for which the Government has paid the prime contractor.

Untimely payment means a payment that is more than 90 days past due under the terms and conditions of a subcontract, for supplies and services for which the Government has paid the prime contractor.

(b) *Notice*. The Contractor shall notify the Contracting Officer, in writing, not later than 14 days after-

(1) A small business subcontractor was entitled to payment under the terms and conditions of the subcontract; and

(2) The Contractor-

(i) Made a reduced or untimely payment to the small business subcontractor; or

(ii) Failed to make a payment, which is now untimely.

(c) *Content of notice*. The Contractor shall include the reason(s) for making the reduced or untimely payment in any notice required under paragraph (b) of this clause.

(End of clause)

52.242-6 [Reserved]

52.242-7 [Reserved]

52.242-8 [Reserved]

52.242-9 [Reserved]

52.242-10 [Reserved]

52.242-11 [Reserved]

52.242-12 [Reserved]

52.242-13 Bankruptcy.

As prescribed in 42.703, insert the following clause:

BANKRUPTCY (JULY 1995)

In the event the Contractor enters into proceedings relating to bankruptcy, whether voluntary or involuntary, the Contractor agrees to furnish, by certified mail or electronic commerce method authorized by the contract, written notification of the bankruptcy to the Contracting Officer responsible for administering the contract. This notification shall be furnished within five days of the initiation of the proceedings relating to bankruptcy filing. This notification shall include the date on which the bankruptcy petition was filed, the identity of the court in which the bankruptcy petition was filed, and a listing of Government contract numbers and contracting offices for all Government contracts against which final payment has not been made. This obligation remains in effect until final payment under this contract.

(End of clause)

52.242-14 Suspension of Work.

As prescribed in 42.1005(a), insert the following clause:

SUSPENSION OF WORK (APR 1984)

(a) The Contracting Officer may order the Contractor, in writing, to suspend, delay, or interrupt all or any part of the work of this contract for the period of time that the Contracting Officer determines appropriate for the convenience of the Government.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1)by an act of the Contracting Officer in the administration of this contract, or (2)by the Contracting Officer's failure to act within the time specified in this contract (or within a reasonable time if not specified), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable

suspension, delay, or interruption, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an equitable adjustment is provided for or excluded under any other term or condition of this contract.

(c) A claim under this clause shall not be allowed-

(1) For any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order); and

(2) Unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the contract.

(End of clause)

52.242-15 Stop-Work Order.

As prescribed in 42.1005(b), insert the following clause:

STOP-WORK ORDER (AUG 1989)

(a) The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this contract for a period of 90 days after the order is delivered to the Contractor, and for any further period to which the parties may agree. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of 90 days after a stop-work order is delivered to the Contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either-

(1) Cancel the stop-work order; or

(2) Terminate the work covered by the order as provided in the Default, or the Termination for Convenience of the Government, clause of this contract.

(b) If a stop-work order issued under this clause is canceled or the period of the order or any extension thereof expires, the Contractor shall resume work. The Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both, and the contract shall be modified, in writing, accordingly, if-

(1) The stop-work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract; and

(2) The Contractor asserts its right to the adjustment within 30 days after the end of the period of work stoppage; provided, that, if the Contracting Officer decides the facts justify the action, the Contracting Officer may receive and act upon a proposal submitted at any time before final payment under this contract.

(c) If a stop-work order is not canceled and the work covered by the order is terminated for the convenience of the Government, the Contracting Officer shall allow reasonable costs resulting from the stop-work order in arriving at the termination settlement.

(d) If a stop-work order is not canceled and the work covered by the order is terminated for default, the Contracting Officer shall allow, by equitable adjustment or otherwise, reasonable costs resulting from the stop-work order.

(End of clause)

Alternate I (APR 1984). If this clause is inserted in a cost-reimbursement contract, substitute in paragraph (a)(2) the words "the Termination clause of this contract" for the words "the Default, or the Termination for Convenience of the Government clause of this contract." In paragraph (b) substitute the words "an equitable adjustment in the delivery schedule, the estimated cost, the fee, or a combination thereof, and in any other terms of the contract that may be affected" for the words "an equitable adjustment in the delivery schedule or contract price, or both."

52.242-16 [Reserved]

52.242-17 Government Delay of Work.

As prescribed in 42.1005(c), insert the following clause:

GOVERNMENT DELAY OF WORK (APR 1984)

(a) If the performance of all or any part of the work of this contract is delayed or interrupted (1)by an act of the Contracting Officer in the administration of this contract that is not expressly or impliedly authorized by this contract, or (2)by a failure of the Contracting Officer to act within the time specified in this contract, or within a reasonable time if not specified, an adjustment (excluding profit) shall be made for any increase in the cost of performance of this contract caused by the delay or interruption and the contract shall be modified in writing accordingly. Adjustment shall also be made in the delivery or performance dates and any other contractual term or condition affected by the delay or interruption. However, no adjustment shall be made under this clause for any delay or interruption to the extent that performance would have been delayed or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an adjustment is provided or excluded under any other term or condition of this contract.

(b) A claim under this clause shall not be allowed-

(1) For any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved; and

(2) Unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the delay or interruption, but not later than the day of final payment under the contract.

(End of clause)

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52.243 [Reserved]

52.243-1 Changes-Fixed-Price.

As prescribed in 43.305(a)(1), insert the following clause. Agency procedures may vary the 30-day period.

CHANGES-FIXED PRICE (DEVIATION DATE)

(a) (1) At any time, the Contracting Officer may issue a written order making changes within the scope of this contract related to:

(i) Drawings, designs, or specifications which require special manufacturing of supplies for the Government,

(ii) The method of shipment or packing, or

(iii) Place of delivery.

(2) If there are any sureties, the Contracting Officer does not need to notify them of a written order.

(b) Whether or not changed by the order, if any of the changes cause an increase or decrease in the cost of, or the time required for, performance of the work under this contract, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

(c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

(d) If the Contractor's proposal includes the cost of property made obsolete or has become excess by the change, the Contracting Officer shall have the right to prescribe the manner of the disposition of the property.

(e) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

(End of clause)

Alternate I (DEVIATION DATE). If no supplies are to be furnished and the requirement is for services, other than architect-engineer or other professional services, the following paragraph (a) will be substituted for paragraph (a) in the basic clause:

(a)(1) At any time, the Contracting Officer may issue a written order making changes within the scope of this contract in any one or more of the following:

(i) Description of services to be performed.

(ii) Time of performance (*i.e.,* hours of the day, days of the week, etc.).

(iii) Place of performance of the services.

(2) If there are any sureties, the Contracting Officer does not need to notify them of a written order.

Alternate II (Deviation Date). If the requirement is for services (other than architect-engineer services, transportation, or research and development) and supplies are to be furnished, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a)(1) At any time, the Contracting Officer may issue a written order making changes within the scope of this contract in any one or more of the following:

(i) Description of services to be performed.

(ii) Time of performance (*i.e.*, hours of the day, days of the week, etc.).

(iii) Place of performance of the services.

(iv) Drawings, designs, or specifications which require special manufacturing of supplies for the Government.

(v) Method of shipment or packing of supplies.

(vi) Place of delivery.

(2) If there are any sureties, the Contracting Officer does not need to notify them of a written order.

Alternate III (DEVIATION DATE). If the requirement is for architect-engineer or other professional services, substitute the following paragraph (a) for paragraph (a) of the basic clause and add the following paragraph (f):

(a)(1) At any time, the Contracting Officer may issue a written order to make changes within the scope of this contract in the services to be performed.

(2) If there are any sureties, the Contracting Officer does not need to notify them of a written order.

(f) No services for which an additional cost or fee will be charged by the Contractor shall be furnished without the prior written authorization of the Contracting Officer.

Alternate IV (Deviation Date). If the requirement is for transportation services, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a)(1) At any time, the Contracting Officer may issue a written order to make changes within the scope of this contract in any one or more of the following:

(i) Specifications.

(ii) Work or services.

(iii) Place of origin.

(iv) Place of delivery.

(v) Tonnage to be shipped.

(vi) Amount of Government-furnished property.

(2) If there are any sureties, the Contracting Officer does not need to notify them of a written order.

Alternate V (Deviation Date). If the requirement is for research and development and it is desired to include the clause, substitute the following subparagraphs (a)(1)(i) and (a)(1)(iii) and paragraph (b) for subparagraphs (a)(1)(i) and (a)(1)(iii) and paragraph (b) of the basic clause:

(a)(1)

(i) Drawings, designs, or specifications.

(iii) Place of inspection, delivery, or acceptance.

(b) If any such change causes an increase or decrease in the cost of, or time required for, performing this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in—

(1) The contract price, the time of performance, or both; and

(2) Other affected terms of the contract, and shall modify the contract accordingly.

52.243-2 Changes-Cost-Reimbursement.

As prescribed in 43.305(b)(1), insert the following clause. The 30-day period may be varied according to agency procedures.

CHANGES-COST-REIMBURSEMENT (DEVIATION DATE)

(a) (1) At any time, the Contracting Officer may issue a written order to make changes within the scope of this contract in any one or more of the following:

(i) Drawings, designs, or specifications which require special manufacturing of supplies for the Government.

(ii) Method of shipment or packing.

(iii) Place of delivery.

(2) If there are any sureties, the Contracting Officer does not need to notify them of a written order.

(b) If any such change causes an increase or decrease in the estimated cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, or otherwise affects any other terms and conditions of this contract, the Contracting Officer shall make an equitable adjustment in the—

(1) Estimated cost, delivery or completion schedule, or both;

(2) Amount of any fixed fee; and

(3) Other affected terms and shall modify the contract accordingly.

(c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

(d) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

(e) Notwithstanding the terms and conditions of paragraphs (a) and (b) of this clause, the estimated cost of this contract and, if this contract is incrementally funded, the funds allotted for the performance of this contract, shall not be increased or considered to be increased except by specific written modification of the contract indicating the new contract estimated cost and, if this contract is incrementally funded, the new amount allotted to the contract. Until this modification is made, the Contractor shall not be obligated to continue performance or incur costs beyond the point established in the Limitation of Cost or Limitation of Funds clause of this contract.

(End of clause)

Alternate I (DEVIATION DATE). If the requirement is for services and no supplies are to be furnished, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a)(1) At any time, the Contracting Officer may issue a written order to make changes within the scope of this contract in any one or more of the following:

(i) Description of services to be performed.

(ii) Time of performance (*i.e.,* hours of the day, days of the week, etc.).

(iii) Place of performance of the services.

(2) If there are any sureties, the Contracting Officer does not need to notify them of a written order.

Alternate II (DEVIATION DATE). If the requirement is for services and supplies are to be furnished, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a)(1) At any time, the Contracting Officer may issue a written order to make changes within the scope of this contract in any one or more of the following:

(i) Description of services to be performed.

(ii) Time of performance (*i.e.,* hours of the day, days of the week, etc.).

(iii) Place of performance of the services.

(iv) Drawings, designs, or specifications which require special manufacturing of supplies for the Government.

(v) Method of shipment or packing of supplies.

(vi) Place of delivery.

(2) If there are any sureties, the Contracting Officer does not need to notify them of a written order.

Alternate III (DEVIATION DATE). If the requirement is for construction, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a)(1) At any time, the Contracting Officer may issue a written order to make changes within the scope of this contract in the plans and specifications or instructions incorporated in the contract.

(2) If there are any sureties, the Contracting Officer does not need to notify them of a written order.

Alternate IV [Reserved]

Alternate V (DEVIATION DATE). If the requirement is for research and development, and it is desired to include the clause, substitute the following subparagraphs (a)(1)(i) and (a)(1)(iii) for subparagraphs (a)(1)(i) and (a)(1)(iii) of the basic clause:

(a)(1)(i) Drawings, designs, or specifications.

(iii) Place of inspection, delivery, or acceptance.

52.243-3 Changes-Time-and-Materials or Labor-Hours.

As prescribed in 43.305(c), insert the following clause:

CHANGES-TIME-AND-MATERIALS OR LABOR-HOURS (DEVIATION DATE)

(a) (1) At any time, the Contracting Officer may issue a written order to make changes in within the scope of this contract in any one or more of the following:

(i) Description of services to be performed.

(ii) Time of performance (i.e., hours of the day, days of the week, etc.).

(iii) Place of performance of the services.

(iv) Drawings, designs, or specifications which require special manufacturing of supplies for the Government.

(v) Method of shipment or packing of supplies.

(vi) Place of delivery.

(vii) Amount of Government-furnished property.

(2) If there are any sureties, the Contracting Officer does not need to notify them of a written order.

(b) If any change causes an increase or decrease in any hourly rate, the ceiling price, or the time required for performance of any part of the work under this contract, whether or not changed by the order, or otherwise affects any other terms and conditions of this contract, the Contracting Officer will make an equitable adjustment in any one or more of the following and will modify the contract accordingly:

(1) Ceiling price.

(2) Hourly rates.

(3) Delivery schedule.

(4) Other affected terms.

(c) The Contractor shall assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

(d) Failure to agree to any adjustment will be a dispute under the Disputes clause. However, nothing in this clause excuses the Contractor from proceeding with the contract as changed.

(End of clause)

52.243-4 Changes.

As prescribed in 43.305(d), insert the following clause. Agency procedures may vary the 30-day period.

CHANGES (DEVIATION DATE)

(a) (1) At any time, the Contracting Officer may issue a written order, identified as a change order, to make changes in the work within the scope of the contract, including changes—

(i) In the specifications (including drawings and designs);

(ii) In the method or manner of performance of the work;

(iii) In the Government-furnished property or services; or

(iv) Directing acceleration in the performance of the work.

(2) If there are any sureties, the Contracting Officer does not need to notify them of a written order.

(b) Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; provided, that the Contractor gives the Contracting Officer written notice stating—

(1) The date, circumstances, and source of the order; and

(2) That the Contractor regards the order as a change order.

(c) Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment.

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for an adjustment based on defective specifications, no adjustment for any change under paragraph (b) of this clause shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required. In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.

(e) (1) The Contractor must assert its right to an adjustment under this clause, by submitting to the Contracting Officer a written statement describing the general nature and amount of proposal within 30 days, unless this period is extended by the Government, after—

(i) Receipt of a written change order under paragraph (a) of this clause; or

(ii) The furnishing of a written notice under paragraph (b) of this clause.

(2) The statement of proposal for adjustment may be included in the notice under paragraph (b) of this clause.

(f) No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract.

(End of clause)

52.243-5 Changes and Changed Conditions.

As prescribed in 43.305(e), insert the following clause:

CHANGES AND CHANGED CONDITIONS (DEVIATION DATE)

(a) The Contracting Officer may order changes in the drawings and specifications within the scope of the contract in writing.

(b) The Contractor shall promptly notify the Contracting Officer, in writing, of subsurface or latent physical conditions differing materially from those indicated in this contract or unknown unusual physical conditions at the site before proceeding with the work.

(c) If changes under paragraph (a) of this clause or conditions under paragraph (b) of this clause increase or decrease the cost of, or time required for performing the work, the Contracting Officer shall make an equitable adjustment (see paragraph (d) of this clause) upon submittal of a proposal for adjustment (hereafter referred to as proposal) by the Contractor before final payment under the contract.

(d) The Contracting Officer shall not make an equitable adjustment under paragraph (b) of this clause unless—

(1) The Contractor has submitted the required written notice and the Contracting Officer has received the notice; or

(2) The Contracting Officer waives the requirement for written notice.

(e) Failure to agree to any adjustment shall be a dispute under the Disputes clause.

(End of clause)

52.243-6 Change Order Accounting.

As prescribed in 43.305(f), the contracting officer may insert a clause, substantially the same as follows:

CHANGE ORDER ACCOUNTING (DEVIATION DATE)

The Contracting Officer may require change order accounting whenever the estimated cost of a change or series of related changes exceeds $100,000. The Contractor, for each change or series of related changes, shall maintain separate accounts, by job order or other suitable accounting procedure, of all incurred segregable, direct costs (less allocable credits) of work, both changed and not changed, allocable to the change. The Contractor shall maintain the accounts until the parties agree to an equitable adjustment for the changes ordered by the Contracting Officer or the matter is conclusively disposed of in accordance with the Disputes clause.

(End of clause)

52.243-7 Notification of Changes.

As prescribed in 43.206, insert the following clause:

NOTIFICATION OF CHANGES (DEVIATION DATE)

(a) *Definitions.*

Contracting Officer, as used in this clause, does not include any representative of the Contracting Officer.

Specifically Authorized Representative (SAR), as used in this clause, means any person the Contracting Officer has designated by written notice (a copy shall be provided to the Contractor) that shall refer to this subparagraph and shall be issued to the designated representative before the SAR exercises such authority.

(b) *Notice.* The primary purpose of this clause is to obtain prompt reporting of Government conduct that the Contractor considers to constitute a change to this contract. Except for changes identified in writing and signed by the Contracting Officer, the Contractor shall notify the Administrative Contracting Officer in writing promptly, within _____ (to be negotiated) calendar days from the date that the Contractor identifies any Government conduct that the Contractor regards as a change to the contract terms and conditions. Examples of conduct that may be regarded as a change to terms and conditions include actions, inactions, and written or oral communications. On the basis of the most accurate information available to the Contractor, the notice shall state—

(1) The date, nature, and circumstances of the conduct regarded as a change;

(2) The name, function, and activity of each Government individual and Contractor official or employee involved in or knowledgeable about such conduct;

(3) The identification of any documents and the substance of any oral communication involved in such conduct;

(4) In the instance of alleged acceleration of scheduled performance or delivery, the basis upon which it arose;

(5) The particular elements of contract performance for which the Contractor may seek an equitable adjustment under this clause, including—

(i) What line items have been or may be affected by the alleged change;

(ii) What labor or materials or both have been or may be added, deleted, or wasted by the alleged change;

(iii) To the extent practicable, what delay and disruption in the manner and sequence of performance and effect on continued performance have been or may be caused by the alleged change;

(iv) What adjustments to contract price, delivery schedule, and other provisions affected by the alleged change are estimated; and

(6) The Contractor's estimate of the time by which the Government must respond to the Contractor's notice to minimize cost, delay or disruption of performance.

(c) *Continued performance.* Following submission of the notice required by paragraph (b) of this clause, the Contractor shall diligently continue performance of this contract to the maximum extent possible in accordance with its terms and conditions as construed by the Contractor, unless the notice reports a direction of the Contracting Officer or a communication from a SAR of the Contracting Officer, in either of which events the Contractor shall continue performance. However, if the Contractor regards the direction or communication as a change as described in paragraph (b) of this clause, notice shall be given in the manner provided. All directions, communications, interpretations, orders and similar actions of the SAR shall be reduced to writing promptly and copies furnished to the Contractor and to the Contracting Officer. The Contracting Officer shall promptly countermand any action which exceeds the authority of the SAR.

(d) *Government response.* The Contracting Officer shall promptly, within _____ (to be negotiated) calendar days after receipt of notice, respond to the notice in writing. In responding, the Contracting Officer shall either—

(1) Confirm that the conduct of which the Contractor gave notice constitutes a change and when necessary direct the mode of further performance;

(2) Countermand any communication regarded as a change;

(3) Deny that the conduct of which the Contractor gave notice constitutes a change and when necessary direct the mode of further performance; or

(4) In the event the Contractor's notice information is inadequate to make a decision under (1), (2), or (3) of paragraph (d) of this clause, advise the Contractor what additional information is required, and establish the date by which it should be furnished and the date thereafter by which the Government will respond.

(e) *Equitable adjustments*. (1) If the Contracting Officer confirms that Government conduct effected a change as alleged by the Contractor, and the conduct causes an increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether changed or not changed by such conduct, an equitable adjustment shall be made—

(i) In the contract price or delivery schedule or both; and

(ii) In such other provisions of the contract as may be affected.

(2) The contract shall be modified in writing accordingly. In the case of drawings, designs or specifications which are defective and for which the Government is responsible, the equitable adjustment shall include the cost and time extension for delay reasonably incurred by the Contractor in attempting to comply with the defective drawings, designs or specifications before the Contractor identified, or reasonably should have identified, such defect. When the cost of property made obsolete or excess as a result of a change confirmed by the Contracting Officer under this clause is included in the equitable adjustment, the Contracting Officer shall have the right to prescribe the manner of disposition of the property. The equitable adjustment shall not include increased costs or time extensions for delay resulting from the Contractor's failure to provide notice or to continue performance as provided, respectively, in paragraphs(b) and (c) of this clause.

Note: The phrases contract price and cost wherever they appear in the clause, may be appropriately modified to apply to cost-reimbursement or incentive contracts, or to combinations thereof.

(End of clause)

52.244 [Reserved]

52.244-1 [Reserved]

52.244-2 Subcontracts.

As prescribed in 44.201-5(a)(1), insert the following clause:

SUBCONTRACTS (JUN 2020)

(a) *Definitions*. As used in this clause-

"Approved purchasing system" means a Contractor's purchasing system that has been reviewed and approved in accordance with part 44 of the Federal Acquisition Regulation (FAR).

"Consent to subcontract" means the Contracting Officer's written consent for the Contractor to enter into a particular subcontract.

Subcontract means any contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of the prime contract or a subcontract. It includes, but is not limited to, purchase orders, and changes and modifications to purchase orders.

(b) When this clause is included in a fixed-price type contract, consent to subcontract is required only on unpriced contract actions (including unpriced modifications or unpriced delivery orders), and only if required in accordance with paragraph (c) or (d) of this clause.

(c) If the Contractor does not have an approved purchasing system, consent to subcontract is required for any subcontract that-

(1) Is of the cost-reimbursement, time-and-materials, or labor-hour type; or

(2) Is fixed-price and exceeds-

(i) For a contract awarded by the Department of Defense, the Coast Guard, or the National Aeronautics and Space Administration, the greater of the simplified acquisition threshold, as defined in FAR 2.101 on the date of subcontract award, or 5 percent of the total estimated cost of the contract; or

(ii) For a contract awarded by a civilian agency other than the Coast Guard and the National Aeronautics and Space Administration, either the simplified acquisition threshold, as defined in FAR 2.101 on the date of subcontract award, or 5 percent of the total estimated cost of the contract.

(d) If the Contractor has an approved purchasing system, the Contractor nevertheless shall obtain the Contracting Officer's written consent before placing the following subcontracts:

_____

(e) (1) The Contractor shall notify the Contracting Officer reasonably in advance of placing any subcontract or modification thereof for which consent is required under paragraph (b), (c), or (d) of this clause, including the following information:

(i) A description of the supplies or services to be subcontracted.

(ii) Identification of the type of subcontract to be used.

(iii) Identification of the proposed subcontractor.

(iv) The proposed subcontract price.

(v) The subcontractor's current, complete, and accurate certified cost or pricing data and Certificate of Current Cost or Pricing Data, if required by other contract provisions.

(vi) The subcontractor's Disclosure Statement or Certificate relating to Cost Accounting Standards when such data are required by other provisions of this contract.

(vii) A negotiation memorandum reflecting-

(A) The principal elements of the subcontract price negotiations;

(B) The most significant considerations controlling establishment of initial or revised prices;

(C) The reason certified cost or pricing data were or were not required;

(D) The extent, if any, to which the Contractor did not rely on the subcontractor's certified cost or pricing data in determining the price objective and in negotiating the final price;

(E) The extent to which it was recognized in the negotiation that the subcontractor's certified cost or pricing data were not accurate, complete, or current; the action taken by the Contractor and the subcontractor; and the effect of any such defective data on the total price negotiated;

(F) The reasons for any significant difference between the Contractor's price objective and the price negotiated; and

(G) A complete explanation of the incentive fee or profit plan when incentives are used. The explanation shall identify each critical performance element, management decisions used to quantify each incentive element, reasons for the incentives, and a summary of all trade-off possibilities considered.

(2) The Contractor is not required to notify the Contracting Officer in advance of entering into any subcontract for which consent is not required under paragraph (b), (c), or (d) of this clause.

(f) Unless the consent or approval specifically provides otherwise, neither consent by the Contracting Officer to any subcontract nor approval of the Contractor's purchasing system shall constitute a determination-

(1) Of the acceptability of any subcontract terms or conditions;

(2) Of the allowability of any cost under this contract; or

(3) To relieve the Contractor of any responsibility for performing this contract.

(g) No subcontract or modification thereof placed under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis, and any fee payable under cost-reimbursement type subcontracts shall not exceed the fee limitations in FAR 15.404-4(c)(4)(i).

(h) The Contractor shall give the Contracting Officer immediate written notice of any action or suit filed and prompt notice of any claim made against the Contractor by any subcontractor or vendor that, in the opinion of the Contractor, may result in litigation related in any way to this contract, with respect to which the Contractor may be entitled to reimbursement from the Government.

(i) The Government reserves the right to review the Contractor's purchasing system as set forth in FAR subpart 44.3.

(j) Paragraphs (c) and (e) of this clause do not apply to the following subcontracts, which were evaluated during negotiations:

_____

(End of clause)

Alternate I (JUNE 2020). As prescribed in 44.201-5(a)(2), substitute the following paragraph (e)(2) for paragraph (e)(2) of the basic clause:

(e)(2) If the Contractor has an approved purchasing system and consent is not required under paragraph (c), or (d) of this clause, the Contractor nevertheless shall notify the Contracting Officer reasonably in advance of entering into any (i) cost-plus-fixed-fee subcontract, or (ii) fixed-price subcontract that exceeds either the simplified acquisition threshold, as defined in FAR 2.101 on the date of subcontract award, or 5 percent of the total estimated cost of this contract. The notification shall include the information required by paragraphs (e)(1)(i) through (iv) of this clause.

52.244-3 [Reserved]

52.244-4 Subcontractors and Outside Associates and Consultants (Architect-Engineer Services).

As prescribed in 44.201-5(b), insert the following clause:

SUBCONTRACTORS AND OUTSIDE ASSOCIATES AND CONSULTANTS (ARCHITECT-ENGINEER SERVICES) (AUG 1998)

Any subcontractors and outside associates or consultants required by the Contractor in connection with the services covered by the contract will be limited to individuals or firms that were specifically identified and agreed to during negotiations. The Contractor shall obtain the Contracting Officer's written consent before making any substitution for these subcontractors, associates, or consultants.

(End of clause)

52.244-5 Competition in Subcontracting.

As prescribed in 44.201-5(c), insert the following clause:

COMPETITION IN SUBCONTRACTING (AUG 2024)

(a) The Contractor shall select subcontractors (including suppliers) on a competitive basis to the maximum practical extent consistent with the objectives and requirements of the contract.

(b) If the Contractor is an approved mentor under the DoD Mentor-Protégé Program (10 U.S.C. 4902), the Contractor may award subcontracts under this contract on a noncompetitive basis to its protégés.

(End of clause)

52.244-6 Subcontracts for Commercial Products and Commercial Services.

As prescribed in 44.403, insert the following clause:

SUBCONTRACTS FOR COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES (DEVIATION DATE)

(a) *Definitions.* As used in this clause—

Commercial product, commercial service and nondevelopmental item have the meanings contained in Federal Acquisition Regulation (FAR) 2.101.

Subcontract has the meaning at FAR 44.401

(b) *Requirements*.

(1) To the maximum extent practicable, the Contractor shall incorporate, and require its subcontractors at all tiers to incorporate, commercial products, commercial services, or non-developmental items as components of items to be supplied under this contract.

(2) If a clause in the following table is included in the contract, the Contractor shall insert the clause in subcontracts for commercial products or commercial services and must flow down the requirements of the clause to subcontracts as indicated in the specific clause:

Number	Title	Date
52.203-13	Contractor Code of Business Ethics and Conduct	NOV 2021
52.203-17	Contractor Employee Whistleblower Rights	NOV 2023
52.203-19	Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements	JAN 2017
52.204-9	Personal Identity Verification of Contractor Personnel	JAN 2011
52.219-8 *	Utilization of Small Business Concerns	JAN 2025
52.222-35	Equal Opportunity for Veterans	JUN 2020
52.222-36	Equal Opportunity for Workers with Disabilities	JUN 2020
52.222-37	Employment Reports on Veterans	JUN 2020
52.222-40	Notification of Employee Rights Under the National Labor Relations Act	DEC 2010
52.222-41	Service Contract Labor Standards	AUG 2018
52.222-50	Combating Trafficking in Persons	NOV 2021
52.222-50 with Alt I	Combating Trafficking in Persons, with its Alternate I	MAR 2015

52.222-51	Exemption from Application of the Service Contract Labor Standards to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements	MAY 2014
52.222-53	Exemption from Application of the Service Contract Labor Standards to Contracts for Certain Services—Requirements	MAY 2014
52.222-54	Employment Eligibility Verification	JAN 2025
52.222-62	Paid Sick Leave Under Executive Order 13706	JAN 2022
52.222-90	Addressing DEI Discrimination by Federal Contractors	APR 2026
52.224-3	Privacy Training	JAN 2017
52.224-3 with Alt I	Privacy Training, with Alternate I	JAN 2017
52.225-26	Contractors Performing Private Security Functions Outside the United States	OCT 2016
52.232-40	Providing Accelerated Payments to Small Business Subcontractors	MAR 2023
52.240-91	Security Prohibitions and Exclusions	DATE
52.240-91 with Alt I	Security Prohibitions and Exclusions, with its Alternate I	DATE
52.240-92	Security Requirements	DATE
52.240-92 with Alt II	Security Requirements, with its Alternate II	DATE
52.247-64	Preference for Privately Owned U.S.-Flag Commercial Vessels	NOV 2021

***** Include only if the subcontract offers further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds the applicable threshold specified in FAR 19.109(a) on the date of subcontract award, the subcontractor must include 52.219-8 in lower tier subcontracts that offer subcontracting opportunities.

(c) *Subcontracts*. The Contractor shall include the terms of this clause, including this paragraph (c), in subcontracts awarded under this contract.

(End of clause)

52.245 [Reserved]

52.245-1 Government Property.

As prescribed in 45.107(a), insert the following clause:

GOVERNMENT PROPERTY (SEP 2021)

(a) *Definitions.* As used in this clause-

Cannibalize means to remove parts from Government property for use or for installation on other Government property.

Contractor-acquired property means property acquired, fabricated, or otherwise provided by the Contractor for performing a contract, and to which the Government has title.

Contractor inventory means-

(1) Any property acquired by and in the possession of a Contractor or subcontractor under a contract for which title is vested in the Government and which exceeds the amounts needed to complete full performance under the entire contract;

(2) Any property that the Government is obligated or has the option to take over under any type of contract, e.g., as a result either of any changes in the specifications or plans thereunder or of the termination of the contract (or subcontract thereunder), before completion of the work, for the convenience or at the option of the Government; and

(3) Government-furnished property that exceeds the amounts needed to complete full performance under the entire contract.

Contractor's managerial personnel means the Contractor's directors, officers, managers, superintendents, or equivalent representatives who have supervision or direction of-

(1) All or substantially all of the Contractor's business;

(2) All or substantially all of the Contractor's operation at any one plant or separate location; or

(3) A separate and complete major industrial operation.

Demilitarization means rendering a product unusable for, and not restorable to, the purpose for which it was designed or is customarily used.

Discrepancies incident to shipment means any differences (e.g., count or condition) between the items documented to have been shipped and items actually received.

Equipment means a tangible item that is functionally complete for its intended purpose, durable, nonexpendable, and needed for the performance of a contract. Equipment is not intended for sale, and does not ordinarily lose its identity or become a component part of another article when put into use. Equipment does not include material, real property, special test equipment or special tooling.

Government-furnished property means property in the possession of, or directly acquired by, the Government and subsequently furnished to the Contractor for performance of a contract. Government-furnished property includes, but is not limited to, spares and property furnished for repair, maintenance, overhaul, or modification. Government-furnished property also includes contractor-acquired property if the contractor-acquired property is a deliverable under a cost contract when accepted by the Government for continued use under the contract.

Government property means all property owned or leased by the Government. Government property includes both Government- furnished and Contractor-acquired property. Government property includes material, equipment, special tooling, special test equipment, and real property. Government property does not include intellectual property and software.

Loss of Government property means unintended, unforeseen or accidental loss, damage or destruction to Government property that reduces the Government's expected economic benefits of the property. Loss of Government property does not include purposeful destructive testing, obsolescence, normal wear and tear or manufacturing defects. Loss of Government property includes, but is not limited to-

(1) Items that cannot be found after a reasonable search;

(2) Theft;

(3) Damage resulting in unexpected harm to property requiring repair to restore the item to usable condition; or

(4) Destruction resulting from incidents that render the item useless for its intended purpose or beyond economical repair.

Material means property that may be consumed or expended during the performance of a contract, component parts of a higher assembly, or items that lose their individual identity through incorporation into an end item. Material does not include equipment, special tooling, special test equipment or real property.

Nonseverable means property that cannot be removed after construction or installation without substantial loss of value or damage to the installed property or to the premises where installed.

Precious metals means silver, gold, platinum, palladium, iridium, osmium, rhodium, and ruthenium.

Production scrap means unusable material resulting from production, engineering, operations and maintenance, repair, and research and development contract activities. Production scrap may have value when re-melted or reprocessed, e.g., textile and metal clippings, borings, and faulty castings and forgings.

Property means all tangible property, both real and personal.

Property Administrator means an authorized representative of the Contracting Officer appointed in accordance with agency procedures, responsible for administering the contract requirements and obligations relating to Government property in the possession of a Contractor.

Property records means the records created and maintained by the contractor in support of its stewardship responsibilities for the management of Government property.

Provide means to furnish, as in Government-furnished property, or to acquire, as in contractor-acquired property.

Real property See Federal Management Regulation 102-71.20 (41 CFR 102-71.20).

Sensitive property means property potentially dangerous to the public safety or security if stolen, lost, or misplaced, or that shall be subject to exceptional physical security, protection, control, and accountability. Examples include weapons, ammunition, explosives, controlled substances, radioactive materials, hazardous materials or wastes, or precious metals.

Unit acquisition cost means-

(1) For Government-furnished property, the dollar value assigned by the Government and identified in the contract; and

(2) For contractor-acquired property, the cost derived from the Contractor's records that reflect consistently applied generally accepted accounting principles.

(b) *Property management.* (1) The Contractor shall have a system of internal controls to manage (control, use, preserve, protect, repair, and maintain) Government property in its possession. The system shall be adequate to satisfy the requirements of this clause. In doing so, the Contractor shall initiate and maintain the processes, systems, procedures, records, and methodologies necessary for effective and efficient control of Government property. The Contractor shall disclose any significant changes to its property management system to the Property Administrator prior to implementation of the changes. The Contractor may employ customary commercial practices, voluntary consensus standards, or industry-leading practices and standards that provide effective and efficient Government property management that are necessary and appropriate for the performance of this contract (except where inconsistent with law or regulation).

(2) The Contractor's responsibility extends from the initial acquisition and receipt of property, through stewardship, custody, and use until formally relieved of responsibility by authorized means, including delivery, consumption, expending, sale (as surplus property), or other disposition, or via a completed investigation, evaluation, and final determination for lost property. This requirement applies to all Government property under the Contractor's accountability, stewardship, possession or control, including its vendors or subcontractors (see paragraph (f)(1)(v) of this clause).

(3) The Contractor shall include the requirements of this clause in all subcontracts under which Government property is acquired or furnished for subcontract performance.

(4) The Contractor shall establish and maintain procedures necessary to assess its property management system effectiveness and shall perform periodic internal reviews, surveillances, self assessments, or audits. Significant findings or results of such reviews and audits pertaining to Government property shall be made available to the Property Administrator.

(c) *Use of Government property.* (1) The Contractor shall use Government property, either furnished or acquired under this contract, only for performing this contract, unless otherwise provided for in this contract or approved by the Contracting Officer.

(2) Modifications or alterations of Government property are prohibited, unless they are-

(i) Reasonable and necessary due to the scope of work under this contract or its terms and conditions;

(ii) Required for normal maintenance; or

(iii) Otherwise authorized by the Contracting Officer.

(3) The Contractor shall not cannibalize Government property unless otherwise provided for in this contract or approved by the Contracting Officer.

(d) *Government-furnished property.* (1) The Government shall deliver to the Contractor the Government-furnished property described in this contract. The Government shall furnish related data and information needed for the intended use of the property. The warranties of suitability of use and timely delivery of Government-furnished property do not apply to property acquired or fabricated by the Contractor as contractor-acquired property and subsequently transferred to another contract with this Contractor.

(2) The delivery and/or performance dates specified in this contract are based upon the expectation that the Government-furnished property will be suitable for contract performance and will be delivered to the Contractor by the dates stated in the contract.

(i) If the property is not delivered to the Contractor by the dates stated in the contract, the Contracting Officer shall, upon the Contractor's timely written request, consider an equitable adjustment to the contract.

(ii) In the event property is received by the Contractor, or for Government-furnished property after receipt and installation, in a condition not suitable for its intended use, the Contracting Officer shall, upon the Contractor's timely written request, advise the Contractor on a course of action to remedy the problem. Such action may include repairing, replacing, modifying, returning, or otherwise disposing of the property at the Government's expense. Upon completion of the required action(s), the Contracting Officer shall consider an equitable adjustment to the contract (see also paragraph (f)(1)(ii)(A) of this clause).

(iii) The Government may, at its option, furnish property in an "as-is" condition. The Contractor will be given the opportunity to inspect such property prior to the property being provided. In such cases, the Government makes no warranty with respect to the serviceability and/or suitability of the property for contract performance. Any repairs, replacement, and/or refurbishment shall be at the Contractor's expense.

(3) (i) The Contracting Officer may by written notice, at any time-

(A) Increase or decrease the amount of Government-furnished property under this contract;

(B) Substitute other Government-furnished property for the property previously furnished, to be furnished, or to be acquired by the Contractor for the Government under this contract; or

(C) Withdraw authority to use property.

(ii) Upon completion of any action(s) under paragraph (d)(3)(i) of this clause, and the Contractor's timely written request, the Contracting Officer shall consider an equitable adjustment to the contract.

(e) *Title to Government property.* (1) All Government-furnished property and all property acquired by the Contractor, title to which vests in the Government under this paragraph (collectively referred to as "Government property"), is subject to the provisions of this clause. The Government shall retain title to all Government-furnished property. Title to Government property shall not be affected by its incorporation into or attachment to any property not owned by the Government, nor shall Government property become a fixture or lose its identity as personal property by being attached to any real property.

(2) Title vests in the Government for all property acquired or fabricated by the Contractor in accordance with the financing provisions or other specific requirements for passage of title in the contract. Under fixed price type contracts, in the absence of financing provisions or other specific requirements for passage of title in the contract, the Contractor retains title to all property acquired by the Contractor for use on the contract, except for property identified as a deliverable end item. If a deliverable item is to be retained by the Contractor for use after inspection and acceptance by the Government, it shall be made accountable to the contract through a contract modification listing the item as Government-furnished property.

(3) *Title under Cost-Reimbursement or Time-and-Material Contracts or Cost-Reimbursable line items under Fixed-Price contracts*. (i) Title to all property purchased by the Contractor for which the Contractor is entitled to be reimbursed as a direct item of cost under this contract shall pass to and vest in the Government upon the vendor's delivery of such property.

(ii) Title to all other property, the cost of which is reimbursable to the Contractor, shall pass to and vest in the Government upon-

(A) Issuance of the property for use in contract performance;

(B) Commencement of processing of the property for use in contract performance; or

(C) Reimbursement of the cost of the property by the Government, whichever occurs first.

(f) *Contractor plans and systems*. (1) Contractors shall establish and implement property management plans, systems, and procedures at the contract, program, site or entity level to enable the following outcomes:

(i) *Acquisition of Property.* The Contractor shall document that all property was acquired consistent with its engineering, production planning, and property control operations.

(ii) *Receipt of Government Property*. The Contractor shall receive Government property and document the receipt, record the information necessary to meet the record requirements of paragraph (f)(1)(iii)(A)(*1*) through (*5*) of this clause, identify as Government owned in a manner appropriate to the type of property (*e.g.*, stamp, tag, mark, or other identification), and manage any discrepancies incident to shipment.

(A) *Government-furnished property*. The Contractor shall furnish a written statement to the Property Administrator containing all relevant facts, such as cause or condition and a recommended course(s) of action, if overages, shortages, or damages and/or other discrepancies are discovered upon receipt of Government-furnished property.

(B) *Contractor-acquired property*. The Contractor shall take all actions necessary to adjust for overages, shortages, damage and/or other discrepancies discovered upon receipt, in shipment of Contractor-acquired property from a vendor or supplier, so as to ensure the proper allocability and allowability of associated costs.

(iii) *Records of Government property.* The Contractor shall create and maintain records of all Government property accountable to the contract, including Government-furnished and Contractor-acquired property.

(A) Property records shall enable a complete, current, auditable record of all transactions and shall, unless otherwise approved by the Property Administrator, contain the following:

(1) The name, part number and description, National Stock Number (if needed for additional item identification tracking and/or disposition), and other data elements as necessary and required in accordance with the terms and conditions of the contract.

(2) Quantity received (or fabricated), issued, and balance-on-hand.

(3) Unit acquisition cost.

(4) Unique-item identifier or equivalent (if available and necessary for individual item tracking).

(5) Unit of measure.

(6) Accountable contract number or equivalent code designation.

(7) Location.

(8) Disposition.

(9) Posting reference and date of transaction.

(10) Date placed in service (if required in accordance with the terms and conditions of the contract).

(B) *Use of a Receipt and Issue System for Government Material*. When approved by the Property Administrator, the Contractor may maintain, in lieu of formal property records, a file of appropriately cross-referenced documents evidencing receipt, issue, and use of material that is issued for immediate consumption.

(iv) *Physical inventory*. The Contractor shall periodically perform, record, and disclose physical inventory results. A final physical inventory shall be performed upon contract completion or termination. The Property Administrator may waive this final inventory requirement, depending on the circumstances (*e.g.*, overall reliability of the Contractor's system or the property is to be transferred to a follow-on contract).

(v) *Subcontractor control*. (A) The Contractor shall award subcontracts that clearly identify items to be provided and the extent of any restrictions or limitations on their use. The Contractor shall ensure appropriate flow down of contract terms and conditions (*e.g.*, extent of liability for loss of Government property.

(B) The Contractor shall assure its subcontracts are properly administered and reviews are periodically performed to determine the adequacy of the subcontractor's property management system.

(vi) *Reports*. The Contractor shall have a process to create and provide reports of discrepancies, loss of Government property, physical inventory results, audits and self-assessments, corrective actions, and other property-related reports as directed by the Contracting Officer.

(vii) *Relief of stewardship responsibility and liability*. The Contractor shall have a process to enable the prompt recognition, investigation, disclosure and reporting of loss of Government property, including losses that occur at subcontractor or alternate site locations.

(A) This process shall include the corrective actions necessary to prevent recurrence.

(B) Unless otherwise directed by the Property Administrator, the Contractor shall investigate and report to the Government all incidents of property loss as soon as the facts become known. Such reports shall, at a minimum, contain the following information:

(1) Date of incident (if known).

(2) The data elements required under paragraph (f)(1)(iii)(A) of this clause.

(3) Quantity.

(4) Accountable contract number.

(5) A statement indicating current or future need.

(6) Unit acquisition cost, or if applicable, estimated sales proceeds, estimated repair or replacement costs.

(7) All known interests in commingled material of which includes Government material.

(8) Cause and corrective action taken or to be taken to prevent recurrence.

(9) A statement that the Government will receive compensation covering the loss of Government property, in the event the Contractor was or will be reimbursed or compensated.

(10) Copies of all supporting documentation.

(11) Last known location.

(12) A statement that the property did or did not contain sensitive, export controlled, hazardous, or toxic material, and that the appropriate agencies and authorities were notified.

(C) Unless the contract provides otherwise, the Contractor shall be relieved of stewardship responsibility and liability for property when-

(1) Such property is consumed or expended, reasonably and properly, or otherwise accounted for, in the performance of the contract, including reasonable inventory adjustments of material as determined by the Property Administrator;

(2) Property Administrator grants relief of responsibility and liability for loss of Government property;

(3) Property is delivered or shipped from the Contractor's plant, under Government instructions, except when shipment is to a subcontractor or other location of the Contractor; or

(4) Property is disposed of in accordance with paragraphs (j) and (k) of this clause.

(viii) *Utilizing Government property*. (A) The Contractor shall utilize, consume, move, and store Government Property only as authorized under this contract. The Contractor shall promptly disclose and report Government property in its possession that is excess to contract performance.

(B) Unless otherwise authorized in this contract or by the Property Administrator the Contractor shall not commingle Government material with material not owned by the Government.

(ix) *Maintenance*. The Contractor shall properly maintain Government property. The Contractor's maintenance program shall enable the identification, disclosure, and performance of normal and routine preventative maintenance and repair. The Contractor shall disclose and report to the Property Administrator the need for replacement and/or capital rehabilitation.

(x) *Property closeout*. The Contractor shall promptly perform and report to the Property Administrator contract property closeout, to include reporting, investigating and securing closure of all loss of Government property cases; physically inventorying all property upon termination or completion of this contract; and disposing of items at the time they are determined to be excess to contractual needs.

(2) The Contractor shall establish and maintain Government accounting source data, as may be required by this contract, particularly in the areas of recognition of acquisitions, loss of Government property, and disposition of material and equipment.

(g) *Systems analysis*. (1) The Government shall have access to the Contractor's premises and all Government property, at reasonable times, for the purposes of reviewing, inspecting and evaluating the Contractor's property management plan(s), systems, procedures, records, and supporting documentation that pertains to Government property. This access includes all site locations and, with the Contractor's consent, all subcontractor premises.

(2) Records of Government property shall be readily available to authorized Government personnel and shall be appropriately safeguarded.

(3) Should it be determined by the Government that the Contractor's (or subcontractor's) property management practices are inadequate or not acceptable for the effective management and control of Government property under this contract, or present an undue risk to the Government, the Contractor shall prepare a corrective action plan when requested by the Property Administrator and take all necessary corrective actions as specified by the schedule within the corrective action plan.

(h) *Contractor Liability for Government Property.* (1) Unless otherwise provided for in the contract, the Contractor shall not be liable for loss of Government property furnished or acquired under this contract, except when any one of the following applies-

(i) The risk is covered by insurance or the Contractor is otherwise reimbursed (to the extent of such insurance or reimbursement). The allowability of insurance costs shall be determined in accordance with 31.205-19.

(ii) Loss of Government property that is the result of willful misconduct or lack of good faith on the part of the Contractor's managerial personnel.

(iii) The Contracting Officer has, in writing, revoked the Government's assumption of risk for loss of Government property due to a determination under paragraph (g) of this clause that the Contractor's property management practices are inadequate, and/or present an undue risk to the Government, and the Contractor failed to take timely corrective action. If the Contractor can establish by clear and convincing evidence that the loss of Government property occurred while the Contractor had adequate property management practices or the loss did not result from the Contractor's failure to maintain adequate property management practices, the Contractor shall not be held liable.

(2) The Contractor shall take all reasonable actions necessary to protect the property from further loss. The Contractor shall separate the damaged and undamaged property, place all the affected property in the best possible order, and take such other action as the Property Administrator directs.

(3) The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any loss of Government property.

(4) The Contractor shall reimburse the Government for loss of Government property, to the extent that the Contractor is financially liable for such loss, as directed by the Contracting Officer.

(5) Upon the request of the Contracting Officer, the Contractor shall, at the Government's expense, furnish to the Government all reasonable assistance and cooperation, including the prosecution of suit and the execution of instruments of assignment in favor of the Government in obtaining recovery.

(i) *Equitable adjustment*. Equitable adjustments under this clause shall be made in accordance with the procedures of the Changes clause. However, the Government shall not be liable for breach of contract for the following:

(1) Any delay in delivery of Government-furnished property.

(2) Delivery of Government-furnished property in a condition not suitable for its intended use.

(3) An increase, decrease, or substitution of Government-furnished property.

(4) Failure to repair or replace Government property for which the Government is responsible.

(j) *Contractor inventory disposal*. Except as otherwise provided for in this contract, the Contractor shall not dispose of Contractor inventory until authorized to do so by the Plant Clearance Officer or authorizing official.

(1) *Predisposal requirements*. (i) If the Contractor determines that the property has the potential to fulfill requirements under other contracts, the Contractor, in consultation with the Property Administrator, shall request that the Contracting Officer transfer the property to the contract in question, or provide authorization for use, as appropriate. In lieu of transferring the property, the Contracting Officer may authorize the Contractor to credit the costs of Contractor-acquired property (material only) to the losing contract, and debit the gaining contract with the corresponding cost, when such material is needed for use on another contract. Property no longer needed shall be considered contractor inventory.

(ii) For any remaining Contractor-acquired property, the Contractor may purchase the property at the unit acquisition cost if desired or make reasonable efforts to return unused property to the appropriate supplier at fair market value (less, if applicable, a reasonable restocking fee that is consistent with the supplier's customary practices.)

(2) *Inventory disposal schedules*. (i) Absent separate contract terms and conditions for property disposition, and provided the property was not reutilized, transferred, or otherwise disposed of, the Contractor, as directed by the Plant Clearance Officer or authorizing official, shall use Standard Form 1428, Inventory Disposal Schedule or electronic equivalent, to identify and report-

(A) Government-furnished property that is no longer required for performance of this contract;

(B) Contractor-acquired property, to which the Government has obtained title under paragraph (e) of this clause, which is no longer required for performance of that contract; and

(C) Termination inventory.

(ii) The Contractor may annotate inventory disposal schedules to identify property the Contractor wishes to purchase from the Government, in the event that the property is offered for sale.

(iii) Separate inventory disposal schedules are required for aircraft in any condition, flight safety critical aircraft parts, and other items as directed by the Plant Clearance Officer.

(iv) The Contractor shall provide the information required by FAR 52.245-1(f)(1)(iii) along with the following:

(A) Any additional information that may facilitate understanding of the property's intended use.

(B) For work-in-progress, the estimated percentage of completion.

(C) For precious metals in raw or bulk form, the type of metal and estimated weight.

(D) For hazardous material or property contaminated with hazardous material, the type of hazardous material.

(E) For metals in mill product form, the form, shape, treatment, hardness, temper, specification (commercial or Government) and dimensions (thickness, width and length).

(v) Property with the same description, condition code, and reporting location may be grouped in a single line item.

(vi) Scrap should be reported by "lot" along with metal content, estimated weight and estimated value.

(3) *Submission requirements*. (i) The Contractor shall submit inventory disposal schedules to the Plant Clearance Officer no later than-

(A) 30 days following the Contractor's determination that a property item is no longer required for performance of this contract;

(B) 60 days, or such longer period as may be approved by the Plant Clearance Officer, following completion of contract deliveries or performance; or

(C) 120 days, or such longer period as may be approved by the Termination Contracting Officer, following contract termination in whole or in part.

(ii) Unless the Plant Clearance Officer determines otherwise, the Contractor need not identify or report production scrap on inventory disposal schedules, and may process and dispose of production scrap in accordance with its own internal scrap procedures. The processing and disposal of other types of Government-owned scrap will be conducted in accordance with the terms and conditions of the contract or Plant Clearance Officer direction, as appropriate.

(4) *Corrections*. The Plant Clearance Officer may-

(i) Reject a schedule for cause (*e.g.*, contains errors, determined to be inaccurate); and

(ii) Require the Contractor to correct an inventory disposal schedule.

(5) *Postsubmission adjustments*. The Contractor shall notify the Plant Clearance Officer at least 10 working days in advance of its intent to remove an item from an approved inventory disposal schedule. Upon approval of the Plant Clearance Officer, or upon expiration of the notice period, the Contractor may make the necessary adjustments to the inventory schedule.

(6) *Storage*. (i) The Contractor shall store the property identified on an inventory disposal schedule pending receipt of disposal instructions. The Government's failure to furnish disposal instructions within 120 days following acceptance of an inventory disposal schedule may entitle the Contractor to an equitable adjustment for costs incurred to store such property on or after the 121st day.

(ii) The Contractor shall obtain the Plant Clearance Officer's approval to remove property from the premises where the property is currently located prior to receipt of final disposition instructions. If approval is granted, any costs incurred by the Contractor to transport or store the property shall not increase the price or fee of any Government contract. The storage area shall be appropriate for assuring the property's physical safety and suitability for use. Approval does not relieve the Contractor of any liability for such property under this contract.

(7) *Disposition instructions*. (i) The Contractor shall prepare for shipment, deliver f.o.b. origin, or dispose of Contractor inventory as directed by the Plant Clearance Officer. Unless otherwise directed by the Contracting Officer or by the Plant Clearance Officer, the Contractor shall remove and destroy any markings identifying the property as U.S. Government-owned property prior to its disposal.

(ii) The Contracting Officer may require the Contractor to demilitarize the property prior to shipment or disposal. In such cases, the Contractor may be entitled to an equitable adjustment under paragraph (i) of this clause.

(8) *Disposal proceeds*. As directed by the Contracting Officer, the Contractor shall credit the net proceeds from the disposal of Contractor inventory to the contract, or to the Treasury of the United States as miscellaneous receipts.

(9) *Subcontractor inventory disposal schedules*. The Contractor shall require its Subcontractors to submit inventory disposal schedules to the Contractor in accordance with the requirements of paragraph (j)(3) of this clause.

(k) *Abandonment of property*. (1) The Government shall not abandon sensitive property or termination inventory without the Contractor's written consent.

(2) The Government, upon notice to the Contractor, may abandon any nonsensitive property in place, at which time all obligations of the Government regarding such property shall cease.

(3) Absent contract terms and conditions to the contrary, the Government may abandon parts removed and replaced from property as a result of normal maintenance actions, or removed from property as a result of the repair, maintenance, overhaul, or modification process.

(4) The Government has no obligation to restore or rehabilitate the Contractor's premises under any circumstances; however, if Government-furnished property is withdrawn or is unsuitable for the intended use, or if other Government property is substituted, then the equitable adjustment under paragraph (i) of this clause may properly include restoration or rehabilitation costs.

(l) *Communication*. All communications under this clause shall be in writing.

(m) *Contracts outside the United States.* If this contract is to be performed outside of the United States and its outlying areas, the words "Government" and "Government-furnished" (wherever they appear in this clause) shall be construed as "United States Government" and "United States Government-furnished," respectively.

(End of clause)

Alternate I (APR 2012). As prescribed in 45.107 (a)(2), substitute the following for paragraph (h)(1) of the basic clause:

(h)(1) The Contractor assumes the risk of, and shall be responsible for, any loss of Government property upon its delivery to the Contractor as Government-furnished property. However, the Contractor is not responsible for reasonable wear and tear to Government property or for Government property properly consumed in performing this contract.

Alternate II (APR 2012). As prescribed in 45.107 (a)(3), substitute the following for paragraph (e)(3) of the basic clause:

(e)(3) Title to property (and other tangible personal property) purchased with funds available for research and having a unit acquisition cost of less than $5,000 shall vest in the Contractor upon acquisition or as soon thereafter as feasible; provided that the Contractor obtained the Contracting Officer's approval before each acquisition. Title to property purchased with funds available for research and having a unit acquisition cost of $5,000 or more shall vest as set forth in this contract. If title to property vests in the Contractor under this paragraph, the Contractor agrees that no costs shall be allowed for any depreciation, amortization, or use under any existing or future Government contract or subcontract thereunder. The Contractor shall furnish the Contracting Officer a list of all property to which title is vested in the Contractor under this paragraph within 10 days following the end of the calendar quarter during which it was received. Vesting title under this paragraph is subject to civil rights legislation, 42 U.S.C. 2000d. Before title is vested and by signing this contract, the Contractor accepts and agrees that-

"No person in the United States or its outlying areas shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under this contemplated financial assistance (title to property)."

52.245-2 Government Property Installation Operation Services.

As prescribed in 45.107(b), insert the following clause:

GOVERNMENT PROPERTY INSTALLATION OPERATION SERVICES (APR 2012)

(a) This Government Property listed in paragraph (e) of this clause is furnished to the Contractor in an "as-is, where is" condition. The Government makes no warranty regarding the suitability for use of the Government property specified in this contract. The Contractor shall be afforded the opportunity to inspect the Government property as specified in the solicitation.

(b) The Government bears no responsibility for repair or replacement of any lost Government property. If any or all of the Government property is lost or becomes no longer usable, the Contractor shall be responsible for replacement of the property at Contractor expense. The Contractor shall have title to all replacement property and shall continue to be responsible for contract performance.

(c) Unless the Contracting Officer determines otherwise, the Government abandons all rights and title to unserviceable and scrap property resulting from contract performance. Upon notification to the Contracting Officer, the Contractor shall remove such property from the Government premises and dispose of it at Contractor expense.

(d) Except as provided in this clause, Government property furnished under this contract shall be governed by the Government Property clause of this contract.

(e) Government property provided under this clause:

_____

(End of clause)

52.245-3 [Reserved]

52.245-4 [Reserved]

52.245-5 [Reserved]

52.245-6 [Reserved]

52.245-7 [Reserved]

52.245-8 [Reserved]

52.245-9 Use and Charges.

As prescribed in 45.107(c), insert the following clause:

USE AND CHARGES (APR 2012)

(a) *Definitions*. Definitions applicable to this contract are provided in the clause at 52.245-1, Government Property. Additional definitions as used in this clause include:

Rental period means the calendar period during which Government property is made available for nongovernmental purposes.

Rental time means the number of hours, to the nearest whole hour, rented property is actually used for nongovernmental purposes. It includes time to set up the property for such purposes, perform required maintenance, and restore the property to its condition prior to rental (less normal wear and tear).

(b) *Use of Government property*. The Contractor may use the Government property without charge in the performance of-

(1) Contracts with the Government that specifically authorize such use without charge;

(2) Subcontracts of any tier under Government prime contracts if the Contracting Officer having cognizance of the prime contract-

(i) Approves a subcontract specifically authorizing such use; or

(ii) Otherwise authorizes such use in writing; and

(3) Other work, if the Contracting Officer specifically authorizes in writing use without charge for such work.

(c) *Rental*. If granted written permission by the Contracting Officer, or if it is specifically provided for in the Schedule, the Contractor may use the Government property (except material) for a rental fee for work other than that provided in paragraph (b) of this clause. Authorizing such use of the Government property does not waive any rights of the Government to terminate the Contractor's right to use the Government property. The rental fee shall be determined in accordance with the following paragraphs.

(d) *General*. (1) Rental requests shall be submitted to the Administrative Contracting Officer (ACO), identify the property for which rental is requested, propose a rental period, and compute an estimated rental charge by using the Contractor's best estimate of rental time in the formulae described in paragraph (e) of this clause.

(2) The Contractor shall not use Government property for nongovernmental purposes, including Independent Research and Development, until a rental charge for real property, or estimated rental charge for other property, is agreed upon. Rented property shall be used only on a non-interference basis.

(e) *Rental charge*.- (1) *Real property and associated fixtures*. (i) The Contractor shall obtain, at its expense, a property appraisal from an independent licensed, accredited, or certified appraiser that computes a monthly, daily, or hourly rental rate for comparable commercial property. The appraisal may be used to compute rentals under this clause throughout its effective period or, if an effective period is not stated in the appraisal, for one year following the date the appraisal was performed. The Contractor shall submit the appraisal to the ACO at least 30 days prior to the date the property is needed for nongovernmental use. Except as provided in paragraph (e)(1)(iii) of this clause, the ACO shall use the appraisal rental rate to determine a reasonable rental charge.

(ii) Rental charges shall be determined by multiplying the rental time by the appraisal rental rate expressed as a rate per hour. Monthly or daily appraisal rental rates shall be divided by 720 or 24, respectively, to determine an hourly rental rate.

(iii) When the ACO believes the appraisal rental rate is unreasonable, the ACO shall promptly notify the Contractor. The parties may agree on an alternative means for computing a reasonable rental charge.

(iv) The Contractor shall obtain, at its expense, additional property appraisals in the same manner as provided in paragraph (e)(1)(i) if the effective period has expired and the Contractor desires the continued use of property for nongovernmental use. The Contractor may obtain additional appraisals within the effective period of the current appraisal if the market prices decrease substantially.

(2) *Other Government property*. The Contractor may elect to compute the rental charge using the appraisal method described in paragraph (e)(1) of this clause subject to the constraints therein or the following formula in which rental time shall be expressed in increments of not less than one hour with portions of hours rounded to the next higher hour: The hourly rental charge is calculated by multiplying 2 percent of the acquisition cost by the hours of rental time, and dividing by 720.

(3) *Alternative methodology*. The Contractor may request consideration of an alternative basis for computing the rental charge if it considers the monthly rental rate or a time-based rental unreasonable or impractical.

(f) *Rental payments*. (1) Rent is due 60 days following completion of the rental period or as otherwise specified in the contract. The Contractor shall compute the rental due, and furnish records or other supporting data in sufficient detail to permit the ACO to verify the rental time and computation. Payment shall be made by check payable to the Treasurer of the United States and sent to the contract administration office identified in this contract, unless otherwise specified by the Contracting Officer.

(2) Interest will be charged if payment is not made by the date specified in paragraph (f)(1) of this clause. Interest will accrue at the "Renegotiation Board Interest Rate" (published in the*Federal Register* semiannually on or about January 1st and July 1st) for the period in which the rent is due.

(3) The Government's acceptance of any rental payment under this clause, in whole or in part, shall not be construed as a waiver or relinquishment of any rights it may have against the Contractor stemming from the Contractor's unauthorized use of Government property or any other failure to perform this contract according to its terms.

(g) *Use revocation*. At any time during the rental period, the Government may revoke nongovernmental use authorization and require the Contractor, at the Contractor's expense, to return the property to the Government, restore the property to its pre-rental condition (less normal wear and tear), or both.

(h) *Unauthorized use*. The unauthorized use of Government property can subject a person to fines, imprisonment, or both, under 18 U.S.C. 641.

(End of clause)

52.246 [Reserved]

52.246-1 Contractor Inspection Requirements.

As prescribed in 46.301, insert the following clause:

CONTRACTOR INSPECTION REQUIREMENTS (APR 1984)

The Contractor is responsible for performing or having performed all inspections and tests necessary to substantiate that the supplies or services furnished under this contract conform to contract requirements, including any applicable technical requirements for specified manufacturers' parts. This clause takes precedence over any Government inspection and testing required in the contract's specifications, except for specialized inspections or tests specified to be performed solely by the Government.

(End of clause)

52.246-2 Inspection of Supplies-Fixed-Price.

As prescribed in 46.302, insert the following clause:

INSPECTION OF SUPPLIES-FIXED-PRICE (AUG 1996)

(a) *Definition.* "Supplies," as used in this clause, includes but is not limited to raw materials, components, intermediate assemblies, end products, and lots of supplies.

(b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering supplies under this contract and shall tender to the Government for acceptance only supplies that have been inspected in accordance with the inspection system and have been found by the Contractor to be in conformity with contract requirements. As part of the system, the Contractor shall prepare records evidencing all inspections made under the system and the outcome. These records shall be kept complete and made available to the Government during contract performance and for as long afterwards as the contract requires. The Government may perform reviews and evaluations as reasonably necessary to ascertain compliance with this paragraph. These reviews and evaluations shall be conducted in a manner that will not unduly delay the contract work. The right of review, whether exercised or not, does not relieve the Contractor of the obligations under the contract.

(c) The Government has the right to inspect and test all supplies called for by the contract, to the extent practicable, at all places and times, including the period of manufacture, and in any event before acceptance. The Government shall perform inspections and tests in a manner that will not unduly delay the work. The Government assumes no contractual obligation to perform any inspection and test for the benefit of the Contractor unless specifically set forth elsewhere in this contract.

(d) If the Government performs inspection or test on the premises of the Contractor or a subcontractor, the Contractor shall furnish, and shall require subcontractors to furnish, at no increase in contract price, all reasonable facilities and assistance for the safe and convenient performance of these duties. Except as otherwise provided in the contract, the Government shall bear the expense of Government inspections or tests made at other than the Contractor's or subcontractor's premises; provided, that in case of rejection, the Government shall not be liable for any reduction in the value of inspection or test samples.

(e) (1) When supplies are not ready at the time specified by the Contractor for inspection or test, the Contracting Officer may charge to the Contractor the additional cost of inspection or test.

(2) The Contracting Officer may also charge the Contractor for any additional cost of inspection or test when prior rejection makes reinspection or retest necessary.

(f) The Government has the right either to reject or to require correction of nonconforming supplies. Supplies are nonconforming when they are defective in material or workmanship or are otherwise not in conformity with contract requirements. The Government may reject nonconforming supplies with or without disposition instructions.

(g) The Contractor shall remove supplies rejected or required to be corrected. However, the Contracting Officer may require or permit correction in place, promptly after notice, by and at the expense of the Contractor. The Contractor shall not tender for acceptance corrected or rejected supplies without disclosing the former rejection or requirement for correction, and, when required, shall disclose the corrective action taken.

(h) If the Contractor fails to promptly remove, replace, or correct rejected supplies that are required to be removed or to be replaced or corrected, the Government may either (1)by contract or otherwise, remove, replace, or correct the supplies

and charge the cost to the Contractor or (2) terminate the contract for default. Unless the Contractor corrects or replaces the supplies within the delivery schedule, the Contracting Officer may require their delivery and make an equitable price reduction. Failure to agree to a price reduction shall be a dispute.

(i) (1) If this contract provides for the performance of Government quality assurance at source, and if requested by the Government, the Contractor shall furnish advance notification of the time-

(i) When Contractor inspection or tests will be performed in accordance with the terms and conditions of the contract; and

(ii) When the supplies will be ready for Government inspection.

(2) The Government's request shall specify the period and method of the advance notification and the Government representative to whom it shall be furnished. Requests shall not require more than 2 workdays of advance notification if the Government representative is in residence in the Contractor's plant, nor more than 7 workdays in other instances.

(j) The Government shall accept or reject supplies as promptly as practicable after delivery, unless otherwise provided in the contract. Government failure to inspect and accept or reject the supplies shall not relieve the Contractor from responsibility, nor impose liability on the Government, for nonconforming supplies.

(k) Inspections and tests by the Government do not relieve the Contractor of responsibility for defects or other failures to meet contract requirements discovered before acceptance. Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract.

(l) If acceptance is not conclusive for any of the reasons in paragraph (k) hereof, the Government, in addition to any other rights and remedies provided by law, or under other provisions of this contract, shall have the right to require the Contractor (1)at no increase in contract price, to correct or replace the defective or nonconforming supplies at the original point of delivery or at the Contractor's plant at the Contracting Officer's election, and in accordance with a reasonable delivery schedule as may be agreed upon between the Contractor and the Contracting Officer; provided, that the Contracting Officer may require a reduction in contract price if the Contractor fails to meet such delivery schedule, or (2) within a reasonable time after receipt by the Contractor of notice of defects or nonconformance, to repay such portion of the contract as is equitable under the circumstances if the Contracting Officer elects not to require correction or replacement. When supplies are returned to the Contractor, the Contractor shall bear the transportation cost from the original point of delivery to the Contractor's plant and return to the original point when that point is not the Contractor's plant. If the Contractor fails to perform or act as required in paragraph (l)(1) or (l)(2) of this clause and does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure, the Government shall have the right by contract or otherwise to replace or correct such supplies and charge to the Contractor the cost occasioned the Government thereby.

(End of clause)

Alternate I (July1985). If a fixed-price incentive contract is contemplated, substitute paragraphs (g), (h), and (l) below for paragraphs (g), (h), and (l) of the basic clause.

(g) The Contractor shall remove supplies rejected or required to be corrected. However, the Contracting Officer may require or permit correction in place, promptly after notice. The Contractor shall not tender for acceptance corrected or rejected supplies without disclosing the former rejection or requirement for correction, and when required shall disclose the corrective action taken. Cost of removal, replacement, or correction shall be considered a cost incurred, or to be incurred, in the total final negotiated cost fixed under the incentive price revision clause. However, replacements or corrections by the Contractor after the establishment of the total final price shall be at no increase in the total final price.

(h) If the Contractor fails to promptly remove, replace, or correct rejected supplies that are required to be removed or to be replaced or corrected, the Government may either (1)by contract or otherwise, remove, replace, or correct the supplies and equitably reduce the target price or, if established, the total final price or (2) may terminate the contract for default. Unless the Contractor corrects or replaces the nonconforming supplies within the delivery schedule, the Contracting Officer may require their delivery and equitably reduce any target price or, if it is established, the total final contract price. Failure to agree upon an equitable price reduction shall be a dispute.

(l) If acceptance is not conclusive for any of the reasons in paragraph (k) hereof, the Government, in addition to any other rights and remedies provided by law, or under other provisions of this contract, shall have the right to require the Contractor (1)at no increase in any target price or, if it is established, the total final price of this contract, to correct or replace the defective or nonconforming supplies at the original point of delivery or at the Contractor's plant at the Contracting Officer's election, and in accordance with a reasonable delivery schedule as may be agreed upon between the Contractor and the

Contracting Officer; provided, that the Contracting Officer may require a reduction in any target price, or, if it is established, the total final price of this contract, if the Contractor fails to meet such delivery schedule; or (2) within a reasonable time after receipt by the Contractor of notice of defects or nonconformance, to repay such portion of the total final price as is equitable under the circumstances if the Contracting Officer elects not to require correction or replacement. When supplies are returned to the Contractor, the Contractor shall bear the transportation costs from the original point of delivery to the Contractor's plant and return to the original point when that point is not the Contractor's plant. If the Contractor fails to perform or act as required in paragraph (l)(1) or (l)(2) of this clause and does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure, the Government shall have the right by contract or otherwise to replace or correct such supplies and equitably reduce any target price or, if it is established, the total final price of this contract.

Alternate II (July1985). If a fixed-ceiling-price contract with retroactive price redetermination is contemplated, substitute paragraphs (g), (h), and (l) below for paragraphs (g), (h), and (l) of the basic clause:

(g) The Contractor shall remove supplies rejected or required to be corrected. However, the Contracting Officer may require or permit correction in place, promptly after notice. The Contractor shall not tender for acceptance corrected or rejected supplies without disclosing the former rejection or requirement for correction, and when required shall disclose the corrective action taken. Cost of removal, replacement, or correction shall be considered a cost incurred, or to be incurred, when redetermining the prices under the price redetermination clause. However, replacements or corrections by the Contractor after the establishment of the redetermined prices shall be at no increase in the redetermined price.

(h) If the Contractor fails to promptly remove, replace, or correct rejected supplies that are required to be removed or to be replaced or corrected, the Government may either (1)by contract or otherwise, remove, replace, or correct the supplies and equitably reduce the initial contract prices or, if established, the redetermined contract prices or (2) terminate the contract for default. Unless the Contractor corrects or replaces the nonconforming supplies within the delivery schedule, the Contracting Officer may require their delivery and equitably reduce the initial contract price or, if it is established, the redetermined contract prices. Failure to agree upon an equitable price reduction shall be a dispute.

(l) If acceptance is not conclusive for any of the reasons in paragraph (k) hereof, the Government, in addition to any other rights and remedies provided by law, or under other provisions of this contract, shall have the right to require the Contractor (1)at no increase in the initial contract prices, or, if it is established, the redetermined prices of this contract, to correct or replace the defective or nonconforming supplies at the original point of delivery or at the Contractor's plant at the Contracting Officer's election, and in accordance with a reasonable delivery schedule as may be agreed upon between the Contractor and the Contracting Officer; provided, that the Contracting Officer may require a reduction in the initial contract prices, or, if it is established, the redetermined prices of this contract, if the Contractor fails to meet such delivery schedule; or (2) within a reasonable time after receipt by the Contractor of notice of defects or nonconformance, to repay such portion of the initial contract prices, or, if it is established, the redetermined prices of this contract, as is equitable under the circumstances if the Contracting Officer elects not to require correction or replacement. When supplies are returned to the Contractor, the Contractor shall bear the transportation costs from the original point of delivery to the Contractor's plant and return to the original point when that point is not the Contractor's plant. If the Contractor fails to perform or act as required in paragraph (l)(1) or (l) (2) of this clause and does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure, the Government shall have the right by contract or otherwise to replace or correct such supplies and equitably reduce the initial contract prices, or, if it is established, the redetermined prices of this contract.

52.246-3 Inspection of Supplies-Cost-Reimbursement.

As prescribed in 46.303, insert the following clause in solicitations and contracts for supplies, or services that involve the furnishing of supplies, when a cost-reimbursement contract is contemplated:

INSPECTION OF SUPPLIES-COST-REIMBURSEMENT (MAY 2001)

(a) *Definitions.* As used in this clause-

Contractor's managerial personnel means any of the Contractor's directors, officers, managers, superintendents, or equivalent representatives who have supervision or direction of-

(1) All or substantially all of the Contractor's business;

(2) All or substantially all of the Contractor's operation at a plant or separate location where the contract is being performed; or

(3) A separate and complete major industrial operation connected with performing this contract.

Supplies includes but is not limited to raw materials, components, intermediate assemblies, end products, lots of supplies, and, when the contract does not include the Warranty of Data clause, data.

(b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the supplies, fabricating methods, and special tooling under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Government during contract performance and for as long afterwards as the contract requires.

(c) The Government has the right to inspect and test the contract supplies, to the extent practicable at all places and times, including the period of manufacture, and in any event before acceptance. The Government may also inspect the plant or plants of the Contractor or any subcontractor engaged in the contract performance. The Government shall perform inspections and tests in a manner that will not unduly delay the work.

(d) If the Government performs inspection or test on the premises of the Contractor or a subcontractor, the Contractor shall furnish and shall require subcontractors to furnish all reasonable facilities and assistance for the safe and convenient performance of these duties.

(e) Unless otherwise specified in the contract, the Government shall accept supplies as promptly as practicable after delivery, and supplies shall be deemed accepted 60 days after delivery, unless accepted earlier.

(f) At any time during contract performance, but no later than 6 months (or such other time as may be specified in the contract) after acceptance of the supplies to be delivered under the contract, the Government may require the Contractor to replace or correct any supplies that are nonconforming at time of delivery. Supplies are nonconforming when they are defective in material or workmanship or are otherwise not in conformity with contract requirements. Except as otherwise provided in paragraph (h) of this clause, the cost of replacement or correction shall be included in allowable cost, determined as provided in the Allowable Cost and Payment clause, but no additional fee shall be paid. The Contractor shall not tender for acceptance supplies required to be replaced or corrected without disclosing the former requirement for replacement or correction, and, when required, shall disclose the corrective action taken.

(g) (1) If the Contractor fails to proceed with reasonable promptness to perform required replacement or correction, the Government may-

(i) By contract or otherwise, perform the replacement or correction and charge to the Contractor any increased cost or make an equitable reduction in any fixed fee paid or payable under the contract;

(ii) Require delivery of undelivered supplies at an equitable reduction in any fixed fee paid or payable under the contract; or

(iii) Terminate the contract for default.

(2) Failure to agree on the amount of increased cost to be charged to the Contractor or to the reduction in the fixed fee shall be a dispute.

(h) Notwithstanding paragraphs (f) and (g) of this clause, the Government may at any time require the Contractor to correct or replace, without cost to the Government, nonconforming supplies, if the nonconformances are due to-

(1) Fraud, lack of good faith, or willful misconduct on the part of the Contractor's managerial personnel; or

(2) The conduct of one or more of the Contractor's employees selected or retained by the Contractor after any of the Contractor's managerial personnel has reasonable grounds to believe that the employee is habitually careless or unqualified.

(i) This clause applies in the same manner to corrected or replacement supplies as to supplies originally delivered.

(j) The Contractor shall have no obligation or liability under this contract to replace supplies that were nonconforming at the time of delivery, except as provided in this clause or as may be otherwise provided in the contract.

(k) Except as otherwise specified in the contract, the Contractor's obligation to correct or replace Government-furnished property shall be governed by the clause pertaining to Government property.

(End of clause)

52.246-4 Inspection of Services-Fixed-Price.

As prescribed in 46.304, insert the following clause:

INSPECTION OF SERVICES-FIXED-PRICE (AUG 1996)

(a) *Definition.*"Services," as used in this clause, includes services performed, workmanship, and material furnished or utilized in the performance of services.

(b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the services under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Government during contract performance and for as long afterwards as the contract requires.

(c) The Government has the right to inspect and test all services called for by the contract, to the extent practicable at all times and places during the term of the contract. The Government shall perform inspections and tests in a manner that will not unduly delay the work.

(d) If the Government performs inspections or tests on the premises of the Contractor or a subcontractor, the Contractor shall furnish, and shall require subcontractors to furnish, at no increase in contract price, all reasonable facilities and assistance for the safe and convenient performance of these duties.

(e) If any of the services do not conform with contract requirements, the Government may require the Contractor to perform the services again in conformity with contract requirements, at no increase in contract amount. When the defects in services cannot be corrected by reperformance, the Government may-

(1) Require the Contractor to take necessary action to ensure that future performance conforms to contract requirements; and

(2) Reduce the contract price to reflect the reduced value of the services performed.

(f) If the Contractor fails to promptly perform the services again or to take the necessary action to ensure future performance in conformity with contract requirements, the Government may-

(1) By contract or otherwise, perform the services and charge to the Contractor any cost incurred by the Government that is directly related to the performance of such service; or

(2) Terminate the contract for default.

(End of clause)

52.246-5 Inspection of Services-Cost-Reimbursement.

As prescribed in 46.305, insert the following clause in solicitations and contracts for services, or supplies that involve the furnishing of services, when a cost-reimbursement contract is contemplated:

INSPECTION OF SERVICES-COST-REIMBURSEMENT (APR 1984)

(a) *Definition.*"Services," as used in this clause, includes services performed, workmanship, and material furnished or used in performing services.

(b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the services under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Government during contract performance and for as long afterwards as the contract requires.

(c) The Government has the right to inspect and test all services called for by the contract, to the extent practicable at all places and times during the term of the contract. The Government shall perform inspections and tests in a manner that will not unduly delay the work.

(d) If any of the services performed do not conform with contract requirements, the Government may require the Contractor to perform the services again in conformity with contract requirements, for no additional fee. When the defects in services cannot be corrected by reperformance, the Government may-

(1) Require the Contractor to take necessary action to ensure that future performance conforms to contract requirements; and

(2) Reduce any fee payable under the contract to reflect the reduced value of the services performed.

(e) If the Contractor fails to promptly perform the services again or take the action necessary to ensure future performance in conformity with contract requirements, the Government may-

(1) By contract or otherwise, perform the services and reduce any fee payable by an amount that is equitable under the circumstances; or

(2) Terminate the contract for default.

(End of clause)

52.246-6 Inspection-Time-and-Material and Labor-Hour.

As prescribed in 46.306, insert the following clause:

INSPECTION-TIME-AND-MATERIAL AND LABOR-HOUR (MAY 2001)

(a) *Definitions.* As used in this clause-

Contractor's managerial personnel means any of the Contractor's directors, officers, managers, superintendents, or equivalent representatives who have supervision or direction of-

(1) All or substantially all of the Contractor's business;

(2) All or substantially all of the Contractor's operation at any one plant or separate location where the contract is being performed; or

(3) A separate and complete major industrial operation connected with the performance of this contract.

Materials includes data when the contract does not include the Warranty of Data clause.

(b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the material, fabricating methods, work, and services under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Government during contract performance and for as long afterwards as the contract requires.

(c) The Government has the right to inspect and test all materials furnished and services performed under this contract, to the extent practicable at all places and times, including the period of performance, and in any event before acceptance. The Government may also inspect the plant or plants of the Contractor or any subcontractor engaged in contract performance. The Government shall perform inspections and tests in a manner that will not unduly delay the work.

(d) If the Government performs inspection or test on the premises of the Contractor or a subcontractor, the Contractor shall furnish and shall require subcontractors to furnish all reasonable facilities and assistance for the safe and convenient performance of these duties.

(e) Unless otherwise specified in the contract, the Government shall accept or reject services and materials at the place of delivery as promptly as practicable after delivery, and they shall be presumed accepted 60 days after the date of delivery, unless accepted earlier.

(f) At any time during contract performance, but not later than 6 months (or such other time as may be specified in the contract) after acceptance of the services or materials last delivered under this contract, the Government may require the Contractor to replace or correct services or materials that at time of delivery failed to meet contract requirements. Except as otherwise specified in paragraph (h) of this clause, the cost of replacement or correction shall be determined under the Payments Under Time-and-Materials and Labor-Hour Contracts clause, but the "hourly rate" for labor hours incurred in the replacement or correction shall be reduced to exclude that portion of the rate attributable to profit. The Contractor shall not tender for acceptance materials and services required to be replaced or corrected without disclosing the former requirement for replacement or correction, and, when required, shall disclose the corrective action taken.

(g) (1) If the Contractor fails to proceed with reasonable promptness to perform required replacement or correction, and if the replacement or correction can be performed within the ceiling price (or the ceiling price as increased by the Government), the Government may-

(i) By contract or otherwise, perform the replacement or correction, charge to the Contractor any increased cost, or deduct such increased cost from any amounts paid or due under this contract; or

(ii) Terminate this contract for default.

(2) Failure to agree to the amount of increased cost to be charged to the Contractor shall be a dispute.

(h) Notwithstanding paragraphs (f) and (g) of this clause, the Government may at any time require the Contractor to remedy by correction or replacement, without cost to the Government, any failure by the Contractor to comply with the requirements of this contract, if the failure is due to-

(1) Fraud, lack of good faith, or willful misconduct on the part of the Contractor's managerial personnel; or

(2) The conduct of one or more of the Contractor's employees selected or retained by the Contractor after any of the Contractor's managerial personnel has reasonable grounds to believe that the employee is habitually careless or unqualified.

(i) This clause applies in the same manner and to the same extent to corrected or replacement materials or services as to materials and services originally delivered under this contract.

(j) The Contractor has no obligation or liability under this contract to correct or replace materials and services that at time of delivery do not meet contract requirements, except as provided in this clause or as may be otherwise specified in the contract.

(k) Unless otherwise specified in the contract, the Contractor's obligation to correct or replace Government-furnished property shall be governed by the clause pertaining to Government property.

(End of clause)

Alternate I (APR 1984). If Government inspection and acceptance are to be performed at the contractor's plant, paragraph (e) below may be substituted for paragraph (e) of the basic clause:

(e) The Government shall inspect for acceptance all items (other than aircraft to be flown away, if any) to be furnished under this contract at the Contractor's plant or plants specified in the contract, or at any other plant or plants approved for such purpose in writing by the Contracting Officer. The Contractor shall inform the contract administration office or Contracting Officer when the work is ready for inspection. The Government reserves the right to charge to the Contractor any additional cost of Government inspection and test when items are not ready at the time for which inspection and test is requested by the Contractor.

52.246-7 Inspection of Research and Development-Fixed-Price.

As prescribed in 46.307(a), insert the following clause:

INSPECTION OF RESEARCH AND DEVELOPMENT-FIXED-PRICE (AUG 1996)

(a) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the work under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Government during contract performance and for as long afterwards as the contract requires.

(b) The Government has the right to inspect and test all work called for by the contract, to the extent practicable at all places and times, including the period of performance, and in any event before acceptance. The Government may also inspect the premises of the Contractor or any subcontractor engaged in contract performance. The Government shall perform inspections and tests in a manner that will not unduly delay the work.

(c) If the Government performs any inspection or test on the premises of the Contractor or a subcontractor, the Contractor shall furnish and shall require subcontractors to furnish, at no increase in contract price, all reasonable facilities and assistance for the safe and convenient performance of these duties. Except as otherwise provided in the contract, the Government shall bear the expense of Government inspections or tests made at other than the Contractor's or subcontractor's premises.

(d) The Government shall accept or reject the work as promptly as practicable after delivery, unless otherwise specified in the contract. Government failure to inspect and accept or reject the work shall not relieve the Contractor from responsibility, nor impose liability on the Government, for nonconforming work. Work is nonconforming when it is defective in material or workmanship or is otherwise not in conformity with contract requirements.

(e) The Government has the right to reject nonconforming work. If the Contractor fails or is unable to correct or to replace nonconforming work within the delivery schedule (or such later time as the Contracting Officer may authorize), the Contracting Officer may accept the work and make an equitable price reduction. Failure to agree on a price reduction shall be a dispute.

(f) Inspection and test by the Government does not relieve the Contractor from responsibility for defects or other failures to meet the contract requirements that may be discovered before acceptance. Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise specified in the contract. If acceptance is not conclusive for any of these causes, the Government, in addition to any other rights and remedies provided by law, or under other provisions of this contract, shall have the right to require the Contractor-

(1) At no increase in contract price, to correct or replace the defective or nonconforming supplies (work) at the original point of delivery or at the Contractor's plant at the Contracting Officer's election, and in accordance with a reasonable delivery schedule as may be agreed upon between the Contractor and the Contracting Officer; provided, the Contracting Officer may require a reduction in contract price if the Contractor fails to meet such delivery schedule; or

(2) Within a reasonable time after the Contractor's receipt of notice of defects or nonconformance, to repayment of such portion of the contract price as is equitable under the circumstances if the Government elects not to require correction or replacement. When supplies (work) are (is) returned to the Contractor, the Contractor shall bear transportation costs from

the original point of delivery to the Contractor's plant and return to the original point of delivery when that point is not the Contractor's plant.

(End of clause)

52.246-8 Inspection of Research and Development-Cost-Reimbursement.

As prescribed in 46.308, insert the following clause in solicitations and contracts for research and development when (a) the primary objective is the delivery of end items other than designs, drawings, or reports; and (b) a cost-reimbursement contract is contemplated; unless use of the clause is impractical and the clause prescribed in 46.309 is considered to be more appropriate:

INSPECTION OF RESEARCH AND DEVELOPMENT—COST-REIMBURSEMENT (MAY 2001)

(a) Definitions. As used in this clause—

Contractor's managerial personnel means the Contractor's directors, officers, managers, superintendents, or equivalent representatives who have supervision or direction of

(1) All or substantially all of the Contractor's business;

(2) All or substantially all of the Contractor's operation at any one plant or separate location where the contract is being performed; or

(3) A separate and complete major industrial operation connected with performing this contract.

Work includes data when the contract does not include the Warranty of Data clause.

(b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the work under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Government during contract performance and for as long afterwards as the contract requires.

(c) The Government has the right to inspect and test all work called for by the contract, to the extent practicable at all places and times, including the period of performance, and in any event before acceptance. The Government may also inspect the plant or plants of the Contractor or its subcontractors engaged in the contract performance. The Government shall perform inspections and tests in a manner that will not unduly delay the work.

(d) If the Government performs any inspection or test on the premises of the Contractor or a subcontractor, the Contractor shall furnish and shall require subcontractors to furnish all reasonable facilities and assistance for the safe and convenient performance of these duties.

(e) Unless otherwise provided in the contract, the Government shall accept work as promptly as practicable after delivery, and work shall be deemed accepted 90 days after delivery, unless accepted earlier.

(f) At any time during contract performance, but no later than 6 months (or such other time as may be specified in the contract) after acceptance of all of the end items (other than designs, drawings, or reports) to be delivered under the contract, the Government may require the Contractor to replace or correct work not meeting contract requirements. Time devoted to the replacement or correction of such work shall not be included in the computation of the above time period. Except as otherwise provided in paragraph (h) of this clause, the cost of replacement or correction shall be determined as specified in the Allowable Cost and Payment clause, but no additional fee shall be paid. The Contractor shall not tender for acceptance work required to be replaced or corrected without disclosing the former requirement for replacement or correction, and, when required, shall disclose the corrective action taken.

(g) (1) If the Contractor fails to proceed with reasonable promptness to perform required replacement or correction, the Government may—

(i) By contract or otherwise, perform the replacement or correction, charge to the Contractor any increased cost, or make an equitable reduction in any fixed fee paid or payable under the contract;

(ii) Require delivery of any undelivered articles and shall have the right to make an equitable reduction in any fixed fee paid or payable under the contract; or

(iii) Terminate the contract for default.

(2) Failure to agree on the amount of increased cost to be charged the Contractor or to the reduction in fixed fee shall be a dispute.

(h) Notwithstanding paragraphs (f) and (g) of this clause, the Government may at any time require the Contractor to remedy by correction or replacement, without cost to the Government, any failure by the Contractor to comply with the requirements of this contract, if the failure is due to—

(1) Fraud, lack of good faith, or willful misconduct on the part of the Contractor's managerial personnel; or

(2) The conduct of one or more of the Contractor's employees selected or retained by the Contractor after any of the Contractor's managerial personnel has reasonable grounds to believe that the employee is habitually careless or unqualified.

(i) This clause shall apply in the same manner to a corrected or replacement end item or components as to work originally delivered.

(j) The Contractor has no obligation or liability under the contract to correct or replace articles not meeting contract requirements at time of delivery, except as provided in this clause or as may otherwise be specified in the contract.

(k) Unless otherwise provided in the contract, the Contractor's obligations to correct or replace Government-furnished property shall be governed by the clause pertaining to Government property.

(End of clause)

Alternate I (APR 1984). If it is contemplated that the contract will be on a no-fee basis, substitute paragraphs (f) and (g) below for paragraphs (f) and (g) of the basic clause.

(f) At any time during contract performance, but not later than 6 months (or such other time as may be specified in the contract) after acceptance of all of the end items (other than designs, drawings, or reports) to be delivered under the contract, the Government may require the Contractor to correct or replace work not meeting contract requirements. Time devoted to the correction or replacement of such work shall not be included in the computation of the above time period. Except as otherwise provided in paragraph (g) of this clause, the allowability of the cost of any such replacement or correction shall be determined as specified in the Allowable Cost and Payment clause. The Contractor shall not tender for acceptance corrected work without disclosing the former requirement for correction, and, when required, shall disclose the corrective action taken.

(g) If the Contractor fails to proceed with reasonable promptness to perform required replacement or correction, the Government may-

(1) By contract or otherwise, perform the replacement or correction and charge to the Contractor any increased cost;

(2) Require delivery of any undelivered articles; or

(3) Terminate the contract for default. Failure to agree on the amount of increased cost to be charged to the Contractor shall be a dispute.

52.246-9 Inspection of Research and Development (Short Form).

As prescribed in 46.309, insert the following clause:

INSPECTION OF RESEARCH AND DEVELOPMENT (SHORTFORM) (APR 1984)

The Government has the right to inspect and evaluate the work performed or being performed under the contract, and the premises where the work is being performed, at all reasonable times and in a manner that will not unduly delay the work. If the Government performs inspection or evaluation on the premises of the Contractor or a subcontractor, the Contractor shall furnish and shall require subcontractors to furnish all reasonable facilities and assistance for the safe and convenient performance of these duties.

(End of clause)

52.246-10 [Reserved]

52.246-11 Higher-Level Contract Quality Requirement.

As prescribed in 46.311, insert the following clause:

HIGHER-LEVEL CONTRACT QUALITY REQUIREMENT (DEC 2014)

(a) The Contractor shall comply with the higher-level quality standard(s) listed below.

_____ *[Contracting Officer insert the title, number, date, and tailoring (if any) of the higher-level quality standards.]*

(b) The Contractor shall include applicable requirements of the higher-level quality standard(s) listed in paragraph (a) of this clause and the requirement to flow down such standards, as applicable, to lower-tier subcontracts, in-

(1) Any subcontract for critical and complex items (see 46.203(b) and (c)); or

(2) When the technical requirements of a subcontract require-

(i) Control of such things as design, work operations, in-process control, testing, and inspection; or

(ii) Attention to such factors as organization, planning, work instructions, documentation control, and advanced metrology.

(End of clause)

52.246-12 Inspection of Construction.

As prescribed in 46.312, insert the following clause:

INSPECTION OF CONSTRUCTION (AUG 1996)

(a) *Definition.*

Work includes, but is not limited to, materials, workmanship, and manufacture and fabrication of components.

(b) The Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the work performed under the contract conforms to contract requirements. The Contractor shall maintain complete inspection records and make them available to the Government. All work shall be conducted under the general direction of the Contracting Officer and is subject to Government inspection and test at all places and at all reasonable times before acceptance to ensure strict compliance with the terms of the contract.

(c) Government inspections and tests are for the sole benefit of the Government and do not-

(1) Relieve the Contractor of responsibility for providing adequate quality control measures;

(2) Relieve the Contractor of responsibility for damage to or loss of the material before acceptance;

(3) Constitute or imply acceptance; or

(4) Affect the continuing rights of the Government after acceptance of the completed work under paragraph (i) of this-section.

(d) The presence or absence of a Government inspector does not relieve the Contractor from any contract requirement, nor is the inspector authorized to change any term or condition of the specification without the Contracting Officer's written authorization.

(e) The Contractor shall promptly furnish, at no increase in contract price, all facilities, labor, and material reasonably needed for performing such safe and convenient inspections and tests as may be required by the Contracting Officer. The Government may charge to the Contractor any additional cost of inspection or test when work is not ready at the time specified by the Contractor for inspection or test, or when prior rejection makes reinspection or retest necessary. The Government shall perform all inspections and tests in a manner that will not unnecessarily delay the work. Special, full size, and performance tests shall be performed as described in the contract.

(f) The Contractor shall, without charge, replace or correct work found by the Government not to conform to contract requirements, unless in the public interest the Government consents to accept the work with an appropriate adjustment in contract price. The Contractor shall promptly segregate and remove rejected material from the premises.

(g) If the Contractor does not promptly replace or correct rejected work, the Government may-

(1) By contract or otherwise, replace or correct the work and charge the cost to the Contractor; or

(2) Terminate for default the Contractor's right to proceed.

(h) If, before acceptance of the entire work, the Government decides to examine already completed work by removing it or tearing it out, the Contractor, on request, shall promptly furnish all necessary facilities, labor, and material. If the work is found to be defective or nonconforming in any material respect due to the fault of the Contractor or its subcontractors, the Contractor shall defray the expenses of the examination and of satisfactory reconstruction. However, if the work is found to meet contract requirements, the Contracting Officer shall make an equitable adjustment for the additional services involved in the examination and reconstruction, including, if completion of the work was thereby delayed, an extension of time.

(i) Unless otherwise specified in the contract, the Government shall accept, as promptly as practicable after completion and inspection, all work required by the contract or that portion of the work the Contracting Officer determines can be accepted separately. Acceptance shall be final and conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or the Government's rights under any warranty or guarantee.

(End of clause)

52.246-13 Inspection-Dismantling, Demolition, or Removal of Improvements.

As prescribed in 46.313, insert the following clause in solicitations and contracts for dismantling, demolition, or removal of improvements:

INSPECTION-DISMANTLING, DEMOLITION, OR REMOVAL OF IMPROVEMENTS (AUG 1996)

(a) Unless otherwise designated by the specifications, all workmanship performed under the contract is subject to Government inspection at all times and places where dismantling or demolition work is being performed. The Contractor shall furnish promptly, and at no increase in contract price, all reasonable facilities, labor, and materials necessary for safe and convenient inspection by the Government. The Government shall perform inspections in a manner that will not unduly delay the work.

(b) The Contractor is responsible for damage to property caused by defective workmanship. The Contractor shall promptly segregate and remove from the premises any unsatisfactory facilities, materials, and equipment used in contract performance, and promptly replace them with satisfactory items. If the Contractor fails to proceed at once in a workmanlike manner with performance of the work or with the correction of defective workmanship, the Government may-

(1) By contract or otherwise, replace the facilities, materials, and equipment or correct the workmanship and charge the cost to the Contractor; and

(2) Terminate for default the Contractor's right to proceed. The Contractor and any surety shall be liable, to the extent specified in the contract for any damage or cost of repair or replacement.

(End of clause)

52.246-14 Inspection of Transportation.

As prescribed in 46.314, insert the following clause in solicitations and contracts for freight transportation services (including local drayage) by rail, motor (including bus), domestic freight forwarder, and domestic water carriers (including inland, coastwise, and intercoastal). The contracting officer shall not use the clause for the acquisition of transportation services by domestic or international air carriers or by international ocean carriers, or to freight services provided under bills of lading or to those negotiated for reduced rates under 49 U.S.C.10721 or 13712 . (See part 47)

INSPECTION OF TRANSPORTATION (APR 1984)

The Government has the right to inspect and test the Contractor's services, facilities, and equipment at all reasonable times. The Contractor shall furnish Government representatives with the free access and reasonable facilities and assistance required to accomplish their inspections and tests.

(End of clause)

52.246-15 Certificate of Conformance.

As prescribed in 46.315, insert the following clause in solicitations and contracts for supplies or services when the conditions in 46.504 apply:

CERTIFICATE OF CONFORMANCE (APR 1984)

(a) When authorized in writing by the cognizant Contract Administration Office (CAO), the Contractor shall ship with a Certificate of Conformance any supplies for which the contract would otherwise require inspection at source. In no case shall the Government's right to inspect supplies under the inspection provisions of this contract be prejudiced. Shipments of such supplies will not be made under this contract until use of the Certificate of Conformance has been authorized in writing by the CAO, or inspection and acceptance have occurred.

(b) The Contractor's signed certificate shall be attached to or included on the top copy of the inspection or receiving report distributed to the payment office or attached to the CAO copy when contract administration (Block10 of the DD Form 250) is performed by the Defense Contract Administration Services. In addition, a copy of the signed certificate shall also be attached to or entered on copies of the inspection or receiving report accompanying the shipment.

(c) The Government has the right to reject defective supplies or services within a reasonable time after delivery by written notification to the Contractor. The Contractor shall in such event promptly replace, correct, or repair the rejected supplies or services at the Contractor's expense.

(d) The certificate shall read as follows:

I certify that on _____ [*insert date*], the ____ [*insert Contractor's name*] furnished the supplies or services called for by Contract No._____ via ____ [*Carrier*] on _____ [*identify the bill of lading or shipping document*] in accordance with all applicable requirements. I further certify that the supplies or services are of the quality specified and conform in all respects with the contract requirements, including specifications, drawings, preservation, packaging, packing, marking requirements, and physical item identification (part number), and are in the quantity shown on this or on the attached acceptance document.

Date of Execution: _____

Signature: _____

Title: _____

(End of clause)

52.246-16 Responsibility for Supplies.

As prescribed in 46.316, insert the following clause:

RESPONSIBILITY FOR SUPPLIES (APR 1984)

(a) Title to supplies furnished under this contract shall pass to the Government upon formal acceptance, regardless of when or where the Government takes physical possession, unless the contract specifically provides for earlier passage of title.

(b) Unless the contract specifically provides otherwise, risk of loss of or damage to supplies shall remain with the Contractor until, and shall pass to the Government upon-

(1) Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or

(2) Acceptance by the Government or delivery of the supplies to the Government at the destination specified in the contract, whichever is later, if transportation is f.o.b. destination.

(c) Paragraph (b) of this clause shall not apply to supplies that so fail to conform to contract requirements as to give a right of rejection. The risk of loss of or damage to such nonconforming supplies remains with the Contractor until cure or acceptance. After cure or acceptance, paragraph (b) of this clause shall apply.

(d) Under paragraph (b) of this clause, the Contractor shall not be liable for loss of or damage to supplies caused by the negligence of officers, agents, or employees of the Government acting within the scope of their employment.

(End of clause)

52.246-17 Warranty of Supplies of a Noncomplex Nature.

As prescribed in 46.710(a)(1), insert a clause substantially as follows:

WARRANTY OF SUPPLIES OF A NONCOMPLEX NATURE (JUNE 2003)

(a) *Definitions.* As used in this clause-

Acceptance means the act of an authorized representative of the Government by which the Government assumes for itself, or as an agent of another, ownership of existing supplies, or approves specific services as partial or complete performance of the contract.

Supplies means the end items furnished by the Contractor and related services required under this contract. The word does not include "data."

(b) Contractor's obligations. (1) Notwithstanding inspection and acceptance by the Government of supplies furnished under this contract, or any condition of this contract concerning the conclusiveness thereof, the Contractor warrants that for _____ *[Contracting Officer shall state specific period of time after delivery, or the specified event whose occurrence will terminate the warranty period; e.g.,the number of miles or hours of use, or combinations of any applicable events or periods of time]*-

(i) All supplies furnished under this contract will be free from defects in material or workmanship and will conform with all requirements of this contract; and

(ii) The preservation, packaging, packing, and marking, and the preparation for, and method of, shipment of such supplies will conform with the requirements of this contract.

(2) When return, correction, or replacement is required, transportation charges and responsibility for the supplies while in transit shall be borne by the Contractor. However, the Contractor's liability for the transportation charges shall not exceed an amount equal to the cost of transportation by the usual commercial method of shipment between the place of delivery specified in this contract and the Contractor's plant, and return.

(3) Any supplies or parts thereof, corrected or furnished in replacement under this clause, shall also be subject to the terms of this clause to the same extent as supplies initially delivered. The warranty, with respect to supplies or parts thereof, shall be equal in duration to that in paragraph (b)(1) of this clause and shall run from the date of delivery of the corrected or replaced supplies.

(4) All implied warranties of merchantability and "fitness for a particular purpose" are excluded from any obligation contained in this contract.

(c) Remedies available to the Government. (1) The Contracting Officer shall give written notice to the Contractor of any breach of warranties in paragraph (b)(1) of this clause within _____ *[Contracting Officer shall insert specific period of time; e.g.",45 days of the last delivery under this contract", or "45 days after discovery of the defec"t]*.

(2) Within a reasonable time after the notice, the Contracting Officer may either-

(i) Require, by written notice, the prompt correction or replacement of any supplies or parts thereof (including preservation, packaging, packing, and marking) that do not conform with the requirements of this contract within the meaning of paragraph (b)(1) of this clause; or

(ii) Retain such supplies and reduce the contract price by an amount equitable under the circumstances.

(3) (i) If the contract provides for inspection of supplies by sampling procedures, conformance of supplies or components subject to warranty action shall be determined by the applicable sampling procedures in the contract. The Contracting Officer-

(A) May, for sampling purposes, group any supplies delivered under this contract;

(B) Shall require the size of the sample to be that required by sampling procedures specified in the contract for the quantity of supplies on which warranty action is proposed;

(C) May project warranty sampling results over supplies in the same shipment or other supplies contained in other shipments even though all of such supplies are not present at the point of reinspection; provided, that the supplies remaining are reasonably representative of the quantity on which warranty action is proposed; and

(D) Need not use the same lot size as on original inspection or reconstitute the original inspection lots.

(ii) Within a reasonable time after notice of any breach of the warranties specified in paragraph (b)(1) of this clause, the Contracting Officer may exercise one or more of the following options:

(A) Require an equitable adjustment in the contract price for any group of supplies.

(B) Screen the supplies grouped for warranty action under this clause at the Contractor's expense and return all nonconforming supplies to the Contractor for correction or replacement.

(C) Require the Contractor to screen the supplies at locations designated by the Government within the contiguous United States and to correct or replace all nonconforming supplies.

(D) Return the supplies grouped for warranty action under this clause to the Contractor (irrespective of the f.o.b. point or the point of acceptance) for screening and correction or replacement.

(4) (i) The Contracting Officer may, by contract or otherwise, correct or replace the nonconforming supplies with similar supplies from another source and charge to the Contractor the cost occasioned to the Government thereby if the Contractor-

(A) Fails to make redelivery of the corrected or replaced supplies within the time established for their return; or

(B) Fails either to accept return of the nonconforming supplies or fails to make progress after their return to correct or replace them so as to endanger performance of the delivery schedule, and in either of these circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

(ii) Instead of correction or replacement by the Government, the Contracting Officer may require an equitable adjustment of the contract price. In addition, if the Contractor fails to furnish timely disposition instructions, the Contracting Officer may dispose of the nonconforming supplies for the Contractor's account in a reasonable manner. The Government is entitled to reimbursement from the Contractor, or from the proceeds of such disposal, for the reasonable expenses of the care and disposition of the nonconforming supplies, as well as for excess costs incurred or to be incurred.

(5) The rights and remedies of the Government provided in this clause are in addition to and do not limit any rights afforded to the Government by any other clause of this contract.

(End of clause)

Alternate I [Reserved]

Alternate II (APR 1984). If it is desirable to specify that necessary transportation incident to correction or replacement will be at the Government's expense (as might be the case if, for example, the cost of a warranty would otherwise be prohibitive), substitute a paragraph substantially the same as the following paragraph (b)(2) for paragraph (b)(2) of the basic clause:

(2) If correction or replacement is required and transportation of supplies in connection with correction or replacement is necessary, transportation charges and responsibility for the supplies while in transit shall be borne by the Government.

Alternate III (APR 1984). If the supplies cannot be obtained from another source, substitute a paragraph substantially the same as the following paragraph (c)(4) for paragraph (c)(4) of the basic clause:

(4) If the Contractor does not agree as to responsibility to correct or replace the supplies delivered, the Contractor shall nevertheless proceed in accordance with the written request issued by the Contracting Officer under paragraph (c)(2) of this clause to correct or replace the defective or nonconforming supplies. In the event it is later determined that the supplies were not defective or nonconforming within the terms and conditions of this clause, the contract price will be equitably adjusted.

Alternate IV (APR 1984). If a fixed-price incentive contract is contemplated, add a paragraph substantially the same as the following paragraph (c)(6) to the basic clause:

(6) All costs incurred or estimated to be incurred by the Contractor in complying with this clause shall be considered when negotiating the total final price under the Incentive Price Revision clause of this contract. After establishment of the total final price, Contractor compliance with this clause shall be at no increase in the total final price. Any equitable adjustment made under paragraph (c)(2) of this clause shall be governed by the paragraph entitled "Equitable Adjustments Under Other Clauses" in the Incentive Price Revision clause of this contract.

Alternate V (APR 1984). If it is anticipated that recovery of the warranted item will involve considerable Government expense for disassembly and/or reassembly of larger items, add a paragraph substantially the same as the following paragraph (c)(6) to the basic clause. Redesignate the additional paragraph as "(c)(7)" if Alternate IV is also being used.

(6) The Contractor shall be liable for the reasonable costs of disassembly and/or reassembly of larger items when it is necessary to remove the supplies to be inspected and/or returned for correction or replacement.

52.246-18 Warranty of Supplies of a Complex Nature.

As prescribed in 46.710(b)(1), insert a clause substantially as follows:

WARRANTY OF SUPPLIES OF A COMPLEX NATURE (MAY 2001)

(a) *Definitions.* As used in this clause-

Acceptance means the act of an authorized representative of the Government by which the Government assumes for itself, or as an agent of another, ownership of existing and identified supplies, or approves specific services rendered, as partial or complete performance of the contract.

Supplies means the end items furnished by the Contractor and related services required under this contract. The word does not include "data."

(b) *Contractor's obligations.* (1) The Contractor warrants that for _____ *[Contracting Officer shall state the specific warranty period after delivery, or the specified event whose occurrence will terminate the warranty period; e.g.,the number of miles or hours of use, or combinations of any applicable events or periods of time]* all supplies furnished under this contract will be free from defects in material and workmanship and will conform with all requirements of this contract; provided, however, that with respect to Government-furnished property, the Contractor's warranty shall extend only to its proper installation, unless the Contractor performs some modification or other work on the property, in which case the Contractor's warranty shall extend to the modification or other work.

(2) Any supplies or parts thereof corrected or furnished in replacement shall be subject to the conditions of this clause to the same extent as supplies initially delivered. This warranty shall be equal in duration to that set forth in paragraph (b)(1) of this clause and shall run from the date of delivery of the corrected or replaced supplies.

(3) The Contractor shall not be obligated to correct or replace supplies if the facilities, tooling, drawings, or other equipment or supplies necessary to accomplish the correction or replacement have been made unavailable to the Contractor

by action of the Government. In the event that correction or replacement has been directed, the Contractor shall promptly notify the Contracting Officer, in writing, of the nonavailability.

(4) The Contractor shall also prepare and furnish to the Government data and reports applicable to any correction required (including revision and updating of all affected data called for under this contract) at no increase in the contract price.

(5) When supplies are returned to the Contractor, the Contractor shall bear the transportation costs from the place of delivery specified in the contract (irrespective of the f.o.b. point or the point of acceptance) to the Contractor's plant and return.

(6) All implied warranties of merchantability and "fitness for a particular purpose" are excluded from any obligation contained in this contract.

(c) Remedies available to the Government. (1) In the event of a breach of the Contractor's warranty in paragraph (b)(1) of this clause, the Government may, at no increase in contract price-

(i) Require the Contractor, at the place of delivery specified in the contract (irrespective of the f.o.b. point or the point of acceptance) or at the Contractor's plant, to repair or replace, at the Contractor's election, defective or nonconforming supplies; or

(ii) Require the Contractor to furnish at the Contractor's plant the materials or parts and installation instructions required to successfully accomplish the correction.

(2) If the Contracting Officer does not require correction or replacement of defective or nonconforming supplies or the Contractor is not obligated to correct or replace under paragraph (b)(3) of this clause, the Government shall be entitled to an equitable reduction in the contract price.

(3) The Contracting Officer shall notify the Contractor in writing of any breach of the warranty in paragraph (b) of this clause within _____. *[Contracting Officer shall insert specific period of time in which notice shall be given to the Contractor; e.g.",45 days after delivery of the nonconforming supplies".; "45 days of the last delivery under this contract".; or "45 days after discovery of the defect".]* The Contractor shall submit to the Contracting Officer a written recommendation within _____ *[Contracting Officer shall insert period of time]* as to the corrective action required to remedy the breach. After the notice of breach, but not later than _____ *[Contracting Officer shall insert period within which the warranty remedies should be exercised]* after receipt of the Contractor's recommendation for corrective action, the Contracting Officer may, in writing, direct correction or replacement as in paragraph (c)(1) of this clause, and the Contractor shall, notwithstanding any disagreement regarding the existence of a breach of warranty, comply with this direction. If it is later determined that the Contractor did not breach the warranty in paragraph (b)(1) of this clause, the contract price will be equitably adjusted.

(4) If supplies are corrected or replaced, the period for notification of a breach of the Contractor's warranty in paragraph (c)(3) of this clause shall be _____ *[Contracting Officer shall insert period within which the Contractor must be notified of a breach as to corrected or replaced supplies]* from the furnishing or return by the Contractor to the Government of the corrected or replaced supplies or parts thereof, or, if correction or replacement is effected by the Contractor at a Government or other activity, for _____ *[Contracting Officer shall insert period within which the Contractor must be notified of a breach of warranty as to corrected or replaced supplies]* thereafter.

(5) The rights and remedies of the Government provided in this clause are in addition to and do not limit any rights afforded to the Government by any other clause of the contract.

(End of clause)

Alternate I [Reserved]

Alternate II (APR 1984). If it is desirable to specify that necessary transportation incident to correction or replacement will be at the Government's expense (as might be the case if, for example, the cost of a warranty would otherwise be prohibitive), substitute a paragraph substantially the same as the following paragraph (b)(5) for paragraph (b)(5) of the basic clause:

(5) If correction or replacement is required and transportation of supplies in connection with correction or replacement is necessary, transportation charges and responsibility for the supplies while in transit shall be borne by the Government.

Alternate III (APR 1984). If a fixed-price incentive contract is contemplated, add a paragraph substantially the same as the following paragraph (c)(6) to the basic clause:

(6) All costs incurred or estimated to be incurred by the Contractor in complying with this clause shall be considered when negotiating the total final price under the Incentive Price Revision clause of this contract. After establishment of the total final price, Contractor compliance with this clause shall be at no increase in the total final price. Any equitable adjustments

made under paragraph (c)(2) of this clause shall be governed by the paragraph entitled "Equitable Adjustments Under Other Clauses" in the Incentive Price Revision clause of this contract.

Alternate IV (APR 1984). If it is anticipated that recovery of the warranted item will involve considerable Government expense for disassembly and/or reassembly of larger items, add a paragraph substantially the same as the following paragraph (c)(6) to the basic clause. Redesignate the additional paragraph as "(c)(7)" if Alternate III is also used:

(6) The Contractor shall be liable for the reasonable costs of disassembly and/or reassembly of larger items when it is necessary to remove the supplies to be inspected and/or returned for correction or replacement.

52.246-19 Warranty of Systems and Equipment under Performance Specifications or Design Criteria.

As prescribed in 46.710(c)(1), the contracting officer may insert a clause substantially as follows:

WARRANTY OF SYSTEMS AND EQUIPMENT UNDER PERFORMANCE SPECIFICATIONS OR DESIGN CRITERIA (MAY 2001)

(a) *Definitions.* As used in this clause-

Acceptance means the act of an authorized representative of the Government by which the Government assumes for itself, or as an agent of another, ownership of existing and identified supplies, or approves specific services rendered, as partial or complete performance of the contract.

Defect means any condition or characteristic in any supplies or services furnished by the Contractor under the contract that is not in compliance with the requirements of the contract.

Supplies means the end items furnished by the Contractor and related services required under this contract. Except when this contract includes the clause entitled Warranty of Data, supplies also mean "data."

(b) Contractor's obligations. (1) The Contractor's warranties under this clause shall apply only to those defects discovered by either the Government or the Contractor _____ *[Contracting Officer shall state the warranty period; e.g.",at the time of delivery"; "within 45 days after delivery", or the specified event whose occurrence will terminate the warranty period; e.g.,the number of miles or hours of use, or combination of any applicable events or periods of time.]*.

(2) If the Contractor becomes aware at any time before acceptance by the Government (whether before or after tender to the Government) that a defect exists in any supplies or services, the Contractor shall-

(i) Promptly correct the defect; or

(ii) Promptly notify the Contracting Officer, in writing, of the defect, using the same procedures prescribed in paragraph (b)(3) of this clause.

(3) If the Contracting Officer determines that a defect exists in any of the supplies or services accepted by the Government under this contract, the Contracting Officer shall promptly notify the Contractor of the defect, in writing, within _____ *[Contracting Officer shall insert the specific period of time in which notice shall be given to the Contractor; e.g.",30 days after delivery of the nonconforming supplies"; "90 days of the last delivery under this contract"; or "90 days after discovery of the defect".]*. Upon timely notification of the existence of a defect, or if the Contractor independently discovers a defect in accepted supplies or services, the Contractor shall submit to the Contracting Officer, in writing, within _____ *[Contracting Officer shall insert period of time]* a recommendation for corrective actions, together with supporting information in sufficient detail for the Contracting Officer to determine what corrective action, if any, shall be undertaken.

(4) The Contractor shall promptly comply with any timely written direction from the Contracting Officer to correct or partially correct a defect, at no increase in the contract price.

(5) The Contractor shall also prepare and furnish to the Contracting Officer data and reports applicable to any correction required under this clause (including revision and updating of all other affected data called for under this contract) at no increase in the contract price.

(6) In the event of timely notice of a decision not to correct or only to partially correct, the Contractor shall submit a technical and cost proposal within _____. *[Contracting Officer shall insert period of time]* to amend the contract to permit acceptance of the affected supplies or services in accordance with the revised requirement, and an equitable reduction in the contract price shall promptly be negotiated by the parties and be reflected in a supplemental agreement to this contract.

(7) Any supplies or parts thereof corrected or furnished in replacement and any services reperformed shall also be subject to the conditions of this clause to the same extent as supplies or services initially accepted. The warranty, with respect to these supplies, parts, or services, shall be equal in duration to that set forth in paragraph (b)(1) of this clause, and shall run from the date of delivery of the corrected or replaced supplies.

(8) The Contractor shall not be responsible under this clause for the correction of defects in Government-furnished property, except for defects in installation, unless the Contractor performs, or is obligated to perform, any modifications or

other work on such property. In that event, the Contractor shall be responsible for correction of defects that result from the modifications or other work.

(9) If the Government returns supplies to the Contractor for correction or replacement under this clause, the Contractor shall be liable for transportation charges up to an amount equal to the cost of transportation by the usual commercial method of shipment from the place of delivery specified in this contract (irrespective of the f.o.b. point or the point of acceptance) to the Contractor's plant and return to the place of delivery specified in this contract. The Contractor shall also bear the responsibility for the supplies while in transit.

(10) All implied warranties of merchantability and "fitness for a particular purpose" are excluded from any obligation under this contract.

(c) Remedies available to the Government. (1) The rights and remedies of the Government provided in this clause-

(i) Shall not be affected in any way by any terms or conditions of this contract concerning the conclusiveness of inspection and acceptance; and

(ii) Are in addition to, and do not limit, any rights afforded to the Government by any other clause of this contract.

(2) Within _____ *[Contracting Officer shall insert period of time]* after receipt of the Contractor's recommendations for corrective action and adequate supporting information, the Contracting Officer, using sole discretion, shall give the Contractor written notice not to correct any defect, or to correct or partially correct any defect within a reasonable time at _____ *[Contracting Officer shall insert locations where corrections may be performed]*.

(3) In no event shall the Government be responsible for any extension or delays in the scheduled deliveries or periods of performance under this contract as a result of the Contractor's obligations to correct defects, nor shall there be any adjustment of the delivery schedule or period of performance as a result of the correction of defects unless provided by a supplemental agreement with adequate consideration.

(4) This clause shall not be construed as obligating the Government to increase the contract price.

(5) (i) The Contracting Officer shall give the Contractor a written notice specifying any failure or refusal of the Contractor to-

(A) Present a detailed recommendation for corrective action as required by paragraph (b)(3) of this clause;

(B) Correct defects as directed under paragraph (b)(4) of this clause; or

(C) Prepare and furnish data and reports as required by paragraph (b)(5) of this clause.

(ii) The notice shall specify a period of time following receipt of the notice by the Contractor in which the Contractor must remedy the failure or refusal specified in the notice.

(6) If the Contractor does not comply with the Contracting Officer's written notice in paragraph (c)(5)(i) of this clause, the Contracting Officer may by contract or otherwise-

(i) Obtain detailed recommendations for corrective action and either-

(A) Correct the supplies or services; or

(B) Replace the supplies or services, and if the Contractor fails to furnish timely disposition instructions, the Contracting Officer may dispose of the nonconforming supplies for the Contractor's account in a reasonable manner, in which case the Government is entitled to reimbursement from the Contractor, or from the proceeds, for the reasonable expenses of care and disposition, as well as for excess costs incurred or to be incurred;

(ii) Obtain applicable data and reports; and

(iii) Charge the Contractor for the costs incurred by the Government.

(End of clause)

Alternate I (APR 1984). If it is desirable to specify that necessary transportation incident to correction or replacement will be at the Government's expense (as might be the case if, for example, the cost of a warranty would otherwise be prohibitive), substitute a paragraph substantially the same as the following paragraph (b)(9) for paragraph (b)(9) of the basic clause:

(9) If correction or replacement is required, and transportation of supplies in connection with correction or replacement is necessary, transportation charges and responsibility for the supplies while in transit shall be borne by the Government.

Alternate II (APR 1984). If a fixed-price incentive contract is contemplated, add a paragraph substantially the same as the following paragraph (c)(7) to the basic clause:

(7) All costs incurred or estimated to be incurred by the Contractor in complying with this clause shall be considered when negotiating the total final price under the Incentive Price Revision clause of this contract. After establishment of the total final price, Contractor compliance with this clause shall be at no increase in the total final price. Any equitable

adjustments made under paragraph (b)(6) of this clause shall be governed by the paragraph entitled "Equitable Adjustments Under Other Clauses" in the Incentive Price Revision clause of this contract.

Alternate III (APR 1984). If it is anticipated that recovery of the warranted item will involve considerable Government expense for disassembly and/or reassembly of larger items, add a paragraph substantially the same as the following paragraph (c)(7) to the basic clause. Redesignate the additional paragraph as "(c)(8)" if Alternate II is also being used:

(7) The Contractor shall be liable for the reasonable costs of disassembly and/or reassembly of larger items when it is necessary to remove the supplies to be inspected and/or returned for correction or replacement.

52.246-20 Warranty of Services.

As prescribed in 46.710(d), insert a clause substantially as follows:

WARRANTY OF SERVICES (MAY 2001)

(a) *Definition.*

Acceptance, as used in this clause, means the act of an authorized representative of the Government by which the Government assumes for itself, or as an agent of another, ownership of existing and identified supplies, or approves specific services, as partial or complete performance of the contract.

(b) Notwithstanding inspection and acceptance by the Government or any provision concerning the conclusiveness thereof, the Contractor warrants that all services performed under this contract will, at the time of acceptance, be free from defects in workmanship and conform to the requirements of this contract. The Contracting Officer shall give written notice of any defect or nonconformance to the Contractor _____ *[Contracting Officer shall insert the specific period of time in which notice shall be given to the Contractor; e.g.",within 30 days from the date of acceptance by the Government",; within 1000 hours of use by the Government"; or other specified event whose occurrence will terminate the period of notice, or combination of any applicable events or period of time]*. This notice shall state either-

(1) That the Contractor shall correct or reperform any defective or nonconforming services; or

(2) That the Government does not require correction or reperformance.

(c) If the Contractor is required to correct or reperform, it shall be at no cost to the Government, and any services corrected or reperformed by the Contractor shall be subject to this clause to the same extent as work initially performed. If the Contractor fails or refuses to correct or reperform, the Contracting Officer may, by contract or otherwise, correct or replace with similar services and charge to the Contractor the cost occasioned to the Government thereby, or make an equitable adjustment in the contract price.

(d) If the Government does not require correction or reperformance, the Contracting Officer shall make an equitable adjustment in the contract price.

(End of clause)

52.246-21 Warranty of Construction.

As prescribed in 46.710(e)(1), the contracting officer may insert a clause substantially as follows in solicitations and contracts when a fixed-price construction contract (see 46.705(c)) is contemplated, and the use of a warranty clause has been approved under agency procedures:

WARRANTY OF CONSTRUCTION (MAR 1994)

(a) In addition to any other warranties in this contract, the Contractor warrants, except as provided in paragraph (i) of this clause, that work performed under this contract conforms to the contract requirements and is free of any defect in equipment, material, or design furnished, or workmanship performed by the Contractor or any subcontractor or supplier at any tier.

(b) This warranty shall continue for a period of 1 year from the date of final acceptance of the work. If the Government takes possession of any part of the work before final acceptance, this warranty shall continue for a period of 1 year from the date the Government takes possession.

(c) The Contractor shall remedy at the Contractor's expense any failure to conform, or any defect. In addition, the Contractor shall remedy at the Contractor's expense any damage to Government-owned or controlled real or personal property, when that damage is the result of-

(1) The Contractor's failure to conform to contract requirements; or

(2) Any defect of equipment, material, workmanship, or design furnished.

(d) The Contractor shall restore any work damaged in fulfilling the terms and conditions of this clause. The Contractor's warranty with respect to work repaired or replaced will run for 1 year from the date of repair or replacement.

(e) The Contracting Officer shall notify the Contractor, in writing, within a reasonable time after the discovery of any failure, defect, or damage.

(f) If the Contractor fails to remedy any failure, defect, or damage within a reasonable time after receipt of notice, the Government shall have the right to replace, repair, or otherwise remedy the failure, defect, or damage at the Contractor's expense.

(g) With respect to all warranties, express or implied, from subcontractors, manufacturers, or suppliers for work performed and materials furnished under this contract, the Contractor shall-

(1) Obtain all warranties that would be given in normal commercial practice;

(2) Require all warranties to be executed, in writing, for the benefit of the Government, if directed by the Contracting Officer; and

(3) Enforce all warranties for the benefit of the Government, if directed by the Contracting Officer.

(h) In the event the Contractor's warranty under paragraph (b) of this clause has expired, the Government may bring suit at its expense to enforce a subcontractor's, manufacturer's, or supplier's warranty.

(i) Unless a defect is caused by the negligence of the Contractor or subcontractor or supplier at any tier, the Contractor shall not be liable for the repair of any defects of material or design furnished by the Government nor for the repair of any damage that results from any defect in Government-furnished material or design.

(j) This warranty shall not limit the Government's rights under the Inspection and Acceptance clause of this contract with respect to latent defects, gross mistakes, or fraud.

(End of clause)

Alternate I (APR 1984). If the Government specifies in the contract the use of any equipment by "brand name and model," the contracting officer may add a paragraph substantially the same as the following paragraph (k) to the basic clause:

(k) Defects in design or manufacture of equipment specified by the Government on a "brand name and model" basis, shall not be included in this warranty. In this event, the Contractor shall require any subcontractors, manufacturers, or suppliers thereof to execute their warranties, in writing, directly to the Government.

52.246-22 [Reserved]

52.246-23 Limitation of Liability.

As prescribed in 46.805, insert the following clause:

LIMITATION OF LIABILITY (FEB 1997)

(a) Except as provided in paragraphs (b) and (c) of this clause, and except for remedies expressly provided elsewhere in this contract, the Contractor shall not be liable for loss of or damage to property of the Government (excluding the supplies delivered under this contract) that-

(1) Occurs after Government acceptance of the supplies delivered under this contract; and

(2) Results from any defects or deficiencies in the supplies.

(b) The limitation of liability under paragraph (a) of this clause shall not apply when a defect or deficiency in, or the Government's acceptance of, the supplies results from willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel. The term "Contractor's managerial personnel," as used in this clause, means the Contractor's directors, officers, and any of the Contractor's managers, superintendents, or equivalent representatives who have supervision or direction of-

(1) All or substantially all of the Contractor's business;

(2) All or substantially all of the Contractor's operations at any one plant, laboratory, or separate location at which the contract is being performed; or

(3) A separate and complete major industrial operation connected with the performance of this contract.

(c) If the Contractor carries insurance, or has established a reserve for self-insurance, covering liability for loss or damage suffered by the Government through purchase or use of the supplies required to be delivered under this contract, the

Contractor shall be liable to the Government, to the extent of such insurance or reserve, for loss of or damage to property of the Government occurring after Government acceptance of, and resulting from any defects or deficiencies in, the supplies delivered under this contract.

(End of clause)

52.246-24 Limitation of Liability-High-Value Items.

As prescribed in 46.805, insert the following clause:

LIMITATION OF LIABILITY-HIGH-VALUE ITEMS (FEB 1997)

(a) Except as provided in paragraphs (b) through (e) of this clause, and notwithstanding any other provision of this contract, the Contractor shall not be liable for loss of or damage to property of the Government (including the supplies delivered under this contract) that-

(1) Occurs after Government acceptance of the supplies delivered under this contract; and

(2) Results from any defects or deficiencies in the sup-plies.

(b) The limitation of liability under paragraph (a) of this clause shall not apply when a defect or deficiency in, or the Government's acceptance of, the supplies results from willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel. The term "Contractor's managerial personnel," as used in this clause, means the Contractor's directors, officers, and any of the Contractor's managers, superintendents, or equivalent representatives who have supervision or direction of-

(1) All or substantially all of the Contractor's business;

(2) All or substantially all of the Contractor's operations at any one plant, laboratory, or separate location at which the contract is being performed; or

(3) A separate and complete major industrial operation connected with the performance of this contract.

(c) If the Contractor carries insurance, or has established a reserve for self-insurance, covering liability for loss or damage suffered by the Government through purchase or use of the supplies required to be delivered under this contract, the Contractor shall be liable to the Government, to the extent of such insurance or reserve, for loss of or damage to property of the Government occurring after Government acceptance of, and resulting from any defects or deficiencies in, the supplies delivered under this contract.

(d) (1) This clause does not diminish the Contractor's obligations, to the extent that they arise otherwise under this contract, relating to correction, repair, replacement, or other relief for any defect or deficiency in supplies delivered under this contract.

(2) Unless this is a cost-reimbursement contract, if loss or damage occurs and correction, repair, or replacement is not feasible or desired by the Government, the Contractor shall, as determined by the Contracting Officer-

(i) Pay the Government the amount it would have cost the Contractor to make correction, repair, or replacement before the loss or damage occurred;

(ii) Provide other equitable relief.

(e) This clause shall not limit or otherwise affect the Government's rights under clauses, if included in this contract, that cover-

(1) Warranty of technical data;

(2) Ground and flight risks or aircraft flight risks; or

(3) Government property.

(End of clause)

Alternate I (APR 1984). If the contract is for both high-value items and other end items, the contracting officer shall identify the high-value items by line item and insert the following preamble before paragraph (a):

(This clause shall apply only to those items identified in this contract as being subject to this clause.)

52.246-25 Limitation of Liability-Services.

As prescribed in 46.805, insert the following clause:

LIMITATION OF LIABILITY-SERVICES (FEB 1997)

(a) Except as provided in paragraphs (b) and (c) of this clause, and except to the extent that the Contractor is expressly responsible under this contract for deficiencies in the services required to be performed under it (including any materials furnished in conjunction with those services), the Contractor shall not be liable for loss of or damage to property of the Government that-

(1) Occurs after Government acceptance of services performed under this contract; and

(2) Results from any defects or deficiencies in the services performed or materials furnished.

(b) The limitation of liability under paragraph (a) of this clause shall not apply when a defect or deficiency in, or the Government's acceptance of, services performed or materials furnished results from willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel. The term "Contractor's managerial personnel," as used in this clause, means the Contractor's directors, officers, and any of the Contractor's managers, superintendents, or equivalent representatives who have supervision or direction of-

(1) All or substantially all of the Contractor's business;

(2) All or substantially all of the Contractor's operations at any one plant, laboratory, or separate location at which the contract is being performed; or

(3) A separate and complete major industrial operation connected with the performance of this contract.

(c) If the Contractor carries insurance, or has established a reserve for self-insurance, covering liability for loss or damage suffered by the Government through the Contractor's performance of services or furnishing of materials under this contract, the Contractor shall be liable to the Government, to the extent of such insurance or reserve, for loss of or damage to property of the Government occurring after Government acceptance of, and resulting from any defects and deficiencies in, services performed or materials furnished under this contract.

(End of clause)

52.246-26 Reporting Nonconforming Items.

As prescribed in 46.317, insert the following clause

REPORTING NONCONFORMING ITEMS (AUG 2024)

(a) *Definitions.* As used in this clause—

Common item means an item that has multiple applications versus a single or peculiar application.

Counterfeit item means an unlawful or unauthorized reproduction, substitution, or alteration that has been knowingly mismarked, misidentified, or otherwise misrepresented to be an authentic, unmodified item from the original manufacturer, or a source with the express written authority of the original manufacturer or current design activity, including an authorized aftermarket manufacturer. Unlawful or unauthorized substitution includes used items represented as new, or the false identification of grade, serial number, lot number, date code, or performance characteristics.

Critical item means an item, the failure of which is likely to result in hazardous or unsafe conditions for individuals using, maintaining, or depending upon the item; or is likely to prevent performance of a vital agency mission.

Critical nonconformance means a nonconformance that is likely to result in hazardous or unsafe conditions for individuals using, maintaining, or depending upon the supplies or services; or is likely to prevent performance of a vital agency mission.

Design activity means an organization, Government or contractor, that has responsibility for the design and configuration of an item, including the preparation or maintenance of design documents. Design activity could be the original organization, or an organization to which design responsibility has been transferred.

Major nonconformance means a nonconformance, other than critical, that is likely to result in failure of the supplies or services, or to materially reduce the usability of the supplies or services for their intended purpose.

Suspect counterfeit item means an item for which credible evidence (including but not limited to, visual inspection or testing) provides reasonable doubt that the item is authentic.

(b) The Contractor shall—

(1) Screen Government-Industry Data Exchange Program (GIDEP) reports, available at www.gidep.org, as a part of the Contractor's inspection system or program for the control of quality, to avoid the use and delivery of counterfeit or suspect counterfeit items or delivery of items that contain a major or critical nonconformance. This requirement does not apply if the

Contractor is a foreign corporation or partnership that does not have an office, place of business, or fiscal paying agent in the United States;

(2) Provide written notification to the Contracting Officer within 60 days of becoming aware or having reason to suspect, such as through inspection, testing, record review, or notification from another source (*e.g.*, seller, customer, third party) that any end item, component, subassembly, part, or material contained in supplies purchased by the Contractor for delivery to, or for, the Government is counterfeit or suspect counterfeit;

(3) Retain counterfeit or suspect counterfeit items in its possession at the time of discovery until disposition instructions have been provided by the Contracting Officer; and

(4) Except as provided in paragraph (c) of this clause, submit a report to GIDEP at www.gidep.org within 60 days of becoming aware or having reason to suspect, such as through inspection, testing, record review, or notification from another source (*e.g.*, seller, customer, third party) that an item purchased by the Contractor for delivery to, or for, the Government is–

(i) A counterfeit or suspect counterfeit item; or

(ii) A common item that has a major or critical nonconformance.

(c) The Contractor shall not submit a report as required by paragraph (b)(4) of this clause, if—

(1) The Contractor is a foreign corporation or partnership that does not have an office, place of business, or fiscal paying agent in the United States;

(2) The Contractor is aware that the counterfeit, suspect counterfeit, or nonconforming item is the subject of an on-going criminal investigation, unless the report is approved by the cognizant law-enforcement agency; or

(3) For nonconforming items other than counterfeit or suspect counterfeit items, it can be confirmed that the organization where the defect was generated (*e.g.*, original component manufacturer, original equipment manufacturer, aftermarket manufacturer, or distributor that alters item properties or configuration) has not released the item to more than one customer.

(d) Reports submitted in accordance with paragraph (b)(4) of this clause shall not include—

(1) Trade secrets or confidential commercial or financial information protected under the Trade Secrets Act (18 U.S.C. 1905); or

(2) Any other information prohibited from disclosure by statute or regulation.

(e) Additional guidance on the use of GIDEP is provided at https://www.gidep.org/login?returnUrl=%2Fdashboard.

(f) If this is a contract with the Department of Defense, as provided in paragraph (c)(5) of section 818 of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112-81), the Contractor or subcontractor that provides a written report or notification under this clause that the end item, component, part, or material contained electronic parts (*i.e.*, an integrated circuit, a discrete electronic component (including, but not limited to, a transistor, capacitor, resistor, or diode), or a circuit assembly)) that are counterfeit electronic parts or suspect counterfeit electronic parts shall not be subject to civil liability on the basis of such reporting, provided that the Contractor or any subcontractor made a reasonable effort to determine that the report was factual.

(g) Subcontracts.

(1) Except as provided in paragraph (g)(2) of this clause, the Contractor shall insert this clause, including this paragraph (g), in subcontracts that are for–

(i) Items subject to higher-level quality standards in accordance with the clause at Federal Acquisition Regulation (FAR) 52.246-11, Higher-Level Contract Quality Requirement;

(ii) Items that the Contractor determines to be critical items for which use of the clause is appropriate;

(iii) Electronic parts or end items, components, parts, or materials containing electronic parts, whether or not covered in paragraph (g)(1)(i) or (ii) of this clause, if the subcontract exceeds the simplified acquisition threshold, as defined in FAR 2.101 on the date of subcontract award,and this contract is by, or for, the Department of Defense (as required by paragraph (c)(4) of section 818 of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112-81)); or

(iv) For the acquisition of services, if the subcontractor will furnish, as part of the service, any items that meet the criteria specified in paragraphs (g)(1)(i) through (g)(1)(iii) of this clause.

(2) The Contractor shall not insert the clause in subcontracts for–

(i) Commercial products and commercial services; or

(ii) Medical devices that are subject to the Food and Drug Administration reporting requirements at 21 CFR 803.

(3) The Contractor shall not alter the clause other than to identify the appropriate parties.

(End of clause)

52.247 [Reserved]

52.247-1 Commercial Bill of Lading Notations.

As prescribed in 47.104-4 , insert the following clause:

COMMERCIAL BILL OF LADING NOTATIONS (FEB 2006)

When the Contracting Officer authorizes supplies to be shipped on a commercial bill of lading and the Contractor will be reimbursed these transportation costs as direct allowable costs, the Contractor shall ensure before shipment is made that the commercial shipping documents are annotated with either of the following notations, as appropriate:

(a) If the Government is shown as the consignor or the consignee, the annotation shall be:

"Transportation is for the _____ *[name the specific agency]* and the actual total transportation charges paid to the carrier(s) by the consignor or consignee are assignable to, and shall be reimbursed by, the Government."

(b) If the Government is not shown as the consignor or the consignee, the annotation shall be:

"Transportation is for the _____ *[name the specific agency]* and the actual total transportation charges paid to the carrier(s) by the consignor or consignee shall be reimbursed by the Government, pursuant to cost-reimbursement contract No. _____. This may be confirmed by contacting _____ *[Name and address of the contract administration office listed in the contract]*."

(End of clause)

52.247-2 Permits, Authorities, or Franchises.

As prescribed in 47.207-1(a), insert the following clause:

PERMITS, AUTHORITIES, OR FRANCHISES (JAN 1997)

(a) The offeror does □, does not □, hold authorization from the Federal Highway Administration (FHWA) or other cognizant regulatory body. If authorization is held, it is as follows:

_____ *(Name of regulatory body)*

_____ *(Authorization No.)*

(b) The offeror shall furnish to the Government, if requested, copies of the authorization before moving the material under any contract awarded. In addition, the offeror shall, at the offeror's expense, obtain and maintain any permits, franchises, licenses, and other authorities issued by State and local governments.

(End of clause)

52.247-3 [Reserved]

(DEVIATION DATE)

52.247-4 [Reserved]

(DEVIATION DATE)

52.247-5 Familiarization with Conditions.

As prescribed in 47.207-1(d), insert the following clause in solicitations and contracts for transportation or for transportation-related services to ensure that offerors become familiar with conditions under which and where the services will be performed:

FAMILIARIZATION WITH CONDITIONS (APR 1984)

The offeror shall become familiar with all available information regarding difficulties that may be encountered and the conditions, including safety precautions, under which the work must be accomplished under the contract. The offeror shall

not be relieved from assuming all responsibility for properly estimating the difficulties and the cost of performing the services required in this contract because the offeror failed to investigate the conditions or to become acquainted with all information concerning the services to be performed.

(End of clause)

52.247-6 [Reserved]

(DEVIATION DATE)

52.247-7 [Reserved]

(DEVIATION DATE)

52.247-8 Estimated Weights or Quantities Not Guaranteed.

As prescribed in 47.207-3(e)(2), insert the following clause in solicitations and contracts for transportation or for transportation-related services when weights or quantities are estimates:

ESTIMATED WEIGHTS OR QUANTITIES NOT GUARANTEED (APR 1984)

The estimated weights or quantities are not a guarantee of actual weights or quantities, as the Government does not guarantee any particular volume of traffic described in this contract. However, to the extent services are required as described in this contract and in accordance with the terms of this contract, orders for these services will be placed with the Contractor.

(End of clause)

52.247-9 [Reserved]

(DEVIATION DATE)

52.247-10 Net Weight-General Freight.

As prescribed in 47.207-4(a)(2), insert the following clause in solicitations and contracts for transportation or for transportation-related services when the weight of shipments of freight other than household goods or office furniture is not known at the time of shipment and the contractor is responsible for determining the net weight of the shipments:

NET WEIGHT-GENERAL FREIGHT (APR 1984)

(a) The net weight of the shipment shall be determined by deducting the tare weight of the vehicle (determined by having the empty vehicle with a full tank of fuel weighed by a certified weighmaster on a certified scale) from the gross weight of the vehicle (determined by having the loaded vehicle with a full tank of fuel weighed by a certified weighmaster on a certified scale).

(b) The Contractor shall attach the original copies of the empty and loaded weight certificates to the invoice for services.

(End of clause)

52.247-11 Net Weight-Household Goods or Office Furniture.

As prescribed in 47.207-4(b), insert the following clause in contracts for transportation or for transportation-related services when movements of Government employees' household goods or relocations of Government offices are involved:

NET WEIGHT-HOUSEHOLD GOODS OR OFFICE FURNITURE (APR 1984)

(a) *Net weight-full loads.* The net weight of the shipment shall be determined by deducting the tare weight of the vehicle (determined by having a certified weighmaster weigh on a certified scale the empty vehicle with all blankets, pads, chains,

dollies, hand trucks, and all other necessary equipment inside the vehicle) from the gross weight of the vehicle (determined by having a certified weighmaster weigh on a certified scale the fully loaded vehicle before arrival at destination).

(b) *Net weight-part loads.* The net weight of the first part load shall be determined in the same manner as specified for a full load. The net weight of the second part load shall be determined by using as the tare weight of the vehicle the gross weight of the vehicle containing the first part load and deducting this weight from the new gross weight (determined by having the loaded vehicle weighed again, in the same manner as specified for the full load). The same procedure shall apply for each succeeding part load.

(c) *Weight certificates.* The contractor shall attach the original copy of each weight certificate to the invoice for services.

(End of clause)

52.247-12 [Reserved]

(DEVIATION DATE)

52.247-13 Accessorial Services-Moving Contracts.

As prescribed in 47.207-5(c), insert a clause substantially as follows in solicitations and contracts for the transportation of household goods or office furniture:

ACCESSORIAL SERVICES-MOVING CONTRACTS (APR 1984)

(a) *Packing and/or crating and padding.* The Contractor shall-

(1) Perform all of the packing and/or crating and padding necessary for the protection of the goods to be transported;

(2) Furnish packing containers, including, but not limited to, barrels, boxes, wardrobes, and cartons; all crating materials; and all padding materials and equipment;

(3) Furnish or cause to be furnished, when necessary, padding or other protective material for the interior of the buildings, including elevators, from and to which the property will be moved under this contract; and

(4) Ensure that all containers and materials are clean and of quality sufficient for protection of the goods.

(b) *Disassembling and reassembling of property and servicing appliances.* The disassembling of property;*e.g.,* beds and sectional bookcases, and the preparing of appliances; *e.g.,* washers, driers, and record players, for shipment shall be performed by the Contractor. The Contractor shall reassemble the property and service the appliances upon delivery at the new location.

(c) *Unpacking and/or uncrating and placement of property.* The Contractor shall unpack and/or uncrate all property that was packed and/or crated for movement under this contract. The Contractor shall also place the property in the new location as instructed by the owner of the property or authorized representative, and shall remove all packing and similar or related material from the premises as requested by the- owner.

(End of clause)

52.247-14 [Reserved]

(DEVIATION DATE)

52.247-15 Contractor Responsibility for Loading and Unloading.

As prescribed in 47.207-5(e), insert the following clause in solicitations and contracts for transportation or for transportation-related services when the contractor is responsible for loading and unloading shipments:

CONTRACTOR RESPONSIBILITY FOR LOADING AND UNLOADING (APR 1984)

(a) (1) Unless otherwise specified in this contract to cover store-door or inside delivery, the Contractor shall load and unload shipments at no additional expense to the Government.

(2) The Government or its agent will place or receive freight at the tailgate of the Contractor's vehicle. Tailgate delivery, for purposes of this contract, is defined as that which enables a forklift truck or similar equipment, with operator only, to place or remove cargo from the tailgate of the Contractor's vehicle.

(b) If loading is the responsibility of the Contractor, the Contractor shall perform all shoring, blocking, and bracing. The Contractor shall provide dunnage at the Contractor's expense.

(End of clause)

52.247-16 [Reserved]

(DEVIATION DATE)

52.247-17 Charges.

As prescribed in 47.207-6(a)(2), insert the following clause in solicitations and contracts for transportation or for transportation-related services:

CHARGES (APR 1984)

In no event shall charges under this contract be in excess of charges based on the Contractor's lowest rate available to the general public, or be in excess of charges based on rates otherwise tendered to the Government by the Contractor for the same type of service.

(End of clause)

52.247-18 Multiple Shipments.

As prescribed in 47.207-6 (c)(5)(i), insert the following clause in solicitations and contracts for transportation or for transportation-related services when multiple shipments are tendered at one time to the contractor for transportation from one origin to two or more consignees at the same destination:

MULTIPLE SHIPMENTS (APR 1984)

When multiple shipments are tendered at one time to the Contractor for movement from one origin to multiple consignees at the same destination, the rate charged for each shipment shall be the rate applicable to the aggregate weight.

(End of clause)

52.247-19 Stopping in Transit for Partial Unloading.

As prescribed in 47.207-6 (c)(5)(ii), insert the following clause in solicitations and contracts for transportation or for transportation-related services when multiple shipments are tendered at one time to the contractor for transportation from one origin to two or more consignees along the route between origin and last destination:

STOPPING IN TRANSIT FOR PARTIAL UNLOADING (APR 1984)

When multiple shipments are tendered at one time to the Contractor for movement from one origin to two or more consignees along the route between the origin and the last destination, the rate charged shall be the rate applicable to the aggregate weight, plus a charge of $_____ for each shipment unloaded at an intermediate point en route to the last destination.

(End of clause)

52.247-20 [Reserved]

(DEVIATION DATE)

52.247-21 Contractor Liability for Personal Injury and/or Property Damage.

As prescribed in 47.207-7(c), insert the following clause in solicitations and contracts for transportation or for transportation-related services:

CONTRACTOR LIABILITY FOR PERSONAL INJURY AND/OR PROPERTY DAMAGE (APR 1984)

(a) The Contractor assumes responsibility for all damage or injury to persons or property occasioned through the use, maintenance, and operation of the Contractor's vehicles or other equipment by, or the action of, the Contractor or the Contractor's employees and agents.

(b) The Contractor, at the Contractor's expense, shall maintain adequate public liability and property damage insurance during the continuance of this contract, insuring the Contractor against all claims for injury or damage.

(c) The Contractor shall maintain Workers' Compensation and other legally required insurance with respect to the Contractor's own employees and agents.

(d) The Government shall in no event be liable or responsible for damage or injury to any person or property occasioned through the use, maintenance, or operation of any vehicle or other equipment by, or the action of, the Contractor or the Contractor's employees and agents in performing under this contract, and the Government shall be indemnified and saved harmless against claims for damage or injury in such cases.

(End of clause)

52.247-22 Contractor Liability for Loss of and/or Damage to Freight other than Household Goods.

As prescribed in 47.207-7(d), insert the following clause in solicitations and contracts for the transportation of freight other than household goods:

CONTRACTOR LIABILITY FOR LOSS OF AND/OR DAMAGE TO FREIGHT OTHER THAN HOUSEHOLD GOODS (APR 1984)

Except when loss and/or damage arises out of causes beyond the control and without the fault or negligence of the Contractor, the Contractor shall assume full liability for any and all goods lost and/or damaged in the movement covered by this contract.

(End of clause)

52.247-23 Contractor Liability for Loss of and/or Damage to Household Goods.

As prescribed in 47.207-7(e), insert the following clause:

CONTRACTOR LIABILITY FOR LOSS OF AND/OR DAMAGE TO HOUSEHOLD GOODS (JAN 1991)

(a) Except when loss and/or damage arise out of causes beyond the control and without the fault or negligence of the Contractor, the Contractor shall be liable to the owner for the loss of and/or damage to any article while being-

(1) Packed, picked up, loaded, transported, delivered, unloaded, or unpacked;

(2) Stored in transit; or

(3) Serviced (appliances, etc.) by a third person hired by the Contractor to perform the servicing.

(b) The Contractor shall be liable for loss and/or damage discovered by the owner if written notice of such loss and/or damage is dispatched to the Contractor not later than 75 days following the date of delivery.

(c) The Contractor shall indemnify the owner of the goods at a rate of ___ cents per pound per article.

(End of clause)

52.247-24 [Reserved]

(DEVIATION DATE)

52.247-25 [Reserved]

(DEVIATION DATE)

52.247-26 [Reserved]

(DEVIATION DATE)

52.247-27 [Reserved]

(DEVIATION DATE)

52.247-28 [Reserved]

(DEVIATION DATE)

52.247-29 F.o.b. Origin.

As prescribed in 47.303-1(c), insert the following clause:

F.O.B. ORIGIN (FEB 2006)

(a) The term "f.o.b. origin," as used in this clause, means free of expense to the Government delivered-

(1) On board the indicated type of conveyance of the carrier (or of the Government, if specified) at a designated point in the city, county, and State from which the shipment will be made and from which line-haul transportation service (as distinguished from switching, local drayage, or other terminal service) will begin;

(2) To, and placed on, the carrier's wharf (at shipside, within reach of the ship's loading tackle, when the shipping point is within a port area having water transportation service) or the carrier's freight station;

(3) To a U.S. Postal Service facility; or

(4) If stated in the solicitation, to any Government designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract (the Federal Motor Carrier Safety Administration prescribes commercial zones at Subpart B of 49 CFR part 372).

(b) The Contractor shall-

(1) (i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment in conformance with carrier requirements to protect the goods and to ensure assessment of the lowest applicable transportation charge;

(2) (i) Order specified carrier equipment when requested by the Government; or

(ii) If not specified, order appropriate carrier equipment not in excess of capacity to accommodate shipment;

(3) Deliver the shipment in good order and condition to the carrier, and load, stow, trim, block, and/or brace carload or truckload shipment (when loaded by the Contractor) on or in the carrier's conveyance as required by carrier rules and regulations;

(4) Be responsible for any loss of and/or damage to the goods-

(i) Occurring before delivery to the carrier;

(ii) Resulting from improper packing and marking; or

(iii) Resulting from improper loading, stowing, trimming, blocking, and/or bracing of the shipment, if loaded by the Contractor on or in the carrier's conveyance;

(5) Complete the Government bill of lading supplied by the ordering agency or, when a Government bill of lading is not supplied, prepare a commercial bill of lading or other transportation receipt. The bill of lading shall show-

(i) A description of the shipment in terms of the governing freight classification or tariff (or Government rate tender) under which lowest freight rates are applicable;

(ii) The seals affixed to the conveyance with their serial numbers or other identification;

(iii) Lengths and capacities of cars or trucks ordered and furnished;

(iv) Other pertinent information required to effect prompt delivery to the consignee, including name, delivery address, postal address and ZIP code of consignee, routing, etc.;

(v) Special instructions or annotations requested by the ordering agency for commercial bills of lading; *e.g., "This shipment is the property of, and the freight charges paid to the carrier(s) will be reimbursed by, the Governmen"t;*and

(vi) The signature of the carrier's agent and the date the shipment is received by the carrier; and

(6) Distribute the copies of the bill of lading, or other transportation receipts, as directed by the ordering agency.

(c) These Contractor responsibilities are specified for performance at the plant or plants at which the supplies are to be finally inspected and accepted, unless the facilities for shipment by carrier's equipment are not available at the Contractor's plant, in which case the responsibilities shall be performed f.o.b. the point or points in the same or nearest city where the specified carrier's facilities are available; subject, however, to the following qualifications:

(1) If the Contractor's shipping plant is located in the State of Alaska or Hawaii, the Contractor shall deliver the supplies listed for shipment outside Alaska or Hawaii to the port of loading in Alaska or Hawaii, respectively, as specified in the contract, at Contractor's expense, and to that extent the contract shall be "f.o.b. destination."

(2) Notwithstanding paragraph (c)(1) of this clause, if the Contractor's shipping plant is located in the State of Hawaii, and the contract requires delivery to be made by container service, the Contractor shall deliver the supplies, at the Contractor's expense, to the container yard in the same or nearest city where seavan container service is available.

(End of clause)

52.247-30 F.o.b. Origin, Contractor's Facility.

As prescribed in 47.303-2(c), insert the following clause in solicitations and contracts when the delivery term is f.o.b. origin, contractor's facility:

F.O.B. ORIGIN, CONTRACTOR'S FACILITY (FEB 2006)

(a) The term "f.o.b. origin, contractor's facility," as used in this clause, means free of expense to the Government delivered on board the indicated type of conveyance of the carrier (or of the Government, if specified) at the designated facility, on the named street or highway, in the city, county, and State from which the shipment will be made.

(b) The Contractor shall-

(1) (i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment in conformance with carrier requirements to protect the goods and to ensure assessment of the lowest applicable transportation charge;

(2) (i) Order specified carrier equipment when requested by the Government; or

(ii) If not specified, order appropriate carrier equipment not in excess of capacity to accommodate shipment;

(3) Deliver the shipment in good order and condition to the carrier, and load, stow, trim, block, and/or brace carload or truckload shipment (when loaded by the Contractor) on or in the carrier's conveyance as required by carrier rules and regulations;

(4) Be responsible for any loss of and/or damage to the goods-

(i) Occurring before delivery to the carrier;

(ii) Resulting from improper packing and marking; or

(iii) Resulting from improper loading, stowing, trimming, blocking, and/or bracing of the shipment, if loaded by the Contractor on or in the carrier's conveyance;

(5) Complete the Government bill of lading supplied by the ordering agency or, when a Government bill of lading is not supplied, prepare a commercial bill of lading or other transportation receipt. The bill of lading shall show-

(i) A description of the shipment in terms of the governing freight classification or tariff (or Government rate tender) under which lowest freight rates are applicable;

(ii) The seals affixed to the conveyance with their serial numbers or other identification;

(iii) Lengths and capacities of cars or trucks ordered and furnished;

(iv) Other pertinent information required to effect prompt delivery to the consignee, including name, delivery address, postal address and ZIP code of consignee, routing, etc.;

(v) Special instructions or annotations requested by the ordering agency for bills of lading; *e.g.*,*"This shipment is the property of, and the freight charges paid to the carrier(s) will be reimbursed by, the Governmen"t;* and

(vi) The signature of the carrier's agent and the date the shipment is received by the carrier; and

(6) Distribute the copies of the bill of lading, or other transportation receipts, as directed by the ordering agency.

(End of clause)

52.247-31 F.o.b. Origin, Freight Allowed.

As prescribed in 47.303-3(c), insert the following clause:

F.O.B. ORIGIN, FREIGHT ALLOWED (FEB 2006)

(a) The term "f.o.b. origin, freight allowed," as used in this clause, means-

(1) Free of expense to the Government delivered-

(i) On board the indicated type of conveyance of the carrier (or of the Government, if specified) at a designated point in the city, county, and State from which the shipments will be made and from which line-haul transportation service (as distinguished from switching, local drayage, or other terminal service) will begin;

(ii) To, and placed on, the carrier's wharf (at shipside within reach of the ship's loading tackle when the shipping point is within a port area having water transportation service) or the carrier's freight station;

(iii) To a U.S. Postal Service facility; or

(iv) If stated in the solicitation, to any Government-designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract the Federal Motor Carrier Safety Administration prescribes commercial zones at Subpart B of 49 CFR part 372; and

(2) An allowance for freight, based on applicable published tariff rates (or Government rate tenders) between the points specified in the contract, is deducted from the contract price.

(b) The Contractor shall-

(1) (i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment in conformance with carrier requirements to protect the goods and to ensure assessment of the lowest applicable transportation charge;

(2) (i) Order specified carrier equipment when requested by the Government; or

(ii) If not specified, order appropriate carrier equipment not in excess of capacity to accommodate shipment;

(3) Deliver the shipment in good order and condition to the carrier, and load, stow, trim, block, and/or brace carload or truckload shipment (when loaded by the Contractor) on or in the carrier's conveyance as required by carrier rules and regulations;

(4) Be responsible for any loss of and/or damage to the goods-

(i) Occurring before delivery to the carrier;

(ii) Resulting from improper packing and marking; or

(iii) Resulting from improper loading, stowing, trimming, blocking, and/or bracing of the shipment, if loaded by the Contractor on or in the carrier's conveyance;

(5) Complete the Government bill of lading supplied by the ordering agency, or when a Government bill of lading is not supplied, prepare a commercial bill of lading or other transportation receipt. The bill of lading shall show-

(i) A description of the shipment in terms of the governing freight classification or tariff (or Government rate tender) under which lowest freight rates are applicable;

(ii) The seals affixed to the conveyance with their serial numbers or other identification;

(iii) Lengths and capacities of cars or trucks ordered and furnished;

(iv) Other pertinent information required to effect prompt delivery to the consignee, including name, delivery address, postal address and ZIP code of consignee, routing, etc.;

(v) Special instructions or annotations requested by the ordering agency for commercial bills of lading;*e.g., "This shipment is the property of, and the freight charges paid to the carrier(s) will be reimbursed by, the Governmen"t*; and

(vi) The signature of the carrier's agent and the date the shipment is received by the carrier; and

(6) Distribute the copies of the bill of lading, or other transportation receipts, as directed by the ordering agency.

(c) These Contractor responsibilities are specified for performance at the plant or plants at which the supplies are to be finally inspected and accepted, unless the facilities for shipment by carrier's equipment are not available at the Contractor's plant, in which case the responsibilities shall be performed f.o.b. the point or points in the same or nearest city where the specified carrier's facilities are available; subject, however, to the following qualifications:

(1) If the Contractor's shipping plant is located in the State of Alaska or Hawaii, the Contractor shall deliver the supplies listed for shipment outside Alaska or Hawaii to the port of loading in Alaska or Hawaii, respectively, as specified in the contract, at Contractor's expense, and to that extent the contract shall be "f.o.b. destination."

(2) Notwithstanding paragraph (c)(1) of this clause, if the Contractor's shipping plant is located in the State of Hawaii, and the contract requires delivery to be made by container service, the Contractor shall deliver the supplies, at the Contractor's expense, to the container yard in the same or nearest city where seavan container service is available.

(End of clause)

52.247-32 F.o.b. Origin, Freight Prepaid.

As prescribed in 47.303-4(c), insert the following clause:

F.O.B. ORIGIN, FREIGHT PREPAID (FEB 2006)

(a) The term "f.o.b. origin, freight prepaid," as used in this clause, means-

(1) Free of expense to the Government delivered-

(i) On board the indicated type of conveyance of the carrier (or of the Government, if specified) at a designated point in the city, county, and State from which the shipments will be made and from which line-haul transportation service (as distinguished from switching, local drayage, or other terminal service) will begin;

(ii) To, and placed on, the carrier's wharf (at shipside, within reach of the ship's loading tackle, when the shipping point is within a port area having water transportation service) or the carrier's freight station;

(iii) To a U.S. Postal Service facility; or

(iv) If stated in the solicitation, to any Government-designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract (the Federal Motor Carrier Safety Administration prescribes commercial zones at Subpart B of 49 CFR part 372); and

(2) The cost of transportation, ultimately the Government's obligation, is prepaid by the contractor to the point specified in the contract.

(b) The Contractor shall-

(1) (i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment in conformance with carrier requirements to protect the goods and to ensure assessment of the lowest applicable transportation charge;

(2) (i) Order specified carrier equipment when requested by the Government; or

(ii) If not specified, order appropriate carrier equipment not in excess of capacity to accommodate shipment;

(3) Deliver the shipment in good order and condition to the carrier, and load, stow, trim, block, and/or brace carload or truckload shipment (when loaded by the Contractor) on or in the carrier's conveyance as required by carrier rules and regulations;

(4) Be responsible for any loss of and/or damage to the goods-

(i) Occurring before delivery to the carrier;

(ii) Resulting from improper packing or marking; or

(iii) Resulting from improper loading, stowing, trimming, blocking, and/or bracing of the shipment, if loaded by the Contractor on or in the carrier's conveyance;

(5) Prepare a bill of lading or other transportation receipt. The bill of lading shall show-

(i) A description of the shipment in terms of the governing freight classification or tariff (or Government rate tender) under which lowest freight rates are applicable;

(ii) The seals affixed to the conveyance with their serial numbers or other identification;

(iii) Lengths and capacities of cars or trucks ordered and furnished;

(iv) Other pertinent information required to effect prompt delivery to the consignee, including name, delivery address, postal address and ZIP code of consignee, routing, etc.;

(v) Special instructions or annotations requested by the ordering agency for bills of lading; *e.g.*, *"This shipment is the property of, and the freight charges paid to the carrier(s) will be reimbursed by, the Governmen"t*; and

(vi) The signature of the carrier's agent and the date the shipment is received by the carrier;

(6) Distribute the copies of the bill of lading, or other transportation receipts, as directed by the ordering agency; and

(7) Prepay all freight charges to the extent specified in the contract.

(c) These Contractor responsibilities are specified for performance at the plant or plants at which these supplies are to be finally inspected and accepted, unless the facilities for shipment by carrier's equipment are not available at the Contractor's plant, in which case the responsibilities shall be performed f.o.b. the point or points in the same or nearest city where the specified carrier's facilities are available; subject, however, to the following qualifications:

(1) If the Contractor's shipping plant is located in the State of Alaska or Hawaii, the Contractor shall deliver the supplies listed for shipment outside Alaska or Hawaii to the port of loading in Alaska or Hawaii, respectively, as specified in the contract, at Contractor's expense, and to that extent the contract shall be "f.o.b. destination."

(2) Notwithstanding paragraph (c)(1) of this clause, if the Contractor's shipping plant is located in the State of Hawaii, and the contract requires delivery to be made by container service, the Contractor shall deliver the supplies, at the Contractor's expense, to the container yard in the same or nearest city where seavan container service is available.

(End of clause)

52.247-33 F.o.b. Origin, with Differentials.

As prescribed in 47.303-5(c), insert the following clause:

F.O.B. ORIGIN, WITH DIFFERENTIALS (FEB 2006)

(a) The term "f.o.b. origin, with differentials," as used in this clause, means-

(1) Free of expense to the Government delivered-

(i) On board the indicated type of conveyance of the carrier (or of the Government, if specified) at a designated point in the city, county, and State from which the shipments will be made and from which line-haul transportation service (as distinguished from switching, local drayage, or other terminal service) will begin;

(ii) To, and placed on, the carrier's wharf (at shipside, within reach of the ship's loading tackle, when the shipping point is within a port area having water transportation service) or the carrier's freight station;

(iii) To a U.S. Postal Service facility; or

(iv) If stated in the solicitation, to any Government-designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract (the Federal Motor Carrier Safety Administration prescribes commercial zones at Subpart B of 49 CFR part 372); and

(2) Differentials for mode of transportation, type of vehicle, or place of delivery as indicated in Contractor's offer may be added to the contract price.

(b) The Contractor shall-

(1) (i) Pack and mark the shipment to comply with contract specification; or

(ii) In the absence of specifications, prepare the shipment in conformance with carrier requirements to protect the goods and to ensure assessment of the lowest applicable transportation charge;

(2) (i) Order specified carrier equipment when requested by the Government; or

(ii) If not specified, order appropriate carrier equipment not in excess of capacity to accommodate shipment;

(3) Deliver the shipment in good order and condition to the carrier, and load, stow, trim, block, and/or brace carload or truckload shipment (when loaded by the Contractor) on or in the carrier's conveyance as required by carrier rules and regulations;

(4) Be responsible for any loss of and/or damage to the goods-

(i) Occurring before delivery to the carrier;

(ii) Resulting from improper packing and marking; or

(iii) Resulting from improper loading, stowing, trimming, blocking, and/or bracing of the shipment, if loaded by the Contractor on or in the carrier's conveyance;

(5) Complete the Government bill of lading supplied by the ordering agency or, when a Government bill of lading is not supplied, prepare a commercial bill of lading or other transportation receipt. The bill of lading shall show-

(i) A description of the shipment in terms of the governing freight classification or tariff (or Government rate tender) under which lowest freight rates are applicable;

(ii) The seals affixed to the conveyance with their serial numbers or other identification;

(iii) Lengths and capacities of cars or trucks ordered and furnished;

(iv) Other pertinent information required to effect prompt delivery to the consignee, including name, delivery address, postal address and ZIP code of consignee, routing, etc.;

(v) Special instructions or annotations requested by the ordering agency for bills of lading; *e.g., "This shipment is the property of, and the freight charges paid to the carrier will be reimbursed by, the Governmen"t*; and

(vi) The signature of the carrier's agent and the date the shipment is received by the carrier; and

(6) Distribute the copies of the bill of lading, or other transportation receipts, as directed by the ordering agency.

(c) (1) It may be advantageous to the offeror to submit f.o.b. origin prices that include only the lowest cost to the Contractor for loading of shipment at the Contractor's plant or most favorable shipping point. The cost beyond that plant or point of bringing the supplies to the place of delivery and the cost of loading, blocking, and bracing on the type vehicle specified by the Government at the time of shipment may exceed the offeror's lowest cost when the offeror ships for the offeror's account. Accordingly, the offeror may indicate differentials that may be added to the offered price. These differentials shall be expressed as a rate in cents for each 100 pounds (CWT) of the supplies for one or more of the options under this clause that the Government may specify at the time of shipment.

(2) These differential(s) will be considered in the evaluation of offers to determine the lowest overall cost to the Government. If, at the time of shipment, the Government specifies a mode of transportation, type of vehicle, or place of delivery for which the offeror has set forth a differential, the Contractor shall include the total of such differential costs (the applicable differential multiplied by the actual weight) as a separate reimbursable item on the Contractor's invoice for the supplies.

(3) The Government shall have the option of performing or arranging at its own expense any transportation from Contractor's shipping plant or point to carrier's facility at the time of shipment and, whenever this option is exercised, the Government shall make no reimbursement based on a quoted differential.

(4) Offeror's differentials in cents for each 100 pounds for optional mode of transportation, types of vehicle, transportation within a mode, or place of delivery, specified by the Government at the time of shipment and not included in the f.o.b. origin price indicated in the Schedule by the offeror, are as follows:

_____ (carload, truckload, less-load,

_____ wharf, flatcar, driveaway, etc.)

(End of clause)

52.247-34 F.o.b. Destination.

As prescribed in 47.303-6(c), insert the following clause:

F.O.B. DESTINATION (JAN 1991)

(a) The term "f.o.b. destination," as used in this clause, means-

(1) Free of expense to the Government, on board the carrier's conveyance, at a specified delivery point where the consignee's facility (plant, warehouse, store, lot, or other location to which shipment can be made) is located; and

(2) Supplies shall be delivered to the destination consignee's wharf (if destination is a port city and supplies are for export), warehouse unloading platform, or receiving dock, at the expense of the Contractor. The Government shall not be liable for any delivery, storage, demurrage, accessorial, or other charges involved before the actual delivery (or "constructive placement" as defined in carrier tariffs) of the supplies to the destination, unless such charges are caused by an act or order of the Government acting in its contractual capacity. If rail carrier is used, supplies shall be delivered to the specified unloading platform of the consignee. If motor carrier (including "piggyback") is used, supplies shall be delivered to truck tailgate at the unloading platform of the consignee, except when the supplies delivered meet the requirements of Item 568 of the National Motor Freight Classification for "heavy or bulky freight." When supplies meeting the requirements of the referenced Item 568 are delivered, unloading (including movement to the tailgate) shall be performed by the consignee, with assistance from the truck driver, if requested. If the contractor uses rail carrier or freight forwarder for less than carload shipments, the contractor shall ensure that the carrier will furnish tailgate delivery, when required, if transfer to truck is required to complete delivery to consignee.

(b) The Contractor shall-

(1) (i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment in conformance with carrier requirements;

(2) Prepare and distribute commercial bills of lading;

(3) Deliver the shipment in good order and condition to the point of delivery specified in the contract;

(4) Be responsible for any loss of and/or damage to the goods occurring before receipt of the shipment by the consignee at the delivery point specified in the contract;

(5) Furnish a delivery schedule and designate the mode of delivering carrier; and

(6) Pay and bear all charges to the specified point of delivery.

(End of clause)

52.247-35 F.o.b. Destination, Within Consignee's Premises.

As prescribed in 47.303-7(c), insert the following clause in solicitations and contracts when the delivery term is f.o.b. destination, within consignee's premises:

F.O.B. DESTINATION, WITHIN CONSIGNEE'S PREMISES (APR 1984)

(a) The term "f.o.b. destination, within consignee's premises," as used in this clause, means free of expense to the Government delivered and laid down within the doors of the consignee's premises, including delivery to specific rooms within a building if so specified.

(b) The Contractor shall-

(1) (i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment in conformance with carrier requirements;

(2) Prepare and distribute commercial bills of lading;

(3) Deliver the shipment in good order and condition to the point of delivery specified in the contract;

(4) Be responsible for any loss of and/or damage to the goods occurring before receipt of the shipment by the consignee at the delivery point specified in the contract;

(5) Furnish a delivery schedule and designate the mode of delivering carrier; and

(6) Pay and bear all charges to the specified point of delivery.

(End of clause)

52.247-36 F.a.s. Vessel, Port of Shipment.

As prescribed in 47.303-8(c), insert the following clause in solicitations and contracts when the delivery term is f.a.s. vessel, port of shipment:

F.A.S. VESSEL, PORT OF SHIPMENT (APR 1984)

(a) The term "f.a.s. vessel, port of shipment," as used in this clause, means free of expense to the Government delivered alongside the ocean vessel and within reach of its loading tackle at the specified port of shipment.

(b) The Contractor shall-

(1) (i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment for ocean transportation in conformance with carrier requirements to protect the goods and to ensure assessment of the lowest applicable transportation charge;

(2) (i) Deliver the shipment in good order and condition alongside the ocean vessel and within reach of its loading tackle, at the point of delivery and on the date or within the period specified in the contract; and

(ii) Pay and bear all applicable charges, including transportation costs, wharfage, handling, and heavy lift charges, if necessary, up to this point;

(3) Provide a clean dock or ship's receipt;

(4) Be responsible for any loss of and/or damage to the goods occurring before delivery of the shipment to the point specified in the contract; and

(5) At the Government's request and expense, assist obtaining the documents required for-

(i) Exportation; or

(ii) Importation at destination.

(End of clause)

52.247-37 F.o.b. Vessel, Port of Shipment.

As prescribed in 47.303-9(c), insert the following clause in solicitations and contracts when the delivery term is f.o.b. vessel, port of shipment:

F.O.B. VESSEL, PORT OF SHIPMENT (APR 1984)

(a) The term "f.o.b. vessel, port of shipment," as used in this clause, means free of expense to the Government loaded, stowed, and trimmed on board the ocean vessel at the specified port of shipment.

(b) The Contractor shall-

(1) (i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment for ocean transportation in conformance with carrier requirements to protect the goods and to ensure assessment of the lowest applicable transportation charge;

(2) (i) Deliver the shipment on board the ocean vessel in good order and condition on the date or within the period fixed; and

(ii) Pay and bear all charges incurred in placing the shipment actually on board;

(3) Provide a clean ship's receipt or on-board ocean bill of lading;

(4) Be responsible for any loss of and/or damage to the goods occurring before delivery of the shipment on board the ocean vessel; and

(5) At the Government's request and expense, assist in obtaining the documents required for-

(i) Exportation; or

(ii) Importation at destination.

(End of clause)

52.247-38 F.o.b. Inland Carrier, Point of Exportation.

As prescribed in 47.303-10(c), insert the following clause in solicitations and contracts when the delivery term is f.o.b. inland carrier, point of exportation:

F.O.B. INLAND CARRIER, POINT OF EXPORTATION (FEB 2006)

(a) The term "f.o.b. inland carrier, point of exportation," as used in this clause, means free of expense to the Government, on board the conveyance of the inland carrier, delivered to the specified point of exportation.

(b) The Contractor shall-

(1) (i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment for ocean transportation in conformance with carrier requirements to protect the goods and to ensure assessment of the lowest applicable transportation charge;

(2) Prepare and distribute commercial bills of lading or other transportation receipt;

(3) (i) Deliver the shipment in good order and condition in or on the conveyance of the carrier on the date or within the period specified; and

(ii) Pay and bear all applicable charges, including transportation costs, to the point of delivery specified in the contract;

(4) Be responsible for any loss of and/or damage to the goods occurring before delivery of the shipment to the point of delivery in the contract; and

(5) At the Government's request and expense, assist in obtaining the documents required for-

(i) Exportation; or

(ii) Importation at destination.

(End of clause)

52.247-39 F.o.b. Inland Point, Country of Importation.

As prescribed in 47.303-11(c), insert the following clause in solicitations and contracts when the delivery term is f.o.b. inland point, country of importation:

F.O.B. INLAND POINT, COUNTRY OF IMPORTATION (APR 1984)

(a) The term "f.o.b. inland point, country of importation," as used in this clause, means free of expense to the Government, on board the indicated type of conveyance of the carrier, delivered to the specified inland point where the consignee's facility is located.

(b) The Contractor shall-

(1) (i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment for ocean transportation in conformance with carrier requirements to protect the goods;

(2) (i) Deliver, in or on the inland carrier's conveyance, the shipment in good order and condition to the specified inland point where the consignee's facility is located; and

(ii) Pay and bear all applicable charges incurred up to the point of delivery, including transportation costs; export, import, or other fees or taxes; costs of landing; wharfage costs; customs duties and costs of certificates of origin; consular invoices; and other documents that may be required for importation; and

(3) Be responsible for any loss of and/or damage to the goods until their arrival on or in the carrier's conveyance at the specified inland point.

(End of clause)

52.247-40 [Reserved]

(DEVIATION DATE)

52.247-41 [Reserved]

(DEVIATION DATE)

52.247-42 [Reserved]

(DEVIATION DATE)

52.247-43 [Reserved]

(DEVIATION DATE)

52.247-44 [Reserved]

(DEVIATION DATE)

52.247-45 [Reserved]

(DEVIATION DATE)

52.247-46 [Reserved]

(DEVIATION DATE)

52.247-47 [Reserved]

(DEVIATION DATE)

52.247-48 F.o.b. Destination-Evidence of Shipment.

As prescribed in 47.305-4(c), insert the following clause:

F.O.B. DESTINATION-EVIDENCE OF SHIPMENT (FEB 1999)

(a) If this contract is awarded on a free on board (f.o.b.) destination basis, the Contractor-

(1) Shall not submit an invoice for payment until the supplies covered by the invoice have been shipped to the destination; and

(2) Shall retain, and make available to the Government for review as necessary, the following evidence of shipment documentation for a period of 3 years after final payment under the contract:

(i) If transportation is accomplished by common carrier, a signed copy of the commercial bill of lading for the supplies covered by the Contractor's invoice, indicating the carrier's intent to ship the supplies to the destination specified in the contract.

(ii) If transportation is accomplished by parcel post, a copy of the certificate of mailing.

(iii) If transportation is accomplished by other than common carrier or parcel post, a copy of the delivery document showing receipt at the destination specified in the contract.

(b) The Contractor is not required to submit evidence of shipment documentation with its invoice.

(End of clause)

52.247-49 [Reserved]

(DEVIATION DATE)

52.247-50 [Reserved]

(DEVIATION DATE)

52.247-51 [Reserved]

(DEVIATION DATE)

52.247-52 Clearance and Documentation Requirements-Shipments to DoD Air or Water Terminal Transshipment Points.

As prescribed in 47.305-6(f)(2), insert the following clause in solicitations and contracts when shipments will be consigned to DoD air or water terminal transshipment points:

CLEARANCE AND DOCUMENTATION REQUIREMENTS-SHIPMENTS TO DOD AIR OR WATER TERMINAL TRANSSHIPMENT POINTS (DEVIATION DATE)

All shipments to water or air ports for transshipment to overseas destinations are subject to the following requirements unless clearance and documentation requirements have been expressly delegated to the Contractor:

(a) At least 10 days before shipping cargo to a water port, the Contractor shall obtain an Export Release from the Government transportation office for—

(1) Each shipment weighing 10,000 pounds or more; and

(2) Each shipment weighing less than 10,000 pounds; if the cargo either—

(i) Is classified TOP SECRET, SECRET, OR CONFIDENTIAL;

(ii) Will require exclusive use of a motor vehicle;

(iii) Will occupy full visible capacity of a railway car or motor vehicle;

(iv) Is less than a carload or truckload, but will be tendered as a carload or truckload; or

(v) Is to be shipped to an ammunition outloading port for water shipment; or

(3) Each shipment weighing less than 10,000 pounds if the cargo consists of—

(i) Narcotics;

(ii) Perishable biological material;

(iii) Vehicles to be offered for driveaway service;

(iv) Explosives, ammunition, poisons or other dangerous articles classified as class 1, division 1.1, 1.2, 1.3, 1.4; class 2, division 2.3; and class 6, division 6.1; or

(v) Radioactive material, as defined in 49 CFR 173.403, class 7.

(b) The Contractor is cautioned not to order railway cars or motor vehicles for loading until an Export Release has been received.

(c) If the Contracting Officer directs delivery within a shorter period than 10 days, the Contractor shall advise the transportation office of the date on which the cargo will be ready for shipment.

(d) At least 5 days before shipping cargo to either a water port or an air port (regardless of the weight, security classification, or the commodity description), the Contractor shall provide the Government transportation office the information shown in paragraph (e) below to permit preparation of a Transportation Control and Movement Document (TCMD).

(e) When applying for the Export Release in paragraph (a) above or when providing information for preparation of the TCMD in accordance with paragraph (d) above, the Contractor shall furnish the—

(1) Proposed date or dates of shipment;

(2) Number and type of containers;

(3) Gross weight and cube of the shipment;

(4) Number of cars or trucks that will be involved;

(5) Transportation Control Number(s) (TCN) as required for marking under MIL-STD-129 or Federal Standard 123; and

(6) Proper shipping name as specified in 49 CFR 172.101 for all items classified as dangerous substances as required for marking under MIL-STD-129.

(f) All movement documents (Government or commercial bills of lading or other delivery documents) shall be annotated by the Contractor with the—

(1) Transportation Control Number, Consignor Code of activity directing the shipment; i.e., cognizant contract administration office, purchasing office when contract administration has been retained, or a Contractor specifically delegated transportation responsibilities under DoD 4500.9-R, Defense Transportation Regulation, responsibilities in the contract, whichever is appropriate, Consignee Code, and Transportation Priority for each shipment unit;

(2) Export Release Number and valid shipping period, if stated (if expired, the Contractor shall request a renewal); and

(3) Cubic foot measurement of each shipment unit.

(g) All annotations on the movement documents shall be made in the Description of Articles space except, on Government bills of lading the Export Release number and shipping period shall be entered in the space entitled Route Order/Release No.

(h) The Contractor shall (1) mail a copy of the bill of lading or other movement document to the transshipment point and (2) give a copy of the bill of lading or other movement document to the carrier for presentation to the transshipment point with delivery of the shipment.

(End of clause)

52.247-53 Freight Classification Description.

As prescribed in 47.305-9(b)(1), insert the following provision in solicitations when the supplies being acquired are new to the supply system, nonstandard, or modifications of previously shipped items, and different freight classifications may apply:

FREIGHT CLASSIFICATION DESCRIPTION (APR 1984)

Offerors are requested to indicate below the full Uniform Freight Classification (rail) description, or the National Motor Freight Classification description applicable to the supplies, the same as offeror uses for commercial shipment. This description should include the packing of the commodity (box, crate, bundle, loose, setup, knocked down, compressed, unwrapped, etc.), the container material (fiberboard, wooden, etc.), unusual shipping dimensions, and other conditions affecting traffic descriptions. The Government will use these descriptions as well as other information available to determine the classification description most appropriate and advantageous to the Government. Offeror understands that shipments on any f.o.b. origin contract awarded, as a result of this solicitation, will be made in conformity with the shipping classification description specified by the Government, which may be different from the classification description furnished below.

FOR FREIGHT CLASSIFICATION PURPOSES, OFFEROR DESCRIBES THIS COMMODITY AS _____.

(End of provision)

52.247-54 [Reserved]

52.247-55 [Reserved]

(DEVIATION DATE)

52.247-56 Transit Arrangements.

As prescribed in 47.305-13 (a)(3)(ii), insert the following provision in solicitations when benefits may accrue to the Government because transit arrangements may apply:

TRANSIT ARRANGEMENTS (APR 1984)

The lowest appropriate common carrier transportation costs, including offeror's through transit rates and charges when applicable, from offeror's shipping points, via the transit point, to the ultimate destination will be used in evaluating offers.

TRANSIT POINT(S)	DESTINATION(S)
_____	_____
_____	_____

(End of clause)

52.247-57 [Reserved]

(DEVIATION DATE)

52.247-58 Loading, Blocking, and Bracing of Freight Car Shipments.

As prescribed in 47.305-15(a)(2), insert the following clause in solicitations and contracts when supplies may be shipped in carload lots by rail:

LOADING, BLOCKING, AND BRACING OF FREIGHT CAR SHIPMENTS (APR 1984)

(a) Upon receipt of shipping instructions, as provided in this contract, the supplies to be included in any carload shipment by rail shall be loaded, blocked, and braced by the Contractor in accordance with the standards published by the Association of American Railroads and effective at the time of shipment.

(b) Shipments, for which the Association of American Railroads has published no such standards, shall be loaded, blocked, and braced in accordance with standards established by the shipper as evidenced by written acceptance of an authorized representative of the carrier.

(c) The Contractor shall be liable for payment of any damage to any supplies caused by the failure to load, block, and brace in accordance with acceptable standards set forth herein.

(d) A copy of the appropriate pamphlet of the Association of American Railroads may be obtained from that Association.

(End of clause)

52.247-59 [Reserved]

(DEVIATION DATE)

52.247-60 [Reserved]

(DEVIATION DATE)

52.247-61 [Reserved]

(DEVIATION DATE)

52.247-62 [Reserved]

(DEVIATION DATE)

52.247-63 Preference for U.S.-Flag Air Carriers.

As prescribed in 47.405(a) , insert the following clause:

PREFERENCE FOR U.S.-FLAG AIR CARRIERS (JAN 2025)

(a) *Definitions*. As used in this clause-

"International air transportation" means transportation by air between a place in the United States and a place outside the United States or between two places both of which are outside the United States.

United States means the 50 States, the District of Columbia, and outlying areas.

U.S.-flag air carrier means an entity granted authority to provide air transportation in the form of a certificate of public convenience and necessity under 49 U.S.C. 41102.

(b) *U.S. Government-financed international air transportation.* 49 U.S.C. 40118, Government-financed air transportation (commonly referred to as the Fly America Act), requires that all Federal agencies and Government contractors and subcontractors use U.S.-flag air carriers for U.S. Government-financed international air transportation of personnel (and their personal effects) or property, to the extent that service by those carriers is available. It requires the General Services Administration to issue regulations that, in the absence of satisfactory proof of the necessity for foreign-flag air transportation, disallow expenditures from funds, appropriated or otherwise established for the account of the United States, for international air transportation secured aboard a foreign-flag air carrier if a U.S.-flag air carrier is available to provide such services.

(c) *Use of U.S.-flag carriers for international air transportation.* If available, the Contractor, in performing work under this contract, shall use U.S.-flag carriers for international air transportation of personnel (and their personal effects) or property.

(d) *Statement of unavailability of U.S.-flag air carriers.* In the event that the Contractor selects a carrier other than a U.S.-flag air carrier for international air transportation, the Contractor shall include a statement on vouchers involving such transportation essentially as follows:

Statement of Unavailability of U.S.-Flag Air Carriers

International air transportation of persons (and their personal effects) or property by U.S.-flag air carrier was not available or it was necessary to use foreign-flag air carrier service for the following reasons (see section 47.403 of the Federal Acquisition Regulation) *[State reasons]:*_____

(End of statement)

(e) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (e), in each subcontract or purchase under this contract that may involve international air transportation.

(End of clause)

52.247-64 Preference for Privately Owned U.S.-Flag Commercial Vessels.

As prescribed in 47.507(a), insert the following clause:

PREFERENCE FOR PRIVATELY OWNED U.S.-FLAG COMMERCIAL VESSELS (DEVIATION DATE)

(a) Except as provided in paragraph (e) of this clause, the Cargo Preference Act of 1954 (46 U.S.C. 55305) requires that Federal departments and agencies shall transport in privately owned U.S.-flag commercial vessels at least 50 percent of the gross tonnage of equipment, materials, or commodities that may be transported in ocean vessels (computed separately for dry bulk carriers, dry cargo liners, and tankers). Such transportation shall be accomplished when any equipment, materials, or commodities, located within or outside the United States, that may be transported by ocean vessel are—

(1) Acquired for a U.S. Government agency account;

(2) Furnished to, or for the account of, any foreign nation without provision for reimbursement;

(3) Furnished for the account of a foreign nation in connection with which the United States advances funds or credits, or guarantees the convertibility of foreign currencies; or

(4) Acquired with advance of funds, loans, or guaranties made by or on behalf of the United States.

(b) The Contractor shall use privately owned U.S.-flag commercial vessels to ship at least 50 percent of the gross tonnage involved under this contract (computed separately for dry bulk carriers, dry cargo liners, and tankers) whenever shipping any equipment, materials, or commodities under the conditions set forth in paragraph (a) above, to the extent that such vessels are available at rates that are fair and reasonable for privately owned U.S.-flag commercial vessels.

(c) (1) The Contractor shall submit one legible copy of a rated on-board ocean bill of lading for each shipment to both

(i) the Contracting Officer and

(ii) the Office of Cargo Preference, Maritime Administration (MAR-590), 400 Seventh Street, SW, Washington, DC 20590. Subcontractor bills of lading shall be submitted through the Prime Contractor.

(2) The Contractor shall furnish these bill of lading copies

(i) within 20 working days of the date of loading for shipments originating in the United States, or

(ii) within 30 working days for shipments originating outside the United States. Each bill of lading copy shall contain the following information:

(A) Sponsoring U.S. Government agency.

(B) Name of vessel.

(C) Vessel flag of registry.

(D) Date of loading.

(E) Port of loading.

(F) Port of final discharge.

(G) Description of commodity.

(H) Gross weight in pounds and cubic feet if available.

(I) Total ocean freight revenue in U.S. dollars.

(d) The Contractor shall insert the substance of this clause, including this paragraph (d), in all subcontracts or purchase orders under this contract, except those described in paragraph (e)(4).

(e) The requirement in paragraph (a) does not apply to—

(1) Cargoes carried in vessels as required or authorized by law or treaty;

(2) Ocean transportation between foreign countries of supplies purchased with foreign currencies made available, or derived from funds that are made available, under the Foreign Assistance Act of 1961 (22 U.S.C. 2353);

(3) Shipments of classified supplies when the classification prohibits the use of non-Government vessels; and

(4) Subcontracts or purchase orders for the acquisition of commercial products or commercial services unless—

(i) This contract is—

(A) A contract or agreement for ocean transportation services; or

(B) A construction contract; or

(ii) The supplies being transported are—

(A) Items the Contractor is reselling or distributing to the Government without adding value. (Generally, the Contractor does not add value to the items when it subcontracts items for f.o.b. destination shipment); or

(B) Shipped in direct support of U.S. military—

(1) Contingency operations;

(2) Exercises; or

(3) Forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations.

(f) Guidance regarding fair and reasonable rates for privately owned U.S.-flag commercial vessels may be obtained from the Office of Costs and Rates, Maritime Administration, 400 Seventh Street, SW, Washington, DC 20590, Phone: 202-366-4610.

(End of clause)

Alternate I (APR 2003). As prescribed in 47.507 (a)(2), substitute the following paragraphs (a) and (b) for paragraphs (a) and (b) of the basic clause:

(a) Except as provided in paragraphs (b) and (e) of this clause, the Contractor shall use privately owned U.S.-flag commercial vessels, and no others, in the ocean transportation of any supplies to be furnished under this contract.

(b) If such vessels are not available for timely shipment at rates that are fair and reasonable for privately owned U.S.-flag commercial vessels, the Contractor shall notify the Contracting Officer and request (1) authorization to ship in foreign-flag vessels or (2) designation of available U.S.-flag vessels. If the Contractor is authorized in writing by the Contracting Officer to ship the supplies in foreign-flag vessels, the contract price shall be equitably adjusted to reflect the difference in costs of shipping the supplies in privately owned U.S.-flag commercial vessels and in foreign-flag vessels.

Alternate II (NOV 2021) . As prescribed in 47.507 (a)(3), substitute the following paragraph (e) for paragraph (e) of the basic clause:

(e) The requirement in paragraph (a) does not apply to-

(1) Cargoes carried in vessels as required or authorized by law or treaty;

(2) Ocean transportation between foreign countries of supplies purchased with foreign currencies made available, or derived from funds that are made available, under the Foreign Assistance Act of 1961 (22 U.S.C. 2353); and

(3) Shipments of classified supplies when the classification prohibits the use of non-Government vessels.

(4) Subcontracts or purchase orders under this contract for the acquisition of commercial products or commercial services unless the supplies being transported are-

(i) Items the Contractor is reselling or distributing to the Government without adding value. (Generally, the Contractor does not add value to the items when it subcontracts items for f.o.b. destination shipment); or

(ii) Shipments in direct support of U.S. military-

(A) Contingency operations;

(B) Exercises; or

(C) Forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations. (*Note*: This contract requires shipment of commercial products in direct support of U.S. military contingency operations, exercises, or forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations.)

52.247-65 [Reserved]

(DEVIATION DATE)

52.247-66 [Reserved]

(DEVIATION DATE)

52.247-67 Submission of Transportation Documents for Audit.

As prescribed in 47.103-2 , insert the following clause:

SUBMISSION OF TRANSPORTATION DOCUMENTS FOR AUDIT (FEB 2006)

(a) The Contractor shall submit to the address identified below, for prepayment audit, transportation documents on which the United States will assume freight charges that were paid-

(1) By the Contractor under a cost-reimbursement contract; and

(2) By a first-tier subcontractor under a cost-reimbursement subcontract thereunder.

(b) Cost-reimbursement Contractors shall only submit for audit those bills of lading with freight shipment charges exceeding $100. Bills under $100 shall be retained on-site by the Contractor and made available for on-site audits. This

exception only applies to freight shipment bills and is not intended to apply to bills and invoices for any other transportation services.

(c) Contractors shall submit the above referenced transportation documents to-

_____ _____

_____

[*To be filled in by Contracting Officer*]

(End of clause)

52.247-68 Report of Shipment (REPSHIP).

As prescribed in 47.208-2 , insert the following clause:

REPORT OF SHIPMENT (REPSHIP) (FEB 2006)

(a) *Definition*. "Domestic destination", as used in this clause, means-

(1) A destination within the contiguous United States; or

(2) If shipment originates in Alaska or Hawaii, a destination in Alaska or Hawaii, respectively.

(b) Unless otherwise directed by the Contracting Officer, the Contractor shall-

(1) Send a prepaid notice of shipment to the consignee transportation officer-

(i) For all shipments of-

(A) Classified material, protected sensitive, and protected controlled material;

(B) Explosives and poisons, class 1, division 1.1, 1.2 and 1.3; class 2, division 2.3 and class 6, division 6.1;

(C) Radioactive materials requiring the use of a III bar label; or

(ii) When a truckload/carload shipment of supplies weighing 20,000 pounds or more, or a shipment of less weight that occupies the full visible capacity of a railway car or motor vehicle, is given to any carrier (common, contract, or private) for transportation to a domestic destination (other than a port for export);

(2) Transmits the notice by rapid means to be received by the consignee transportation officer at least 24 hours before the arrival of the shipment; and

(3) Send, to the receiving transportation officer, the bill of lading or letter or other document containing the following information and prominently identified as a "Report of Shipment"or "REPSHIP FOR T.O."

REPSHIP FOR T.O. 81 JUN 01
TRANSPORTATION OFFICER
DEFENSE DEPOT, MEMPHIS, TN.
SHIPPED YOUR DEPOT 1981 JUN 1 540 CTNS MENS
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***Bill of lading.
****If not shipped by BL, identify lading document and state whether paid by contractor.
*****Estimated time of arrival.

(End of clause)

52.247-69 Reporting Requirement for U.S.-Flag Air Carriers Regarding Training to Prevent Human Trafficking.

As prescribed in 47.405(b), insert the following clause:

REPORTING REQUIREMENT FOR U.S.-FLAG AIR CARRIERS
REGARDING TRAINING TO PREVENT HUMAN TRAFFICKING. (JAN 2025)

(a) *Definitions.* As used in this clause—

Human trafficking means “Severe forms of trafficking in persons” or “Sex trafficking.”

Severe forms of trafficking in persons means—

(1) Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

(2) The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

Sex trafficking means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.

(b) *Annual reporting requirement.*

(1) In accordance with 49 U.S.C. 40118(g), the Contractor shall provide the annual report described in paragraph (b)(2) of this clause by October 30th, via email, to the following agencies:

(i) General Services Administration: TraffickingPreventionReport@gsa.gov;

(ii) U.S. Department of Transportation: trafficking@dot.gov;

(iii) Department of Labor: AirCarrier-HTreports@dol.gov;

(iv) Transportation Security Administration: ics-cchtfams@tsa.dhs.gov;

(v) U.S. Customs and Border Protection: CLP@cbp.dhs.gov; and

(vi) DHS Center for Countering Human Trafficking: Info@CCHT.dhs.gov.

(2) The annual report shall include information from the preceding Government fiscal year (October 1 through September 30) regarding—

(i) The number of personnel trained in the detection and reporting of potential human trafficking, including the training required under 49 U.S.C. 44734(a)(4);

(ii) The number of notifications of potential human trafficking victims received from staff or other passengers; and

(iii) (A) Whether the Contractor notified the Global Human Trafficking Hotline, another comparable hotline, or law enforcement at the relevant airport of the potential human trafficking victim for each such notification of potential human trafficking; and

(B) If the Contractor made a notification, the date the notification was made and the method of notification (*e.g.*, text to Hotline, call to law enforcement).

(c) *Training*. In accordance with 49 U.S.C. 44734 and 44738, personnel trained in the detection and reporting of potential human trafficking should include the following:

(1) Flight attendants;

(2) Ticket counter agents;

(3) Gate agents; and

(4) Other air carrier workers whose jobs require regular interaction with passengers.

(End of clause)

52.248 [Reserved]

52.248-1 Value Engineering.

As prescribed in 48.201 , insert the following clause:

VALUE ENGINEERING (DEVIATION DATE)

(a) *General*. The Contractor is encouraged to develop, prepare, and submit value engineering change proposals (VECP's) voluntarily. The Contractor shall share in any net acquisition savings realized from accepted VECP's, in accordance with the incentive sharing rates in paragraph (f) of this clause.

(b) *Definitions*.

Acquisition savings, as used in this clause, means savings resulting from the application of a VECP to contracts awarded by the same contracting office or its successor for essentially the same unit. Acquisition savings include-

(1) Instant contract savings, which are the net cost reductions on this, the instant contract, and which are equal to the instant unit cost reduction multiplied by the number of instant contract units affected by the VECP, less the Contractor's allowable development and implementation costs;

(2) Concurrent contract savings, which are net reductions in the prices of other contracts that are definitized and ongoing at the time the VECP is accepted; and

(3) Future contract savings, which are the product of the future unit cost reduction multiplied by the number of future contract units in the sharing base. On an instant contract, future contract savings include savings on increases in quantities after VECP acceptance that are due to contract modifications, exercise of options, additional orders, and funding of subsequent year requirements on a multiyear contract.

Collateral costs means agency costs of operation, maintenance, logistic support, or Government-furnished property.

Collateral savings, as used in this clause, means those measurable net reductions resulting from a VECP in the agency's overall projected collateral costs, exclusive of acquisition savings, whether or not the acquisition cost changes.

Contracting office includes any contracting office that the acquisition is transferred to, such as another branch of the agency or another agency's office that is performing a joint acquisition action.

Contractor's development and implementation costs, as used in this clause, means those costs the Contractor incurs on a VECP specifically in developing, testing, preparing, and submitting the VECP, as well as those costs the Contractor incurs to make the contractual changes required by Government acceptance of a VECP.

Future unit cost reduction, as used in this clause, means the instant unit cost reduction adjusted as the Contracting Officer considers necessary for projected learning or changes in quantity during the sharing period. It is calculated at the time the VECP is accepted and applies either-

(1) Throughout the sharing period, unless the Contracting Officer decides that recalculation is necessary because conditions are significantly different from those previously anticipated; or

(2) To the calculation of a lump-sum payment, which cannot later be revised.

Government costs, as used in this clause, means those agency costs that result directly from developing and implementing the VECP, such as any net increases in the cost of testing, operations, maintenance, and logistics support. The term does not include the normal administrative costs of processing the VECP or any increase in this contract's cost or price resulting from negative instant contract savings.

Instant contract, as used in this clause, means this contract, under which the VECP is submitted. It does not include increases in quantities after acceptance of the VECP that are due to contract modifications, exercise of options, or additional orders. If this is a multiyear contract, the term does not include quantities funded after VECP acceptance. If this contract is a fixed-price contract with prospective price redetermination, the term refers to the period for which firm prices have been established.

Instant unit cost reduction means the amount of the decrease in unit cost of performance (without deducting any Contractor's development or implementation costs) resulting from using the VECP on this, the instant contract. If this is a service contract, the instant unit cost reduction is normally equal to the number of hours per line-item task saved by using the VECP on this contract, multiplied by the appropriate contract labor rate.

Negative instant contract savings means the increase in the cost or price of this contract when the acceptance of a VECP results in an excess of the Contractor's allowable development and implementation costs over the product of the instant unit cost reduction multiplied by the number of instant contract units affected.

Net acquisition savings means total acquisition savings, including instant, concurrent, and future contract savings, less Government costs.

Sharing base, as used in this clause, means the number of affected end items on contracts of the contracting office accepting the VECP.

Sharing period, as used in this clause, means the period beginning with acceptance of the first unit incorporating the VECP and ending at a calendar date or event determined by the contracting officer for each VECP.

Unit, as used in this clause, means the item or task to which the Contracting Officer and the Contractor agree the VECP applies.

Value engineering change proposal (VECP) means a proposal that-

(1) Requires a change to this, the instant contract, to implement; and

(2) Results in reducing the overall projected cost to the agency without impairing essential functions or characteristics;*provided*, that it does not involve a change-

(i) In deliverable end item quantities only;

(ii) In research and development (R&D) end items or R&D test quantities that is due solely to results of previous testing under this contract; or

(iii) To the contract type only.

(c) *VECP preparation*. As a minimum, the Contractor shall include in each VECP the information described in paragraphs (c)(1) through (8) of this clause. If the proposed change is affected by contractually required configuration management or similar procedures, the instructions in those procedures relating to format, identification, and priority assignment shall govern VECP preparation. The VECP shall include the following:

(1) A description of the difference between the existing contract requirement and the proposed requirement, the comparative advantages and disadvantages of each, a justification when an item's function or characteristics are being altered, the effect of the change on the end item's performance, and any pertinent objective test data.

(2) A list and analysis of the contract requirements that must be changed if the VECP is accepted, including any suggested specification revisions.

(3) Identification of the unit to which the VECP applies.

(4) A separate, detailed cost estimate for (i) the affected portions of the existing contract requirement and (ii) the VECP. The cost reduction associated with the VECP shall take into account the Contractor's allowable development and implementation costs, including any amount attributable to subcontracts under the Subcontracts paragraph of this clause.

(5) A description and estimate of costs the Government may incur in implementing the VECP, such as test and evaluation and operating and support costs.

(6) A prediction of any effects the proposed change would have on collateral costs to the agency.

(7) A statement of the time by which a contract modification accepting the VECP must be issued in order to achieve the maximum cost reduction, noting any effect on the contract completion time or delivery schedule.

(8) Identification of any previous submissions of the VECP, including the dates submitted, the agencies and contract numbers involved, and previous Government actions, if known.

(d) *Submission*. The Contractor shall submit VECP's to the Contracting Officer, unless this contract states otherwise. If this contract is administered by other than the contracting office, the Contractor shall submit a copy of the VECP simultaneously to the Contracting Officer and to the Administrative Contracting Officer.

(e) Government action. (1) The Contracting Officer will notify the Contractor of the status of the VECP within 45 calendar days after the contracting office receives it. If additional time is required, the Contracting Officer will notify the Contractor within the 45-day period and provide the reason for the delay and the expected date of the decision. The Government will process VECP's expeditiously; however, it will not be liable for any delay in acting upon a VECP.

(2) If the VECP is not accepted, the Contracting Officer will notify the Contractor in writing, explaining the reasons for rejection. The Contractor may withdraw any VECP, in whole or in part, at any time before it is accepted by the Government. The Contracting Officer may require that the Contractor provide written notification before undertaking significant expenditures for VECP effort.

(3) Any VECP may be accepted, in whole or in part, by the Contracting Officer's award of a modification to this contract citing this clause and made either before or within a reasonable time after contract performance is completed. Until such a contract modification applies a VECP to this contract, the Contractor shall perform in accordance with the existing contract. The decision to accept or reject all or part of any VECP is a unilateral decision made solely at the discretion of the Contracting Officer.

(f) *Sharing rates*. If a VECP is accepted, the Contractor shall share in net acquisition savings according to the percentages shown in the table below. The percentage paid the Contractor depends upon-

(1) This contract's type (fixed-price, incentive, or cost-reimbursement);

(2) The sharing arrangement specified in paragraph (a) of this clause (incentive, program requirement, or a combination as delineated in the Schedule); and

(3) The source of the savings (the instant contract, or concurrent and future contracts), as follows:

Contractor's Share of Net Acquisition Savings (Figure in Percent)				
	Sharing arrangement			
Contract Type	**Incentive (Voluntary)**		**Program Requirement (Mandatory)**	
	Instant Contract Rate	**Concurrent and Future Contract Rate**	**Instant Contract Rate**	**Concurrent and Future Contract Rate**
Fixed-price (includes fixed-price-award-fee; excludes other fixed-price incentive contracts)	*50	*50	25	25
Incentive (fixed-price or cost) (other than award fee)	(**)	*50	(**)	25
Cost-reimbursement (includes cost-plus-award-fee; excludes other cost-type incentive contracts)	***25	***25	15	15
* The Contracting Office may increase the Contractor's sharing rate to as high as 75 percent for each VECP.				
** Same sharing arrangement as the contract's profit or fee adjustment formula.				
*** The Contracting Office may increase the Contractor's sharing rate to as high as 50 percent for each VECP.				

(g) Calculating net acquisition savings. (1) Acquisition savings are realized when (i) the cost or price is reduced on the instant contract, (ii) reductions are negotiated in concurrent contracts, (iii) future contracts are awarded, or (iv) agreement is reached on a lump-sum payment for future contract savings (see paragraph (i)(4) of this clause). Net acquisition savings are first realized, and the Contractor shall be paid a share, when Government costs and any negative instant contract savings have been fully offset against acquisition savings.

(2) Except in incentive contracts, Government costs and any price or cost increases resulting from negative instant contract savings shall be offset against acquisition savings each time such savings are realized until they are fully offset. Then, the Contractor's share is calculated by multiplying net acquisition savings by the appropriate Contractor's percentage sharing rate (see paragraph (f) of this clause). Additional Contractor shares of net acquisition savings shall be paid to the Contractor at the time realized.

(3) If this is an incentive contract, recovery of Government costs on the instant contract shall be deferred and offset against concurrent and future contract savings. The Contractor shall share through the contract incentive structure in savings on the instant contract items affected. Any negative instant contract savings shall be added to the target cost or to the target price and ceiling price, and the amount shall be offset against concurrent and future contract savings.

(4) If the Government does not receive and accept all items on which it paid the Contractor's share, the Contractor shall reimburse the Government for the proportionate share of these payments.

(h) *Contract adjustment*. The modification accepting the VECP (or a subsequent modification issued as soon as possible after any negotiations are completed) shall-

(1) Reduce the contract price or estimated cost by the amount of instant contract savings, unless this is an incentive contract;

(2) When the amount of instant contract savings is negative, increase the contract price, target price and ceiling price, target cost, or estimated cost by that amount;

(3) Specify the Contractor's dollar share per unit on future contracts, or provide the lump-sum payment;

(4) Specify the amount of any Government costs or negative instant contract savings to be offset in determining net acquisition savings realized from concurrent or future contract savings; and

(5) Provide the Contractor's share of any net acquisition savings under the instant contract in accordance with the following:

(i) Fixed-price contracts-add to contract price.

(ii) Cost-reimbursement contracts-add to contract fee.

(i) Concurrent and future contract savings. (1) Payments of the Contractor's share of concurrent and future contract savings shall be made by a modification to the instant contract in accordance with paragraph (h)(5) of this clause. For incentive contracts, shares shall be added as a separate firm-fixed-price line item on the instant contract. The Contractor shall maintain records adequate to identify the first delivered unit for 3 years after final payment under this contract.

(2) The Contracting Officer shall calculate the Contractor's share of concurrent contract savings by-

(i) Subtracting from the reduction in price negotiated on the concurrent contract any Government costs or negative instant contract savings not yet offset; and

(ii) Multiplying the result by the Contractor's sharing rate.

(3) The Contracting Officer shall calculate the Contractor's share of future contract savings by-

(i) Multiplying the future unit cost reduction by the number of future contract units scheduled for delivery during the sharing period;

(ii) Subtracting any Government costs or negative instant contract savings not yet offset; and

(iii) Multiplying the result by the Contractor's sharing rate.

(4) When the Government wishes and the Contractor agrees, the Contractor's share of future contract savings may be paid in a single lump sum rather than in a series of payments over time as future contracts are awarded. Under this alternate procedure, the future contract savings may be calculated when the VECP is accepted, on the basis of the Contracting Officer's forecast of the number of units that will be delivered during the sharing period. The Contractor's share shall be included in a modification to this contract (see paragraph (h)(3) of this clause) and shall not be subject to subsequent adjustment.

(5) *Alternate no-cost settlement method*. When, in accordance with section 48.104-4 of the Federal Acquisition Regulation (FAR), the Government and the Contractor mutually agree to use the no-cost settlement method, the following applies:

(i) The Contractor will keep all the savings on the instant contract and on its concurrent contracts only.

(ii) The Government will keep all the savings resulting from concurrent contracts placed on other sources, savings from all future contracts, and all collateral savings.

(j) *Collateral savings*. If a VECP is accepted, the Contracting Officer will increase the instant contract amount, as specified in paragraph (h)(5) of this clause, by a rate from 20 to 100 percent, as determined by the Contracting Officer, of any projected collateral savings determined to be realized in a typical year of use after subtracting any Government costs not previously offset. However, the Contractor's share of collateral savings will not exceed the contract's firm-fixed-price, target price, target cost, or estimated cost, at the time the VECP is accepted, or $100,000, whichever is greater. The Contracting Officer will be the sole determiner of the amount of collateral savings.

(k) *Relationship to other incentives*. Only those benefits of an accepted VECP not rewardable under performance, design-to-cost (production unit cost, operating and support costs, reliability and maintainability), or similar incentives shall be rewarded under this clause. However, the targets of such incentives affected by the VECP shall not be adjusted because of VECP acceptance. If this contract specifies targets but provides no incentive to surpass them, the value engineering sharing shall apply only to the amount of achievement better than target.

(l) *Subcontracts*. The Contractor shall include an appropriate value engineering clause in any subcontract-valued at or above the simplified acquisition threshold, as defined in FAR 2.101 on the date of subcontract award, and may include one in subcontracts of lesser value. In calculating any adjustment in this contract's price for instant contract savings (or negative instant contract savings), the Contractor's allowable development and implementation costs shall include any subcontractor's allowable development and implementation costs, and any value engineering incentive payments to a subcontractor, clearly resulting from a VECP accepted by the Government under this contract. The Contractor may choose any arrangement for subcontractor value engineering incentive payments, *provided*, that the payments shall not reduce the Government's share of concurrent or future contract savings or collateral savings.

(m) *Data*. The Contractor may restrict the Government's right to use any part of a VECP or the supporting data by marking the following legend on the affected parts:

"These data, furnished under the Value Engineering clause of contract _____, shall not be disclosed outside the Government or duplicated, used, or disclosed, in whole or in part, for any purpose other than to evaluate a value engineering change proposal submitted under the clause. This restriction does not limit the Government's right to use information contained in these data if it has been obtained or is otherwise available from the Contractor or from another source without limitations."

If a VECP is accepted, the Contractor hereby grants the Government unlimited rights in the VECP and supporting data, except that, with respect to data qualifying and submitted as limited rights technical data, the Government shall have the rights specified in the contract modification implementing the VECP and shall appropriately mark the data. (The terms "unlimited rights" and "limited rights" are defined in part 27 of the Federal Acquisition Regulation.)

(End of clause)

Alternate I (APR 1984). If the contracting officer selects a mandatory value engineering program requirement, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) *General*. The Contractor shall (1) engage in a value engineering program, and submit value engineering progress reports, as specified in the Schedule and (2) submit to the Contracting Officer any resulting value engineering change proposals (VECP's). In addition to being paid as the Schedule specifies for this mandatory program, the Contractor shall share in any net acquisition savings realized from accepted VECP's, in accordance with the program requirement sharing rates in paragraph (f) of this clause.

Alternate II (JAN 2015). If the contracting officer selects both a value engineering incentive and mandatory value engineering program requirement, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) *General*. For those line items designated in the Schedule as subject to the value engineering program requirement, the Contractor shall (1) engage in a value engineering program, and submit value engineering progress reports, as specified in the Schedule and (2) submit to the Contracting Officer any resulting VECP's. In addition to being paid as the Schedule specifies for this mandatory program, the Contractor shall share in any net acquisition savings realized from VECP's accepted under the program, in accordance with the program requirement sharing rates in paragraph (f) of this clause. For remaining areas of the contract, the Contractor is encouraged to develop, prepare, and submit VECP's voluntarily; for VECP's accepted under these remaining areas, the incentive sharing rates apply. The decision on which rate applies is a unilateral decision made solely at the discretion of the Government.

Alternate III (APR 1984). When the head of the contracting activity determines that the cost of calculating and tracking collateral savings will exceed the benefits to be derived in a contract calling for a value engineering incentive, delete paragraph (j) from the basic clause and redesignate the remaining paragraphs accordingly.

52.248-2 Value Engineering-Architect-Engineer.

As prescribed in 48.201(f), insert the following clause:

VALUE ENGINEERING-ARCHITECT-ENGINEER (MAR 1990)

(a) *General*. The Contractor shall (1) perform value engineering (VE) services and submit progress reports as specified in the Schedule; and (2) submit to the Contracting Officer any resulting value engineering proposals (VEP's). Value engineering activities shall be performed concurrently with, and without delay to, the schedule set forth in the contract. The services shall include VE evaluation and review and study of design documents immediately following completion of the 35 percent design state or at such stages as the Contracting Officer may direct. Each separately priced line item for VE services shall define specifically the scope of work to be accomplished and may include VE studies of items other than design documents. The Contractor shall be paid as the contract specifies for this effort, but shall not share in savings which may result from acceptance and use of VEP's by the Government.

(b) *Definitions*.

Life cycle cost, as used in this clause, is the sum of all costs over the useful life of a building, system or product. It includes the cost of design, construction, acquisition, operation, maintenance, and salvage (resale) value, if any.

Value engineering, as used in this clause, means an organized effort to analyze the functions of systems, equipment, facilities, services, and supplies for the purpose of achieving the essential functions at the lowest life cycle cost consistent with required performance, reliability, quality, and safety.

Value engineering proposal, as used in this clause, means, in connection with an A-E contract, a change proposal developed by employees of the Federal Government or contractor value engineering personnel under contract to an agency to provide value engineering services for the contract or program.

(c) *Submissions*. After award of an architect-engineering contract the contractor shall-

(1) Provide the Government with a fee breakdown schedule for the VE services (such as criteria review, task team review, and bid package review) included in the contract schedule;

(2) Submit, for approval by the Contracting Officer, a list of team members and their respective resumes representing the engineering disciplines required to complete the study effort, and evidence of the team leader's qualifications and engineering discipline. Subsequent changes or substitutions to the approved VE team shall be submitted in writing to the Contracting Officer for approval; and

(3) The team leader shall be responsible for pre-study work assembly and shall edit, reproduce, and sign the final report and each VEP. All VEP's, even if submitted earlier as an individual submission, shall be contained in the final report.

(d) *VEP preparation.* As a minimum, the contractor shall include the following information in each VEP:

(1) A description of the difference between the existing and proposed design, the comparative advantages and disadvantages of each, a justification when an item's function is being altered, the effect of the change on system or facility performance, and any pertinent objective test data.

(2) A list and analysis of design criteria or specifications that must be changed if the VEP is accepted.

(3) A separate detailed estimate of the impact on project cost of each VEP, if accepted and implemented by the Government.

(4) A description and estimate of costs the Government may incur in implementing the VEP, such as design change cost and test and evaluation cost.

(5) A prediction of any effects the proposed change may have on life cycle cost.

(6) The effect the VEP will have on design or construction schedules.

(e) *VEP acceptance*. Approved VEP's shall be implemented by bilateral modification to this contract.

(End of clause)

52.248-3 Value Engineering-Construction.

As prescribed in 48.202 , insert the following clause:

VALUE ENGINEERING-CONSTRUCTION (OCT 2025)

(a) *General*. The Contractor is encouraged to develop, prepare, and submit value engineering change proposals (VECP's) voluntarily. The Contractor shall share in any instant contract savings realized from accepted VECP's, in accordance with paragraph (f) of this clause.

(b) *Definitions*. "Collateral costs," as used in this clause, means agency costs of operation, maintenance, logistic support, or Government-furnished property.

Collateral savings, as used in this clause, means those measurable net reductions resulting from a VECP in the agency's overall projected collateral costs, exclusive of acquisition savings, whether or not the acquisition cost changes.

Contractor's development and implementation costs, as used in this clause, means those costs the Contractor incurs on a VECP specifically in developing, testing, preparing, and submitting the VECP, as well as those costs the Contractor incurs to make the contractual changes required by Government acceptance of a VECP.

Government costs, as used in this clause, means those agency costs that result directly from developing and implementing the VECP, such as any net increases in the cost of testing, operations, maintenance, and logistic support. The term does not include the normal administrative costs of processing the VECP.

Instant contract savings, as used in this clause, means the estimated reduction in Contractor cost of performance resulting from acceptance of the VECP, minus allowable Contractor's development and implementation costs, including subcontractors' development and implementation costs (see paragraph (h) of this clause).

Value engineering change proposal (VECP) means a proposal that-

(1) Requires a change to this, the instant contract, to implement; and

(2) Results in reducing the contract price or estimated cost without impairing essential functions or characteristics; *provided*, that it does not involve a change-

(i) In deliverable end item quantities only; or

(ii) To the contract type only.

(c) *VECP preparation*. As a minimum, the Contractor shall include in each VECP the information described in paragraphs (c)(1) through (7) of this clause. If the proposed change is affected by contractually required configuration management or similar procedures, the instructions in those procedures relating to format, identification, and priority assignment shall govern VECP preparation. The VECP shall include the following:

(1) A description of the difference between the existing contract requirement and that proposed, the comparative advantages and disadvantages of each, a justification when an item's function or characteristics are being altered, and the effect of the change on the end item's performance.

(2) A list and analysis of the contract requirements that must be changed if the VECP is accepted, including any suggested specification revisions.

(3) A separate, detailed cost estimate for (i) the affected portions of the existing contract requirement and (ii) the VECP. The cost reduction associated with the VECP shall take into account the Contractor's allowable development and implementation costs, including any amount attributable to subcontracts under paragraph (h) of this clause.

(4) A description and estimate of costs the Government may incur in implementing the VECP, such as test and evaluation and operating and support costs.

(5) A prediction of any effects the proposed change would have on collateral costs to the agency.

(6) A statement of the time by which a contract modification accepting the VECP must be issued in order to achieve the maximum cost reduction, noting any effect on the contract completion time or delivery schedule.

(7) Identification of any previous submissions of the VECP, including the dates submitted, the agencies and contract numbers involved, and previous Government actions, if known.

(d) *Submission*. The Contractor shall submit VECP's to the Resident Engineer at the worksite, with a copy to the Contracting Officer.

(e) Government action. (1) The Contracting Officer will notify the Contractor of the status of the VECP within 45 calendar days after the contracting office receives it. If additional time is required, the Contracting Officer will notify the Contractor within the 45-day period and provide the reason for the delay and the expected date of the decision. The Government will process VECP's expeditiously; however, it will not be liable for any delay in acting upon a VECP.

(2) If the VECP is not accepted, the Contracting Officer will notify the Contractor in writing, explaining the reasons for rejection. The Contractor may withdraw any VECP, in whole or in part, at any time before it is accepted by the Government. The Contracting Officer may require that the Contractor provide written notification before undertaking significant expenditures for VECP effort.

(3) Any VECP may be accepted, in whole or in part, by the Contracting Officer's award of a modification to this contract citing this clause. The Contracting Officer may accept the VECP, even though an agreement on price reduction has not been reached, by issuing the Contractor a notice to proceed with the change. Until a notice to proceed is issued or a contract modification applies a VECP to this contract, the Contractor shall perform in accordance with the existing contract. The decision to accept or reject all or part of any VECP is a unilateral decision made solely at the discretion of the Contracting Officer.

(f) Sharing- (1) *Rates*. The Government's share of savings is determined by subtracting Government costs from instant contract savings and multiplying the result by-

(i) 45 percent for fixed-price contracts; or

(ii) 75 percent for cost-reimbursement contracts.

(2) *Payment*. Payment of any share due the Contractor for use of a VECP on this contract shall be authorized by a modification to this contract to-

(i) Accept the VECP;

(ii) Reduce the contract price or estimated cost by the amount of instant contract savings; and

(iii) Provide the Contractor's share of savings by adding the amount calculated to the contract price or fee.

(g) *Collateral savings*. If a VECP is accepted, the Contracting Officer will increase the instant contract amount by 20 percent of any projected collateral savings determined to be realized in a typical year of use after subtracting any Government costs not previously offset. However, the Contractor's share of collateral savings will not exceed the contract's firm-fixed-price or estimated cost, at the time the VECP is accepted, or $100,000, whichever is greater. The Contracting Officer is the sole determiner of the amount of collateral savings.

(h) *Subcontracts*. The Contractor shall include an appropriate value engineering clause in any subcontract of $90,000 or more and may include one in subcontracts of lesser value. In computing any adjustment in this contract's price under paragraph (f) of this clause, the Contractor's allowable development and implementation costs shall include any

subcontractor's allowable development and implementation costs clearly resulting from a VECP accepted by the Government under this contract, but shall exclude any value engineering incentive payments to a subcontractor. The Contractor may choose any arrangement for subcontractor value engineering incentive payments; *provided*, that these payments shall not reduce the Government's share of the savings resulting from the VECP.

(i) *Data*. The Contractor may restrict the Government's right to use any part of a VECP or the supporting data by marking the following legend on the affected parts:

"These data, furnished under the Value Engineering-Construction clause of contract _____, shall not be disclosed outside the Government or duplicated, used, or disclosed, in whole or in part, for any purpose other than to evaluate a value engineering change proposal submitted under the clause. This restriction does not limit the Government's right to use information contained in these data if it has been obtained or is otherwise available from the Contractor or from another source without limitations."

If a VECP is accepted, the Contractor hereby grants the Government unlimited rights in the VECP and supporting data, except that, with respect to data qualifying and submitted as limited rights technical data, the Government shall have the rights specified in the contract modification implementing the VECP and shall appropriately mark the data. (The terms "unlimited rights" and "limited rights" are defined in part 27 of the Federal Acquisition Regulation.)

(End of clause)

Alternate I (APR 1984). When the head of the contracting activity determines that the cost of calculating and tracking collateral savings will exceed the benefits to be derived in a construction contract, delete paragraph (g) from the basic clause and redesignate the remaining paragraphs accordingly.

52.249 [Reserved]

52.249-1 Termination for Convenience of the Government (Fixed-Price) (Short Form).

As prescribed in 49.502(a)(1), insert the following clause:

TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (SHORT FORM) (APR 1984)

The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the Government's interest. If this contract is terminated, the rights, duties, and obligations of the parties, including compensation to the Contractor, shall be in accordance with part 49 of the Federal Acquisition Regulation in effect on the date of this contract.

(End of clause)

Alternate I (APR 1984). If the contract is for dismantling, demolition, or removal of improvements, designate the basic clause as paragraph (a) and add the following paragraph (b):

(b) Upon receipt of the termination notice, if title to property is vested in the Contractor under this contract, it shall revest in the Government regardless of any other clause of the contract, except for property that the Contractor (a) disposed of by bona fide sale or (b) removed from the site.

52.249-2 Termination for Convenience of the Government (Fixed-Price).

As prescribed in 49.502 (b)(1)(i), insert the following clause:

TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (APR 2012)

(a) The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest. The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying the extent of termination and the effective date.

(b) After receipt of a Notice of Termination, and except as directed by the Contracting Officer, the Contractor shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this clause:

(1) Stop work as specified in the notice.

(2) Place no further subcontracts or orders (referred to as subcontracts in this clause) for materials, services, or facilities, except as necessary to complete the continued portion of the contract.

(3) Terminate all subcontracts to the extent they relate to the work terminated.

(4) Assign to the Government, as directed by the Contracting Officer, all right, title, and interest of the Contractor under the subcontracts terminated, in which case the Government shall have the right to settle or to pay any termination settlement proposal arising out of those terminations.

(5) With approval or ratification to the extent required by the Contracting Officer, settle all outstanding liabilities and termination settlement proposals arising from the termination of subcontracts; the approval or ratification will be final for purposes of this clause.

(6) As directed by the Contracting Officer, transfer title and deliver to the Government-

(i) The fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced or acquired for the work terminated; and

(ii) The completed or partially completed plans, drawings, information, and other property that, if the contract had been completed, would be required to be furnished to the Government.

(7) Complete performance of the work not terminated.

(8) Take any action that may be necessary, or that the Contracting Officer may direct, for the protection and preservation of the property related to this contract that is in the possession of the Contractor and in which the Government has or may acquire an interest.

(9) Use its best efforts to sell, as directed or authorized by the Contracting Officer, any property of the types referred to in paragraph (b)(6) of this clause; *provided*, however, that the Contractor (i)is not required to extend credit to any purchaser and (ii) may acquire the property under the conditions prescribed by, and at prices approved by, the Contracting Officer. The

proceeds of any transfer or disposition will be applied to reduce any payments to be made by the Government under this contract, credited to the price or cost of the work, or paid in any other manner directed by the Contracting Officer.

(c) The Contractor shall submit complete termination inventory schedules no later than 120 days from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor within this 120-day period.

(d) After expiration of the plant clearance period as defined in Subpart 49.001 of the Federal Acquisition Regulation, the Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of termination inventory not previously disposed of, excluding items authorized for disposition by the Contracting Officer. The Contractor may request the Government to remove those items or enter into an agreement for their storage. Within 15 days, the Government will accept title to those items and remove them or enter into a storage agreement. The Contracting Officer may verify the list upon removal of the items, or if stored, within 45 days from submission of the list, and shall correct the list, as necessary, before final settlement.

(e) After termination, the Contractor shall submit a final termination settlement proposal to the Contracting Officer in the form and with the certification prescribed by the Contracting Officer. The Contractor shall submit the proposal promptly, but no later than 1 year from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor within this 1-year period. However, if the Contracting Officer determines that the facts justify it, a termination settlement proposal may be received and acted on after 1 year or any extension. If the Contractor fails to submit the proposal within the time allowed, the Contracting Officer may determine, on the basis of information available, the amount, if any, due the Contractor because of the termination and shall pay the amount determined.

(f) Subject to paragraph (e) of this clause, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount to be paid or remaining to be paid because of the termination. The amount may include a reasonable allowance for profit on work done. However, the agreed amount, whether under this paragraph (f) or paragraph (g) of this clause, exclusive of costs shown in paragraph (g)(3) of this clause, may not exceed the total contract price as reduced by (1) the amount of payments previously made and (2) the contract price of work not terminated. The contract shall be modified, and the Contractor paid the agreed amount. Paragraph (g) of this clause shall not limit, restrict, or affect the amount that may be agreed upon to be paid under this paragraph.

(g) If the Contractor and the Contracting Officer fail to agree on the whole amount to be paid because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined by the Contracting Officer as follows, but without duplication of any amounts agreed on under paragraph (f) of this clause:

(1) The contract price for completed supplies or services accepted by the Government (or sold or acquired under paragraph (b)(9) of this clause) not previously paid for, adjusted for any saving of freight and other charges.

(2) The total of-

(i) The costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto, but excluding any costs attributable to supplies or services paid or to be paid under paragraph (g)(1) of this clause;

(ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subdivision (g)(2)(i) of this clause; and

(iii) A sum, as profit on subdivision (g)(2)(i) of this clause, determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this subdivision (g)(2)(iii) and shall reduce the settlement to reflect the indicated rate of loss.

(3) The reasonable costs of settlement of the work terminated, including-

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

(h) Except for normal spoilage, and except to the extent that the Government expressly assumed the risk of loss, the Contracting Officer shall exclude from the amounts payable to the Contractor under paragraph (g) of this clause, the fair value as determined by the Contracting Officer, for the loss of the Government property.

(i) The cost principles and procedures of part 31 of the Federal Acquisition Regulation, in effect on the date of this contract, shall govern all costs claimed, agreed to, or determined under this clause.

(j) The Contractor shall have the right of appeal, under the Disputes clause, from any determination made by the Contracting Officer under paragraph (e), (g), or (l) of this clause, except that if the Contractor failed to submit the termination settlement proposal or request for equitable adjustment within the time provided in paragraph (e) or (l), respectively, and failed to request a time extension, there is no right of appeal.

(k) In arriving at the amount due the Contractor under this clause, there shall be deducted-

(1) All unliquidated advance or other payments to the Contractor under the terminated portion of this contract;

(2) Any claim which the Government has against the Contractor under this contract; and

(3) The agreed price for, or the proceeds of sale of, materials, supplies, or other things acquired by the Contractor or sold under the provisions of this clause and not recovered by or credited to the Government.

(l) If the termination is partial, the Contractor may file a proposal with the Contracting Officer for an equitable adjustment of the price(s) of the continued portion of the contract. The Contracting Officer shall make any equitable adjustment agreed upon. Any proposal by the Contractor for an equitable adjustment under this clause shall be requested within 90 days from the effective date of termination unless extended in writing by the Contracting Officer.

(m) (1) The Government may, under the terms and conditions it prescribes, make partial payments and payments against costs incurred by the Contractor for the terminated portion of the contract, if the Contracting Officer believes the total of these payments will not exceed the amount to which the Contractor will be entitled.

(2) If the total payments exceed the amount finally determined to be due, the Contractor shall repay the excess to the Government upon demand, together with interest computed at the rate established by the Secretary of the Treasury under 50 U.S.C. App.1215(b)(2). Interest shall be computed for the period from the date the excess payment is received by the Contractor to the date the excess is repaid. Interest shall not be charged on any excess payment due to a reduction in the Contractor's termination settlement proposal because of retention or other disposition of termination inventory until 10 days after the date of the retention or disposition, or a later date determined by the Contracting Officer because of the circumstances.

(n) Unless otherwise provided in this contract or by statute, the Contractor shall maintain all records and documents relating to the terminated portion of this contract for 3 years after final settlement. This includes all books and other evidence bearing on the Contractor's costs and expenses under this contract. The Contractor shall make these records and documents available to the Government, at the Contractor's office, at all reasonable times, without any direct charge. If approved by the Contracting Officer, photographs, microphotographs, or other authentic reproductions may be maintained instead of original records and documents.

(End of clause)

Alternate I (SEPT 1996). If the contract is for construction, substitute the following paragraph (g) for paragraph (g) of the basic clause:

(g) If the Contractor and Contracting Officer fail to agree on the whole amount to be paid the Contractor because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined as follows, but without duplication of any amounts agreed upon under paragraph (f) of this clause:

(1) For contract work performed before the effective date of termination, the total (without duplication of any items) of-

(i) The cost of this work;

(ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subdivision (g)(1)(i) of this clause; and

(iii) A sum, as profit on subdivision (g)(1)(i) of this clause, determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this subdivision (g)(1)(iii) and shall reduce the settlement to reflect the indicated rate of loss.

(2) The reasonable costs of settlement of the work terminated, including-

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

Alternate II (SEPT 1996). If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the Contracting Officer determines that the requirement to pay interest on excess partial payments is inappropriate, delete paragraph (m)(2) of the basic clause.

Alternate III (SEPT 1996). If the contract is for construction and with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, substitute the following paragraph (g) for paragraph (g) of the basic clause. Paragraph (m)(2) may be deleted from the basic clause if the Contracting Officer determines that the requirement to pay interest on excess partial payments is inappropriate.

(g) If the Contractor and Contracting Officer fail to agree on the whole amount to be paid the Contractor because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined as follows, but without duplication of any amounts agreed upon under paragraph (f) of this clause:

(1) For contract work performed before the effective date of termination, the total (without duplication of any items) of-

(i) The cost of this work;

(ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subdivision (g)(1)(i) of this clause; and

(iii) A sum, as profit on subdivision (g)(1)(i) of this clause, determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this subdivision(iii) and shall reduce the settlement to reflect the indicated rate of loss.

(2) The reasonable costs of settlement of the work terminated, including-

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

52.249-3 Termination for Convenience of the Government (Dismantling, Demolition, or Removal of Improvements).

As prescribed in 49.502(b)(2), insert the following clause:

TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (DISMANTLING, DEMOLITION, OR REMOVAL OF IMPROVEMENTS) (APR 2012)

(a) The Government may terminate performance of work under this contract, in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest. The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying the extent of termination and the effective date. Upon receipt of the notice, if title to property is vested in the Contractor under this contract, it shall revest in the Government regardless of any other clause of this contract, except for property that the Contractor disposed of by bona fide sale or removed from the site.

(b) After receipt of a Notice of Termination, and except as directed by the Contracting Officer, the Contractor shall immediately proceed with the following obligations, regardless of delay in determining or adjusting any amounts due under this clause:

(1) Stop work as specified in the notice.

(2) Place no further subcontracts or orders (referred to as subcontracts in this clause) for materials, services, or facilities, except as necessary to complete the continued portion of the contract.

(3) Terminate all subcontracts to the extent they relate to the work terminated.

(4) Assign to the Government, as directed by the Contracting Officer, all right, title, and interest of the Contractor under the subcontracts terminated, in which case the Government shall have the right to settle or to pay any termination settlement proposal arising out of those terminations.

(5) With approval or ratification to the extent required by the Contracting Officer, settle all outstanding liabilities and termination settlement proposals arising from the termination of subcontracts; the approval or ratification will be final for purposes of this clause.

(6) As directed by the Contracting Officer, transfer title and deliver to the Government-

(i) The fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced or acquired for the work terminated; and

(ii) The completed or partially completed plans, drawings, information, and other property that, if the contract has been completed, would be required to be furnished to the Government.

(7) Complete performance of the work not terminated.

(8) Take any action that may be necessary, or that the Contracting Officer may direct, for the protection and preservation of the property related to this contract that is in the possession of the Contractor and in which the Government has or may acquire an interest.

(9) Use its best efforts to sell, as directed or authorized by the Contracting Officer, any property of the types referred to in paragraph (b)(6) of this clause; provided, however, that the Contractor (i)is not required to extend credit to any purchaser and (ii) may acquire the property under the conditions prescribed by, and at prices approved by, the Contracting Officer. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by the Government under this contract, credited to the price or cost of the work, or paid in any other manner directed by the Contracting Officer.

(c) The Contractor shall submit complete termination inventory schedules no later than 120 days from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor within this 120-day period.

(d) After expiration of the plant clearance period as defined in Subpart 49.001 of the Federal Acquisition Regulation, the Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of termination inventory not previously disposed of, excluding items authorized for disposition by the Contracting Officer. The Contractor may request the Government to remove those items or enter into an agreement for their storage. Within 15 days, the Government will accept title to those items and remove them or enter into a storage agreement. The Contracting Officer may verify the list upon removal of the items, or if stored, within 45 days from submission of the list, and shall correct the list, as necessary, before final settlement.

(e) After termination, the Contractor shall submit a final termination settlement proposal to the Contracting Officer in the form and with the certification prescribed by the Contracting Officer. The Contractor shall submit the proposal promptly, but no later than 1 year from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor within this 1-year period. However, if the Contracting Officer determines that the facts justify it, a termination settlement proposal may be received and acted on after 1 year or any extension. If the Contractor fails to submit the proposal within the time allowed, the Contracting Officer may determine, on the basis of information available, the amount, if any, due the Contractor because of the termination and shall pay the amount determined.

(f) Subject to paragraph (e) of this clause, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount to be paid because of the termination. The amount may include a reasonable allowance for profit on work done. However, the agreed amount, whether under this paragraph (f) or paragraph (g) of this clause, exclusive of settlement costs, may not exceed the total contract price as reduced by (1) the amount of payments previously made and (2) the contract price of work not terminated. The contract shall be amended and the Contractor paid the agreed amount. Paragraph (g) of this clause shall not limit, restrict, or affect the amount that may be agreed upon to be paid under this paragraph.

(g) If the Contractor and the Contracting Officer fail to agree on the whole amount to be paid because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined by the Contracting Officer as follows, but without duplication of any amounts agreed on under paragraph (f) of this clause:

(1) For contract work performed before the effective date of termination, the total (without duplication of any items) of-

(i) The cost of this work;

(ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract, if not included in subdivision (g)(1)(i) of this clause; and

(iii) A sum, as profit on subdivision (g)(1)(i) of this clause, determined by the Contracting Officer under section 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this subdivision(iii) and shall reduce the amount of the settlement to reflect the indicated rate of loss.

(2) The reasonable costs of settlement of the work terminated, including-

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) Preservation and protection of property under paragraph (b)(8) of this clause.

(h) Except for normal spoilage, and except to the extent that the Government expressly assumed the risk of loss, the Contracting Officer shall exclude from the amounts payable to the Contractor under paragraph (g) of this clause, the fair value, as determined by the Contracting Officer, for the loss of the Government property.

(i) The cost principles and procedures of part 31 of the Federal Acquisition Regulation, in effect on the date of this contract, shall govern all costs claimed, agreed to, or determined under this clause.

(j) The Contractor shall have the right of appeal, under the Disputes clause, from any determination made by the Contracting Officer under paragraph (e), (g), or (l) of this clause, except that if the Contractor failed to submit the termination settlement proposal within the time provided in paragraph (e) or (l) and failed to request a time extension, there is no right of appeal. If the Contracting Officer has made a determination of the amount due under paragraph (e), (g), or (l) of this clause, the Government shall pay the Contractor-

(1) The amount determined by the Contracting Officer, if there is no right of appeal or if no timely appeal has been taken; or

(2) The amount finally determined on an appeal.

(k) In arriving at the amount due the Contractor under this clause, there shall be deducted-

(1) All unliquidated advance or other payments to the Contractor under the terminated portion of this contract;

(2) Any claim which the Government has against the Contractor under this contract; and

(3) The agreed price for, or the proceeds of sale of, materials, supplies, or other things acquired by the Contractor or sold under the provisions of this clause and not recovered by or credited to the Government.

(l) If the termination is partial, the Contractor may file a proposal with the Contracting Officer for an equitable adjustment of the price(s) of the continued portion of the contract. The Contracting Officer shall make any equitable adjustment agreed upon. Any proposal by the Contractor for an equitable adjustment under this clause shall be requested within 90 days from the effective date of termination unless extended in writing by the Contracting Officer.

(m) (1) The Government may, under the terms and conditions it prescribes, make partial payments and payments against cost incurred by the Contractor for the terminated portion of the contract, if the Contracting Officer believes the total of these payments will not exceed the amount to which the Contractor will be entitled.

(2) If the total payments exceed the amount finally determined to be due, the Contractor shall repay the excess to the Government upon demand, together with interest computed at the rate established by the Secretary of the Treasury under 50 U.S.C.App 1215(b)(2). Interest shall be computed for the period from the date the excess payment is received by the Contractor to the date the excess is repaid. Interest shall not be charged on any excess payment due to a reduction in the Contractor's termination settlement proposal because of retention or other disposition of termination inventory until 10 days after the date of the retention or disposition, or a later date determined by the Contracting Officer because of the circumstances.

(n) Unless otherwise provided in this contract or by statute, the Contractor shall maintain all records and documents relating to the terminated portion of this contract for 3 years after final settlement. This includes all books and other evidence bearing on the Contractor's costs and expenses under this contract. The Contractor shall make these records and documents available to the Government, at the Contractor's office, at all reasonable times, without any direct charge. If approved by the Contracting Officer, photographs, microphotographs, or other authentic reproductions may be maintained instead of original records and documents.

(End of clause)

Alternate I (Sept1996). If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate, delete paragraph (m)(2) from the basic clause.

52.249-4 Termination for Convenience of the Government (Services) (Short Form).

As prescribed in 49.502(c), insert the following clause in solicitations and contracts for services, regardless of value, when a fixed-price contract is contemplated and the Contracting Officer determines that because of the kind of services required, the successful offeror will not incur substantial charges in preparation for and in carrying out the contract, and would, if terminated for the convenience of the Government, limit termination settlement charges to services rendered before the date of termination:

TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (SERVICES) (SHORT FORM) (APR 1984)

The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the Government's interest. If this contract is terminated, the Government shall be liable only for payment under the payment provisions of this contract for services rendered before the effective date of termination.

(End of clause)

52.249-5 Termination for Convenience of the Government (Educational and Other Nonprofit Institutions).

As prescribed in 49.502(d), insert the following clause:

TERMINATION FOR CONVENIENCE OF THE GOVERNMENT
(EDUCATIONAL AND OTHER NONPROFIT INSTITUTIONS) (AUG 2016)

(a) The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest. The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying the extent of termination and the effective date.

(b) After receipt of a Notice of Termination and except as directed by the Contracting Officer, the Contractor shall immediately proceed with the following obligations:

(1) Stop work as specified in the notice.

(2) Place no further subcontracts or orders (referred to as subcontracts in this clause), except as necessary to complete the continued portion of the contract.

(3) Terminate all applicable subcontracts and cancel or divert applicable commitments covering personal services that extend beyond the effective date of termination.

(4) Assign to the Government, as directed by the Contracting Officer, all right, title, and interest of the Contractor under the subcontracts terminated, in which case the Government shall have the right to settle or pay any termination settlement proposal arising out of those terminations.

(5) With approval or ratification to the extent required by the Contracting Officer, settle all outstanding liabilities and termination settlement proposals arising from the termination of subcontracts; approval or ratification will be final for purposes of this clause.

(6) Transfer title (if not already transferred) and, as directed by the Contracting Officer, deliver to the Government any information and items that, if the contract had been completed, would have been required to be furnished, including-

(i) Materials or equipment produced, in process, or acquired for the work terminated; and

(ii) Completed or partially completed plans, drawings, and information.

(7) Complete performance of the work not terminated.

(8) Take any action that may be necessary, or that the Contracting Officer may direct, for the protection and preservation of the property related to this contract that is in the possession of the Contractor and in which the Government has or may acquire an interest.

(9) Use its best efforts to sell, as directed or authorized by the Contracting Officer, termination inventory other than that retained by the Government under paragraph (b)(6) of this clause; *provided, however*, that the Contractor (i)is not required to extend credit to any purchaser and (ii) may acquire the property under the conditions prescribed by, and at prices approved by, the Contracting Officer. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by the Government under this contract, credited to the price or cost of the work, or paid in any other manner directed by the Contracting Officer.

(c) The Contractor shall submit complete termination inventory schedules no later than 120 days from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor within this 120-day period.

(d) After termination, the Contractor shall submit a final termination settlement proposal to the Contracting Officer in the form and with the certification prescribed by the Contracting Officer. The Contractor shall submit the proposal promptly but no later than 1 year from the effective date of termination unless extended in writing by the Contracting Officer upon written request of the Contractor within this 1-year period. If the Contractor fails to submit the termination settlement proposal within the time allowed, the Contracting Officer may determine, on the basis of information available, the amount, if any, due the Contractor because of the termination and shall pay the amount determined.

(e) Subject to paragraph (d) of this clause, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount to be paid because of the termination. This amount may include reasonable cancellation charges incurred

by the Contractor and any reasonable loss on outstanding commitments for personal services that the Contractor is unable to cancel; *provided*, that the Contractor exercised reasonable diligence in diverting such commitments to other operations. The contract shall be amended and the Contractor paid the agreed amount.

(f) The cost principles and procedures in subpart 31.3 of the Federal Acquisition Regulation (FAR), Contracts with Educational Institutions (defined as institutions of higher education in the OMB Uniform Guidance in 2 CFR part 200, subpart A, and 20 U.S.C. 1001), as in effect on the date of the contract, shall govern all costs claimed, agreed to, or determined under this clause; however, if the Contractor is not an educational institution and is a nonprofit organization (as defined in the OMB Uniform Guidance at 2 CFR part 200), the cost principles and procedures in subpart 31.7 of the FAR, Contracts with Nonprofit Organizations, shall apply; unless the Contractor is a nonprofit institution listed in the OMB Uniform Guidance at 2 CFR part 200, appendix VIII, as exempted from the cost principles in subpart E, in which case the cost principles at FAR 31.2 for commercial organizations shall apply to such contractor.

(g) The Government may, under the terms and conditions it prescribes, make partial payments against costs incurred by the Contractor for the terminated portion of this contract, if the Contracting Officer believes the total of these payments will not exceed the amount to which the Contractor will be entitled.

(h) The Contractor has the right of appeal as provided under the Disputes clause, except that if the Contractor failed to submit the termination settlement proposal within the time provided in paragraph (d) of this clause and failed to request a time extension, there is no right of appeal.

(End of clause)

52.249-6 Termination (Cost-Reimbursement).

As prescribed in 49.503(a)(1), insert the following clause:

TERMINATION (COST-REIMBURSEMENT) (MAY 2004)

(a) The Government may terminate performance of work under this contract in whole or, from time to time, in part, if-

(1) The Contracting Officer determines that a termination is in the Government's interest; or

(2) The Contractor defaults in performing this contract and fails to cure the default within 10 days (unless extended by the Contracting Officer) after receiving a notice specifying the default. "Default" includes failure to make progress in the work so as to endanger performance.

(b) The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying whether termination is for default of the Contractor or for convenience of the Government, the extent of termination, and the effective date. If, after termination for default, it is determined that the Contractor was not in default or that the Contractor's failure to perform or to make progress in performance is due to causes beyond the control and without the fault or negligence of the Contractor as set forth in the Excusable Delays clause, the rights and obligations of the parties will be the same as if the termination was for the convenience of the Government.

(c) After receipt of a Notice of Termination, and except as directed by the Contracting Officer, the Contractor shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this clause:

(1) Stop work as specified in the notice.

(2) Place no further subcontracts or orders (referred to as subcontracts in this clause), except as necessary to complete the continued portion of the contract.

(3) Terminate all subcontracts to the extent they relate to the work terminated.

(4) Assign to the Government, as directed by the Contracting Officer, all right, title, and interest of the Contractor under the subcontracts terminated, in which case the Government shall have the right to settle or to pay any termination settlement proposal arising out of those terminations.

(5) With approval or ratification to the extent required by the Contracting Officer, settle all outstanding liabilities and termination settlement proposals arising from the termination of subcontracts, the cost of which would be reimbursable in whole or in part, under this contract; approval or ratification will be final for purposes of this clause.

(6) Transfer title (if not already transferred) and, as directed by the Contracting Officer, deliver to the Government-

(i) The fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced or acquired for the work terminated;

(ii) The completed or partially completed plans, drawings, information, and other property that, if the contract had been completed, would be required to be furnished to the Government; and

(iii) The jigs, dies, fixtures, and other special tools and tooling acquired or manufactured for this contract, the cost of which the Contractor has been or will be reimbursed under this contract.

(7) Complete performance of the work not terminated.

(8) Take any action that may be necessary, or that the Contracting Officer may direct, for the protection and preservation of the property related to this contract that is in the possession of the Contractor and in which the Government has or may acquire an interest.

(9) Use its best efforts to sell, as directed or authorized by the Contracting Officer, any property of the types referred to in paragraph (c)(6) of this clause; *provided, however*, that the Contractor (i)is not required to extend credit to any purchaser and (ii) may acquire the property under the conditions prescribed by, and at prices approved by, the Contracting Officer. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by the Government under this contract, credited to the price or cost of the work, or paid in any other manner directed by the Contracting Officer.

(d) The Contractor shall submit complete termination inventory schedules no later than 120 days from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor within this 120-day period.

(e) After expiration of the plant clearance period as defined in Subpart 49.001 of the Federal Acquisition Regulation, the Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of termination inventory not previously disposed of, excluding items authorized for disposition by the Contracting Officer. The Contractor may request the Government to remove those items or enter into an agreement for their storage. Within 15 days, the Government will accept the items and remove them or enter into a storage agreement. The Contracting Officer may verify the list upon removal of the items, or if stored, within 45 days from submission of the list, and shall correct the list, as necessary, before final settlement.

(f) After termination, the Contractor shall submit a final termination settlement proposal to the Contracting Officer in the form and with the certification prescribed by the Contracting Officer. The Contractor shall submit the proposal promptly, but no later than 1 year from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor within this 1-year period. However, if the Contracting Officer determines that the facts justify it, a termination settlement proposal may be received and acted on after 1 year or any extension. If the Contractor fails to submit the proposal within the time allowed, the Contracting Officer may determine, on the basis of information available, the amount, if any, due the Contractor because of the termination and shall pay the amount determined.

(g) Subject to paragraph (f) of this clause, the Contractor and the Contracting Officer may agree on the whole or any part of the amount to be paid (including an allowance for fee) because of the termination. The contract shall be amended, and the Contractor paid the agreed amount.

(h) If the Contractor and the Contracting Officer fail to agree in whole or in part on the amount of costs and/or fee to be paid because of the termination of work, the Contracting Officer shall determine, on the basis of information available, the amount, if any, due the Contractor, and shall pay that amount, which shall include the following:

(1) All costs reimbursable under this contract, not previously paid, for the performance of this contract before the effective date of the termination, and those costs that may continue for a reasonable time with the approval of or as directed by the Contracting Officer; however, the Contractor shall discontinue those costs as rapidly as practicable.

(2) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in paragraph (h)(1) of this clause.

(3) The reasonable costs of settlement of the work terminated, including-

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory. If the termination is for default, no amounts for the preparation of the Contractor's termination settlement proposal may be included.

(4) A portion of the fee payable under the contract, determined as follows:

(i) If the contract is terminated for the convenience of the Government, the settlement shall include a percentage of the fee equal to the percentage of completion of work contemplated under the contract, but excluding subcontract effort included in subcontractors' termination proposals, less previous payments for fee.

(ii) If the contract is terminated for default, the total fee payable shall be such proportionate part of the fee as the total number of articles (or amount of services) delivered to and accepted by the Government is to the total number of articles (or amount of services) of a like kind required by the contract.

(5) If the settlement includes only fee, it will be determined under paragraph (h)(4) of this clause.

(i) The cost principles and procedures in part 31 of the Federal Acquisition Regulation, in effect on the date of this contract, shall govern all costs claimed, agreed to, or determined under this clause.

(j) The Contractor shall have the right of appeal, under the Disputes clause, from any determination made by the Contracting Officer under paragraph (f), (h), or (l) of this clause, except that if the Contractor failed to submit the termination settlement proposal within the time provided in paragraph (f) and failed to request a time extension, there is no right of appeal. If the Contracting Officer has made a determination of the amount due under paragraph (f), (h) or (l) of this clause, the Government shall pay the Contractor-

(1) The amount determined by the Contracting Officer if there is no right of appeal or if no timely appeal has been taken; or

(2) The amount finally determined on an appeal.

(k) In arriving at the amount due the Contractor under this clause, there shall be deducted-

(1) All unliquidated advance or other payments to the Contractor, under the terminated portion of this contract;

(2) Any claim which the Government has against the Contractor under this contract; and

(3) The agreed price for, or the proceeds of sale of materials, supplies, or other things acquired by the Contractor or sold under this clause and not recovered by or credited to the Government.

(l) The Contractor and Contracting Officer must agree to any equitable adjustment in fee for the continued portion of the contract when there is a partial termination. The Contracting Officer shall amend the contract to reflect the agreement.

(m) (1) The Government may, under the terms and conditions it prescribes, make partial payments and payments against costs incurred by the Contractor for the terminated portion of the contract, if the Contracting Officer believes the total of these payments will not exceed the amount to which the Contractor will be entitled.

(2) If the total payments exceed the amount finally determined to be due, the Contractor shall repay the excess to the Government upon demand, together with interest computed at the rate established by the Secretary of the Treasury under 50 U.S.C. App.1215(b)(2). Interest shall be computed for the period from the date the excess payment is received by the Contractor to the date the excess is repaid. Interest shall not be charged on any excess payment due to a reduction in the Contractor's termination settlement proposal because of retention or other disposition of termination inventory until 10 days after the date of the retention or disposition, or a later date determined by the Contracting Officer because of the circumstances.

(n) The provisions of this clause relating to fee are inapplicable if this contract does not include a fee.

(End of clause)

Alternate I (Sept 1996). If the contract is for construction, substitute the following paragraph (h)(4) for paragraph (h)(4) of the basic clause:

(4) A portion of the fee payable under the contract determined as follows:

(i) If the contract is terminated for the convenience of the Government, the settlement shall include a percentage of the fee equal to the percentage of completion of work contemplated under the contract, but excluding subcontract effort included in subcontractors' termination settlement proposals, less previous payments for fee.

(ii) If the contract is terminated for default, the total fee payable shall be such proportionate part of the fee as the actual work in place is to the total work in place required by the contract.

Alternate II (Sept 1996). If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate, delete paragraph (m)(2) from the basic clause.

Alternate III (Sept1996). If the contract is for construction with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, the following paragraph (h)(4) shall be substituted for paragraph (h)(4) of the basic clause. Paragraph (m)(2) may be deleted from the basic clause if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate.

(4) A portion of the fee payable under the contract determined as follows:

(i) If the contract is terminated for the convenience of the Government, the settlement shall include a percentage of the fee equal to the percentage of completion of work contemplated under the contract, but excluding subcontract effort included in subcontractors' termination settlement proposals, less previous payments for fee.

(ii) If the contract is terminated for default, the total fee payable shall be such proportionate part of the fee as the actual work in place is to the total work in place required by the contract.

Alternate IV (Sept 1996). If the contract is a time-and-material or labor-hour contract, substitute the following paragraphs (h) and (l) for paragraphs (h) and (l) of the basic clause:

(h) If the Contractor and the Contracting Officer fail to agree in whole or in part on the amount to be paid because of the termination of work, the Contracting Officer shall determine, on the basis of information available, the amount, if any, due the Contractor and shall pay the amount determined as follows:

(1) If the termination is for the convenience of the Government, include-

(i) An amount for direct labor hours (as defined in the Schedule of the contract) determined by multiplying the number of direct labor hours expended before the effective date of termination by the hourly rate(s) in the Schedule, less any hourly rate payments already made to the Contractor;

(ii) An amount (computed under the provisions for payment of materials) for material expenses incurred before the effective date of termination, not previously paid to the Contractor;

(iii) An amount for labor and material expenses computed as if the expenses were incurred before the effective date of termination, if they are reasonably incurred after the effective date, with the approval of or as directed by the Contracting Officer; however, the Contractor shall discontinue these expenses as rapidly as practicable;

(iv) If not included in subdivision (h)(1)(i), (ii), or (iii) of this clause, the cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract; and

(v) The reasonable costs of settlement of the work terminated, including-

(A) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(B) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(C) Storage, transportation, and other costs incurred, reasonably necessary for the protection or disposition of the termination inventory.

(2) If the termination is for default of the Contractor, include the amounts computed under paragraph (h)(1) of this clause but omit-

(i) Any amount for preparation of the Contractor's termination settlement proposal; and

(ii) The portion of the hourly rate allocable to profit for any direct labor hours expended in furnishing materials and services not delivered to and accepted by the Government.

(3) If the termination is partial, the Contractor may file with the Contracting Officer a proposal for an equitable adjustment of price(s) for the continued portion of the contract. The Contracting Officer shall make any equitable adjustment agreed upon. Any proposal by the Contractor for an equitable adjustment under this clause shall be requested within 90 days from the effective date of termination, unless extended in writing by the Contracting Officer.

Alternate V (Sept 1996). If the contract is a time-and-material or labor-hour contract with an agency of the U.S. Government or with State, local or foreign governments or their agencies, substitute the following paragraphs (h) and (l) for paragraphs (h) and (l) of the basic clause. Paragraph (m)(2) may be deleted from the basic clause if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate.

(h) If the Contractor and the Contracting Officer fail to agree in whole or in part on the amount to be paid because of the termination of work, the Contracting Officer shall determine, on the basis of information available, the amount, if any, due the Contractor and shall pay the amount determined as follows:

(1) If the termination is for the convenience of the Government, include-

(i) An amount for direct labor hours (as defined in the Schedule of the contract) determined by multiplying the number of direct labor hours expended before the effective date of termination by the hourly rate(s) in the Schedule, less any hourly rate payments already made to the contractor;

(ii) An amount (computed under the provisions for payment of materials) for material expenses incurred before the effective date of termination, not previously paid to the Contractor;

(iii) An amount for labor and material expenses computed as if the expenses were incurred before the effective date of termination if they are reasonably incurred after the effective date, with the approval of or as directed by the Contracting Officer; however, the Contractor shall discontinue these expenses as rapidly as practicable;

(iv) If not included in subdivision (h)(1)(i), (ii), or (iii) of this clause, the cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract; and

(v) The reasonable costs of settlement of the work terminated, including-

(A) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(B) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(C) Storage, transportation, and other costs incurred, reasonably necessary for the protection or disposition of the termination inventory.

(2) If the termination is for default of the Contractor, include the amounts computed under paragraph (h)(1) of this clause but omit-

(i) Any amount for preparation of the Contractor's termination settlement proposal; and

(ii) The portion of the hourly rate allocable to profit for any direct labor hours expended in furnishing materials and services not delivered to and accepted by the Government.

(3) If the termination is partial, the Contractor may file with the Contracting Officer a proposal for an equitable adjustment of the price(s) for the continued portion of the contract. The Contracting Officer shall make any equitable adjustment agreed upon. Any proposal by the Contractor for an equitable adjustment under this clause shall be requested within 90 days from the effective date of termination, unless extended in writing by the Contracting Officer.

52.249-7 Termination (Fixed-Price Architect-Engineer).

As prescribed in 49.503(b), insert the following clause in solicitations and contracts for architect-engineer services when a fixed-price contract is contemplated:

TERMINATION (FIXED-PRICE ARCHITECT-ENGINEER) (APR 1984)

(a) The Government may terminate this contract in whole or, from time to time, in part, for the Government's convenience or because of the failure of the Contractor to fulfill the contract obligations. The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying the nature, extent, and effective date of the termination. Upon receipt of the notice, the Contractor shall-

(1) Immediately discontinue all services affected (unless the notice directs otherwise); and

(2) Deliver to the Contracting Officer all data, drawings, specifications, reports, estimates, summaries, and other information and materials accumulated in performing this contract, whether completed or in process.

(b) If the termination is for the convenience of the Government, the Contracting Officer shall make an equitable adjustment in the contract price but shall allow no anticipated profit on unperformed services.

(c) If the termination is for failure of the Contractor to fulfill the contract obligations, the Government may complete the work by contract or otherwise and the Contractor shall be liable for any additional cost incurred by the Government.

(d) If, after termination for failure to fulfill contract obligations, it is determined that the Contractor had not failed, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

(e) The rights and remedies of the Government provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

(End of clause)

52.249-8 Default (Fixed-Price Supply and Service).

As prescribed in 49.504(a)(1), insert the following clause:

DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984)

(a) (1) The Government may, subject to paragraphs (c) and (d) of this clause, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to-

(i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;

(ii) Make progress, so as to endanger performance of this contract (but see paragraph (a)(2) of this clause); or

(iii) Perform any of the other provisions of this contract (but see paragraph (a)(2) of this clause).

(2) The Government's right to terminate this contract under subdivisions (a)(1)(ii) and (1)(iii) of this clause, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

(b) If the Government terminates this contract in whole or in part, it may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to the Government for any excess costs for those supplies or services. However, the Contractor shall continue the work not terminated.

(c) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.

(d) If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.

(e) If this contract is terminated for default, the Government may require the Contractor to transfer title and deliver to the Government, as directed by the Contracting Officer, any (1) completed supplies, and (2) partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (collectively referred to as "manufacturing materials" in this clause) that the Contractor has specifically produced or acquired for the terminated portion of this contract. Upon direction of the Contracting Officer, the Contractor shall also protect and preserve property in its possession in which the Government has an interest.

(f) The Government shall pay contract price for completed supplies delivered and accepted. The Contractor and Contracting Officer shall agree on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property. Failure to agree will be a dispute under the Disputes clause. The Government may withhold from these amounts any sum the Contracting Officer determines to be necessary to protect the Government against loss because of outstanding liens or claims of former lien holders.

(g) If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

(h) The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.

(End of clause)

Alternate I (APR 1984). If the contract is for transportation or transportation-related services, delete paragraph (f) of the basic clause, redesignate the remaining paragraphs accordingly, and substitute the following paragraphs (a) and (e) for paragraphs (a) and (e) of the basic clause:

(a)(1) The Government may, subject to paragraphs (c) and (d) of this clause, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to-

(i) Pick up the commodities or to perform the services, including delivery services, within the time specified in this contract or any extension;

(ii) Make progress, so as to endanger performance of this contract (but see paragraph (a)(2) of this clause); or

(iii) Perform any of the other provisions of this contract (but see paragraph (a)(2) of this clause).

(2) The Government's right to terminate this contract under subdivisions (a)(1)(ii) and (iii) of this clause, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

(e) If this contract is terminated while the Contractor has possession of Government goods, the Contractor shall, upon direction of the Contracting Officer, protect and preserve the goods until surrendered to the Government or its agent. The Contractor and Contracting Officer shall agree on payment for the preservation and protection of goods. Failure to agree on an amount will be a dispute under the Disputes clause.

52.249-9 Default (Fixed-Price Research and Development).

As prescribed in 49.504(b), insert the following clause:

DEFAULT (FIXED-PRICE RESEARCH AND DEVELOPMENT) (APR 1984)

(a) (1) The Government may, subject to paragraphs (c) and (d) of this clause, by written Notice of Default to the Contractor, terminate this contract in whole or in part if the Contractor fails to-

(i) Perform the work under the contract within the time specified in this contract or any extension;

(ii) Prosecute the work so as to endanger performance of this contract (but see paragraph (a)(2) of this clause); or

(iii) Perform any of the other provisions of this contract (but see paragraph (a)(2) of this clause).

(2) The Government's right to terminate this contract under subdivisions (a)(1)(ii) and (iii) of this clause may be exercised if the Contractor does not cure such failure within 10 days (or more, if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

(b) If the Government terminates this contract in whole or in part, it may acquire, under the terms and in the manner the Contracting Officer considers appropriate, work similar to the work terminated, and the Contractor will be liable to the Government for any excess costs for the similar work. However, the Contractor shall continue the work not terminated.

(c) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.

(d) If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule or other performance requirements.

(e) If this contract is terminated for default, the Government may require the Contractor to transfer title and deliver to the Government, as directed by the Contracting Officer, any (1) completed or partially completed work not previously delivered to, and accepted by, the Government and (2) other property, including contract rights, specifically produced or acquired for the terminated portion of this contract. Upon direction of the Contracting Officer, the Contractor shall also protect and preserve property in its possession in which the Government has an interest.

(f) The Government shall pay the contract price, if separately stated, for completed work it has accepted and the amount agreed upon by the Contractor and the Contracting Officer for (1) completed work for which no separate price is stated, (2) partially completed work, (3) other property described above that it accepts, and (4) the protection and preservation of the property. Failure to agree will be a dispute under the Disputes clause. The Government may withhold from these amounts any sum the Contracting Officer determines to be necessary to protect the Government against loss from outstanding liens or claims of former lien holders.

(g) If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

(h) The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.

(End of clause)

52.249-10 Default (Fixed-Price Construction).

As prescribed in 49.504(c)(1), insert the following clause:

DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984)

(a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed. In this event, the Government may take over the work and complete it by contract or

otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work. The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the- work.

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if-

(1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include-

(i) Acts of God or of the public enemy;

(ii) Acts of the Government in either its sovereign or contractual capacity;

(iii) Acts of another Contractor in the performance of a contract with the Government;

(iv) Fires;

(v) Floods;

(vi) Epidemics;

(vii) Quarantine restrictions;

(viii) Strikes;

(ix) Freight embargoes;

(x) Unusually severe weather; or

(xi) Delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and

(2) The Contractor, within 10 days from the beginning of any delay (unless extended by the Contracting Officer), notifies the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of delay. If, in the judgment of the Contracting Officer, the findings of fact warrant such action, the time for completing the work shall be extended. The findings of the Contracting Officer shall be final and conclusive on the parties, but subject to appeal under the Disputes clause.

(c) If, after termination of the Contractor's right to proceed, it is determined that the Contractor was not in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of the Government.

(d) The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.

(End of clause)

Alternate I (APR 1984). If the contract is for dismantling, demolition, or removal of improvements, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a)(1) If the Contractor refuses or fails to prosecute the work, or any separable part, with the diligence that will insure its completion within the time specified in this contract, including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work or the part of the work that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work.

(2) If title to property is vested in the Contractor under this contract, it shall revest in the Government regardless of any other clause of this contract, except for property that the Contractor has disposed of by bona fide sale or removed from the site.

(3) The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

Alternate II (APR 1984). If the contract is to be awarded during a period of national emergency, paragraph (b)(1) below may be substituted for paragraph (b)(1) of the basic clause:

(1) The delay in completing the work arises from causes other than normal weather beyond the control and without the fault or negligence of the Contractor. Examples of such causes include-

(i) Acts of God or of the public enemy;

(ii) Acts of the Government in either its sovereign or contractual capacity;

(iii) Acts of another Contractor in the performance of a contract with the Government;

(iv) Fires;
(v) Floods;
(vi) Epidemics;
(vii) Quarantine restrictions;
(viii) Strikes;
(ix) Freight embargoes;
(x) Unusually severe weather; or
(xi) Delays of subcontractors or suppliers at any tier arising from causes other than normal weather beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and

Alternate III (APR 1984). If the contract is for dismantling, demolition, or removal of improvements and is to be awarded during a period of national emergency, substitute the following paragraph (a) for paragraph (a) of the basic clause. The following paragraph (b)(1) may be substituted for paragraph (b)(1) of the basic clause:

(a)(1) If the Contractor refuses or fails to prosecute the work, or any separable part, with the diligence that will insure its completion within the time specified in this contract, including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work or the part of the work that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work.

(2) If title to property is vested in the Contractor under this contract, it shall revest in the Government regardless of any other clause of this contract, except for property that the Contractor has disposed of by bona fide sale or removed from the site.

(3) The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if-

(1) The delay in completing the work arises from causes other than normal weather beyond the control and without the fault or negligence of the Contractor. Examples of such causes include-

(i) Acts of God or of the public enemy;
(ii) Acts of the Government in either its sovereign or contractual capacity;
(iii) Acts of another Contractor in the performance of a contract with the Government;
(iv) Fires;
(v) Floods;
(vi) Epidemics;
(vii) Quarantine restrictions;
(viii) Strikes;
(ix) Freight embargoes;
(x) Unusually severe weather; or
(xi) Delays of subcontractors or suppliers at any tier arising from causes other than normal weather beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and

52.249-11 [Reserved]

52.249-12 Termination (Personal Services).

As prescribed in 49.505(a), insert the following clause in solicitations and contracts for personal services (see part 37):

TERMINATION (PERSONAL SERVICES) (APR 1984)

The Government may terminate this contract at any time upon at least 15 days' written notice by the Contracting Officer to the Contractor. The Contractor, with the written consent of the Contracting Officer, may terminate this contract upon at least 15 days' written notice to the Contracting Officer.

(End of clause)

52.249-13 [Reserved]

52.249-14 Excusable Delays.

As prescribed in 49.505(b), insert the following clause in solicitations and contracts for supplies, services, construction, and research and development on a fee basis whenever a cost-reimbursement contract is contemplated. Also insert the clause in time-and-material contracts, and labor-hour contracts. When used in construction contracts, substitute the words "completion time" for "delivery schedule" in the last sentence of the clause.

EXCUSABLE DELAYS (APR 1984)

(a) Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. "Default" includes failure to make progress in the work so as to endanger performance.

(b) If the failure to perform is caused by the failure of a subcontractor at any tier to perform or make progress, and if the cause of the failure was beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be deemed to be in default,- unless-

(1) The subcontracted supplies or services were obtainable from other sources;

(2) The Contracting Officer ordered the Contractor in writing to purchase these supplies or services from the other source; and

(3) The Contractor failed to comply reasonably with this order.

(c) Upon request of the Contractor, the Contracting Officer shall ascertain the facts and extent of the failure. If the Contracting Officer determines that any failure to perform results from one or more of the causes above, the delivery schedule shall be revised, subject to the rights of the Government under the termination clause of this contract.

(End of clause)

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52.250 [Reserved]

52.250-1 Indemnification Under Public Law 85-804.

As prescribed in 50.104-4 , insert the following clause:

INDEMNIFICATION UNDER PUBLIC LAW 85-804 (APR 1984)

(a) "Contractor's principal officials," as used in this clause, means directors, officers, managers, superintendents, or other representatives supervising or directing-

(1) All or substantially all of the Contractor's business;

(2) All or substantially all of the Contractor's operations at any one plant or separate location in which this contract is being performed; or

(3) A separate and complete major industrial operation in connection with the performance of this contract.

(b) Under Public Law85-804 (50 U.S.C. 1431-1435) and Executive Order 10789, as amended, and regardless of any other provisions of this contract, the Government shall, subject to the limitations contained in the other paragraphs of this clause, indemnify the Contractor against-

(1) Claims (including reasonable expenses of litigation or settlement) by third persons (including employees of the Contractor) for death; personal injury; or loss of, damage to, or loss of use of property;

(2) Loss of, damage to, or loss of use of Contractor property, excluding loss of profit; and

(3) Loss of, damage to, or loss of use of Government property, excluding loss of profit.

(c) This indemnification applies only to the extent that the claim, loss, or damage (1) arises out of or results from a risk defined in this contract as unusually hazardous or nuclear and (2) is not compensated for by insurance or otherwise. Any such claim, loss, or damage, to the extent that it is within the deductible amounts of the Contractor's insurance, is not covered under this clause. If insurance coverage or other financial protection in effect on the date the approving official authorizes use of this clause is reduced, the Government's liability under this clause shall not increase as a result.

(d) When the claim, loss, or damage is caused by willful misconduct or lack of good faith on the part of any of the Contractor's principal officials, the Contractor shall not be indemnified for-

(1) Government claims against the Contractor (other than those arising through subrogation); or

(2) Loss or damage affecting the Contractor's property.

(e) With the Contracting Officer's prior written approval, the Contractor may, in any subcontract under this contract, indemnify the subcontractor against any risk defined in this contract as unusually hazardous or nuclear. This indemnification shall provide, between the Contractor and the subcontractor, the same rights and duties, and the same provisions for notice, furnishing of evidence or proof, and Government settlement or defense of claims as this clause provides. The Contracting Officer may also approve indemnification of subcontractors at any lower tier, under the same terms and conditions. The Government shall indemnify the Contractor against liability to subcontractors incurred under subcontract provisions approved by the Contracting Officer.

(f) The rights and obligations of the parties under this clause shall survive this contract's termination, expiration, or completion. The Government shall make no payment under this clause unless the agency head determines that the amount is just and reasonable. The Government may pay the Contractor or subcontractors, or may directly pay parties to whom the Contractor or subcontractors may be liable.

(g) The Contractor shall-

(1) Promptly notify the Contracting Officer of any claim or action against, or any loss by, the Contractor or any subcontractors that may be reasonably be expected to involve indemnification under this clause;

(2) Immediately furnish to the Government copies of all pertinent papers the Contractor receives;

(3) Furnish evidence or proof of any claim, loss, or damage covered by this clause in the manner and form the Government requires; and

(4) Comply with the Government's directions and execute any authorizations required in connection with settlement or defense of claims or actions.

(h) The Government may direct, control, or assist in settling or defending any claim or action that may involve indemnification under this clause.

(End of clause)

Alternate I (APR 1984). In cost-reimbursement contracts, add the following paragraph (i) to the basic clause:

(i) The cost of insurance (including self-insurance programs) covering a risk defined in this contract as unusually hazardous or nuclear shall not be reimbursed except to the extent that the Contracting Officer has required or approved this insurance. The Government's obligations under this clause are-

(1) Excepted from the release required under this contract's clause relating to allowable cost; and

(2) Not affected by this contract's Limitation of Cost or Limitation of Funds clause.

52.250-2 SAFETY Act Coverage Not Applicable.

As prescribed in 50.206(a), insert the following provision:

SAFETY ACT COVERAGE NOT APPLICABLE (FEB 2009)

The Government has determined that for purposes of this solicitation the product(s) or service(s) being acquired by this action are neither presumptively nor actually entitled to a pre-determination that the products or services are qualified anti-terrorism technologies as that term is defined by the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), 6 U.S.C. 441-444. This determination does not prevent sellers of technologies from applying for SAFETY Act protections in other contexts. Proposals in which either acceptance or pricing is made contingent upon SAFETY Act designation as a qualified anti-terrorism technology or SAFETY Act certification as an approved product for homeland security of the proposed product or service will not be considered for award. See Federal Acquisition Regulation subpart 50.2.

(End of provision)

52.250-3 SAFETY Act Block Designation/Certification.

As prescribed in 50.206(b)(1), insert the following provision:

SAFETY ACT BLOCK DESIGNATION/CERTIFICATION (FEB 2009)

(a) *Definitions*. As used in this provision-

Act of terrorism means any act determined to have met the following requirements or such other requirements as defined and specified by the Secretary of Homeland Security:

(1) Is unlawful.

(2) Causes harm, including financial harm, to a person, property, or entity, in the United States, or in the case of a domestic United States air carrier or a United States-flag vessel (or a vessel based principally in the United States on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), in or outside the United States.

(3) Uses or attempts to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.

Block certification means SAFETY Act certification of a technology class that the Department of Homeland Security (DHS) has determined to be an approved class of approved products for homeland security.

Block designation means SAFETY Act designation of a technology class that the DHS has determined to be a Qualified Anti-Terrorism Technology (QATT).

Qualified Anti-Terrorism Technology (QATT) means any technology designed, developed, modified, procured, or sold for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, for which a SAFETY Act designation has been issued. For purposes of defining a QATT, technology means any product, equipment, service (including support services), device, or technology (including information technology) or any combination of the foregoing. Design services, consulting services, engineering services, software development services, software integration services, threat assessments, vulnerability studies, and other analyses relevant to homeland security may be deemed a technology.

SAFETY Act certification means a determination by DHS pursuant to 6 U.S.C. 442(d), as further delineated in 6 CFR 25.9, that a QATT for which a SAFETY Act designation has been issued is an approved product for homeland security, *i.e.*, it will perform as intended, conforms to the seller's specifications, and is safe for use as intended.

SAFETY Act designation means a determination by DHS pursuant to 6 U.S.C. 441(b) and 6 U.S.C. 443(a), as further delineated in 6 CFR 25.4, that a particular Anti-Terrorism Technology constitutes a QATT under the SAFETY Act.

(b) The Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), 6 U.S.C. 441-444, creates certain liability limitations for claims arising out of, relating to, or resulting from an act of terrorism where QATTs have been deployed. It also confers other important benefits. SAFETY Act designation and SAFETY Act certification are designed to support effective technologies aimed at preventing, detecting, identifying, or deterring acts of terrorism, or limiting the harm that such acts might otherwise cause, and which also meet other prescribed criteria. For some classes of technologies, DHS may issue a block designation/certification in order to lessen the burdens for filing for SAFETY Act designation or SAFETY Act certifications by not requiring applicants to provide certain information otherwise required and in order to offer expedited review of any application submitted pursuant to a block designation/certification. Block designations/certifications will be issued only for technologies that rely on established performance standards or defined technical characteristics.

(c) (1) DHS has issued a block designation or block certification for the technology to be acquired under this solicitation.

(2) This block designation or block certification is attached to this solicitation and contains essential information, including-

(i) A detailed description of and specification for the technology covered by the block designation or block certification;

(ii) A listing of those portions of the SAFETY Act application kit that must be completed and submitted by applicants;

(iii) The date of its expiration; and

(iv) Any other terms and conditions.

(3) Offerors should read this block designation or block certification carefully to make sure they comply with its terms if they plan to take advantage of SAFETY Act coverage for their technology(ies).

(d) All determinations by DHS are based on factors set forth in the SAFETY Act and its implementing regulations. A determination by DHS to issue a SAFETY Act designation, or not to issue a SAFETY Act designation for a particular technology as a QATT is not a determination that the technology meets, or fails to meet, the requirements of any solicitation issued by any Federal, State, local or tribal governments. Determinations by DHS with respect to whether to issue a SAFETY Act designation for technologies submitted for DHS review are based on the factors identified in 6 CFR 25.4(b).

(e) Neither SAFETY Act designation nor certification is in any way a requirement of this action. Whether to seek the benefits of the SAFETY Act for a proposed product or service is entirely up to the offeror. Additional information about the SAFETY Act and this block designation/certification may be found at the SAFETY Act website at http://www.SAFETYAct.gov or requests may be mailed to:

Directorate of Science and Technology SAFETY Act/Room 4320 Department of Homeland Security Washington, DC 20528

(f) Proposals in which pricing or any other terms or conditions are offered contingent upon SAFETY Act designation or SAFETY Act certification of the proposed product(s) or service(s) will not be considered for award.

(End of provision)

Alternate I (FEB 2009). As prescribed in 50.206 (b)(2), substitute the following paragraph (f):

(f)(1) Offerors are authorized to submit proposals made contingent upon SAFETY Act designation (or SAFETY Act certification, if a block certification exists) before award. When an offer is made contingent upon SAFETY Act designation or certification, the offeror also may submit an alternate offer without the contingency.

(2) If an offer is submitted contingent upon receipt of SAFETY Act designation (or SAFETY Act certification, if a block certification exists) prior to contract award, then the Government may not award a contract based on such offer unless the offeror demonstrates prior to award that DHS has issued a SAFETY Act designation (or SAFETY Act certification, if a block certification exists) for the offeror's technology.

(3) The Government reserves the right to award the contract based on a noncontingent offer, prior to DHS resolution of the offeror's application for SAFETY Act designation (or SAFETY Act certification, if a block certification exists).

Alternate II (Feb 2009). As prescribed in 50.206 (b)(3), substitute the following paragraph (f):

(f)(1) Offerors are authorized to submit offers presuming that SAFETY Act designation (or SAFETY Act certification, if a block certification exists) will be obtained before or after award.

(2) An offeror is eligible for award only if the offeror-

(i) Files a SAFETY Act designation (or SAFETY Act certification) application, limited to the scope of the applicable block designation (or block certification), within 15 days after submission of the proposal;

(ii) Pursues its SAFETY Act designation (or SAFETY Act certification) application in good faith; and

(iii) Agrees to obtain the amount of insurance DHS requires for issuing the offeror's SAFETY Act designation (or SAFETY Act certification).

(3) If DHS has not issued a SAFETY Act designation (or SAFETY Act certification) to the successful offeror before contract award, the contracting officer will include the clause at 52.250-5 in the resulting contract.

52.250-4 SAFETY Act Pre-qualification Designation Notice.

As prescribed in 50.206(c)(1), insert the following provision:

SAFETY ACT PRE-QUALIFICATION DESIGNATION NOTICE (FEB 2009)

(a) *Definitions*. As used in this provision-

Act of terrorism means any act determined to have met the following requirements or such other requirements as defined and specified by the Secretary of Homeland Security:

(1) Is unlawful.

(2) Causes harm, including financial harm, to a person, property, or entity, in the United States, or in the case of a domestic United States air carrier or a United States-flag vessel (or a vessel based principally in the United States on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), in or outside the United States.

(3) Uses or attempts to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.

Block certification means SAFETY Act certification of a technology class that the Department of Homeland Security (DHS) has determined to be an approved class of approved products for homeland security.

Block designation means SAFETY Act designation of a technology class that the DHS has determined to be a Qualified Anti-Terrorism Technology (QATT).

Pre-qualification designation notice means a notice in a procurement solicitation or other publication by the Government stating that the technology to be procured either affirmatively or presumptively satisfies the technical criteria necessary to be deemed a qualified anti-terrorism technology. A pre-qualification designation notice authorizes offeror(s) to submit streamlined SAFETY Act applications for SAFETY Act designation and receive expedited processing of those applications.

Qualified Anti-Terrorism Technology (QATT) means any technology designed, developed, modified, procured, or sold for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, for which a SAFETY Act designation has been issued. For purposes of defining a QATT, technology means any product, equipment, service (including support services), device, or technology (including information technology) or any combination of the foregoing. Design services, consulting services, engineering services, software development services, software integration services, threat assessments, vulnerability studies, and other analyses relevant to homeland security may be deemed a technology.

SAFETY Act certificationi.e.

SAFETY Act designation means a determination by DHS pursuant to 6 U.S.C. 441(b) and 6 U.S.C. 443(a), as further delineated in 6 CFR 25.4, that a particular Anti-Terrorism Technology constitutes a QATT under the SAFETY Act.

(b) The Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), 6 U.S.C. 441-444, creates certain liability limitations for claims arising out of, relating to, or resulting from an act of terrorism where QATTs have been deployed. It also confers other important benefits. SAFETY Act designation and SAFETY Act certification are designed to support effective technologies aimed at preventing, detecting, identifying, or deterring acts of terrorism, or limiting the harm that such acts might otherwise cause, and which also meet other prescribed criteria.

(c) (1) DHS has issued a SAFETY Act pre-qualification designation notice for the technology to be acquired under this solicitation.

(2) This notice is attached to this solicitation and contains essential information, including-

(i) A detailed description of and specification for the technology covered by the notice;

(ii) A statement that the technology described and specified in the notice satisfies the technical criteria to be deemed a QATT and the offeror's proposed technology either may presumptively or will qualify for the issuance of a designation provided the offeror complies with terms and conditions in the notice and its application is approved;

(iii) The period of time within which DHS will take action upon submission of a SAFETY Act application submitted pursuant to the notice;

(iv) A listing of those portions of the application that must be completed and submitted by selected awardees and the time periods for such submissions;

(v) The date of expiration of the notice; and

(vi) Any other terms and conditions concerning the notice.

(3) Offerors should read this notice carefully to make sure they comply with the terms of the notice if they plan on taking advantage of SAFETY Act coverage for their technologies.

(d) All determinations by DHS are based on factors set forth in the SAFETY Act and its implementing regulations. A determination by DHS to issue a SAFETY Act designation, or not to issue a SAFETY Act designation for a particular Technology as a QATT is not a determination that the Technology meets, or fails to meet, the requirements of any solicitation issued by any Federal, State, local or tribal governments. Determinations by DHS with respect to whether to issue a SAFETY Act designation for Technologies submitted for DHS review are based on the factors identified in 6 CFR 25.4(b).

(e) Neither SAFETY Act designation nor certification is in any way a requirement of this action. Whether to seek the benefits of the SAFETY Act for a proposed product or service is entirely up to the offeror. Additional information about the SAFETY Act may be found at the SAFETY Act website at http://www.SAFETYAct.gov.

(f) Proposals in which pricing or any other terms or conditions are offered contingent upon SAFETY Act designation or certification of the proposed product(s) or service(s) will not be considered for award.

(End of provision)

Alternate I (FEB 2009). As prescribed in 50.206 (c)(2), substitute the following paragraph (f):

(f)(1) Offerors are authorized to submit proposals made contingent upon SAFETY Act designation before award. When an offer is made contingent upon SAFETY Act designation, the offeror also may submit an alternate offer without the contingency.

(2) If an offer is submitted contingent upon receipt of SAFETY Act designation prior to contract award, then the Government may not award a contract based on such offer unless the offeror demonstrates prior to award that DHS has issued a SAFETY Act designation for the offeror's technology.

(3) The Government reserves the right to award the contract based on a noncontingent offer, prior to DHS resolution of the offeror's application for SAFETY Act designation.

Alternate II (FEB 2009). As prescribed in 50.206 (c)(3), substitute the following paragraph (f):

(f)(1) Offerors are authorized to submit proposals presuming SAFETY Act designation before or after award.

(2) An offeror is eligible for award only if the offeror-

(i) Files a SAFETY Act designation application, limited to the scope of the applicable prequalification designation notice, within 15 days after submission of the proposal;

(ii) Pursues its SAFETY Act designation application in good faith; and

(iii) Agrees to obtain the amount of insurance DHS requires for issuing the offeror's SAFETY Act designation.

(3) If DHS has not issued a SAFETY Act designation to the successful offeror before contract award, the contracting officer will include the clause at 52.250-5 in the resulting contract.

52.250-5 SAFETY Act-Equitable Adjustment.

As prescribed in 50.206(d), insert the following clause:

SAFETY ACT-EQUITABLE ADJUSTMENT (DEVIATION DATE)

(a) *Definitions*. As used in this clause—

Act of terrorism means any act determined to have met the following requirements or such other requirements as defined and specified by the Secretary of Homeland Security:

(1) Is unlawful.

(2) Causes harm, including financial harm, to a person, property, or entity, in the United States, or in the case of a domestic United States air carrier or a United States-flag vessel (or a vessel based principally in the United States on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), in or outside the United States.

(3) Uses or attempts to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.

Block certification means SAFETY Act certification of a technology class that the Department of Homeland Security (DHS) has determined to be an approved class of approved products for homeland security.

Block designation means SAFETY Act designation of a technology class that the DHS has determined to be a Qualified Anti-Terrorism Technology (QATT).

Qualified Anti-Terrorism Technology (QATT) means any technology designed, developed, modified, procured, or sold for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, for which a SAFETY Act designation has been issued. For purposes of defining a QATT, technology means any product, equipment, service (including support services), device, or technology (including information technology) or any combination of the foregoing. Design services, consulting services, engineering services, software development services, software integration services, threat assessments, vulnerability studies, and other analyses relevant to homeland security may be deemed a technology.

SAFETY Act certification means a determination by DHS pursuant to 6 U.S.C. 442(d), as further delineated in 6 CFR 25.9, that a QATT for which a SAFETY Act designation has been issued is an approved product for homeland security, *i.e.*, it will perform as intended, conforms to the seller's specifications, and is safe for use as intended.

SAFETY Act designation means a determination by DHS pursuant to 6 U.S.C. 441(b) and 6 U.S.C. 443(a), as further delineated in 6 CFR 25.4, that a particular Anti-Terrorism Technology constitutes a QATT under the SAFETY Act.

(b) Prices for the items covered by the pre-qualification designation notice, block designation, or block certification in the contract were established presuming DHS will issue a SAFETY Act designation (or SAFETY Act certification) for those items.

(c) In order to qualify for an equitable adjustment in accordance with paragraph (d) of this clause the Contractor shall in good faith pursue obtaining—

(1) SAFETY Act designation (or SAFETY Act certification); and

(2) The amount of insurance DHS requires for issuing any SAFETY Act designation (or SAFETY Act certification).

(d) (1) If DHS denies the Contractor’s SAFETY Act designation (or certification) application, the Contractor may submit a request for an equitable adjustment within 30 days of DHS’s notification of denial.

(2) The Contracting Officer will either—

(i) Make an equitable adjustment to the contract price based on evidence of the resulting increase or decrease in the Contractor’s costs and/or an equitable adjustment to other terms and conditions based on lack of SAFETY Act designation (or certification); or

(ii) At the sole option of the Government, terminate this contract for the convenience of the Government in place of an equitable adjustment.

(3) A failure of the parties to agree on the equitable adjustment will be considered to be a dispute in accordance with the "Disputes" clause of this contract.

(4) Unless first terminated, the Contractor shall continue contract performance during establishment of any equitable adjustment.

(End of clause)

52.251 [Reserved]

52.251-1 [Reserved]

(DEVIATION DATE)

52.251-2 [Reserved]

(DEVIATION DATE)

52.252 [Reserved]

52.252-1 Solicitation Provisions Incorporated by Reference.

As prescribed in 52.107(a), insert the following provision:

SOLICITATION PROVISIONS INCORPORATED BY REFERENCE (FEB 1998)

This solicitation incorporates one or more solicitation provisions by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available. The offeror is cautioned that the listed provisions may include blocks that must be completed by the offeror and submitted with its quotation or offer. In lieu of submitting the full text of those provisions, the offeror may identify the provision by paragraph identifier and provide the appropriate information with its quotation or offer. Also, the full text of a solicitation provision may be accessed electronically at this/these address(es):

_____ _____

_____ *[Insert one or more Internet addresses]*

(End of provision)

52.252-2 Clauses Incorporated by Reference.

As prescribed in 52.107(b), insert the following clause:

CLAUSES INCORPORATED BY REFERENCE (FEB 1998)

This contract incorporates one or more clauses by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available. Also, the full text of a clause may be accessed electronically at this/these address(es):

_____ _____

_____ *[Insert one or more Internet addresses]*

(End of clause)

52.252-3 Alterations in Solicitation.

As prescribed in 52.107(c), insert the following provision in solicitations in order to revise or supplement, as necessary, other parts of the solicitation that apply to the solicitation phase only, except for any provision authorized for use with a deviation. Include clear identification of what is being- altered.

ALTERATIONS IN SOLICITATION (APR 1984)

Portions of this solicitation are altered as follows:

_____

_____ _____

(End of clause)

52.252-4 Alterations in Contract.

As prescribed in 52.107(d), insert the following clause in solicitations and contracts in order to revise or supplement, as necessary, other parts of the contract, or parts of the solicitation that apply after contract award, except for any clause authorized for use with a deviation. Include clear identification of what is being altered.

ALTERATIONS IN CONTRACT (APR 1984)

Portions of this contract are altered as follows:

(End of clause)

52.252-5 Authorized Deviations in Provisions.

As prescribed in 52.107(e), insert the following provision in solicitations that include any FAR or supplemental provision with an authorized deviation. Whenever any FAR or supplemental provision is used with an authorized deviation, the contracting officer shall identify it by the same number, title, and date assigned to the provision when it is used without deviation, include regulation name for any supplemental provision, except that the contracting officer shall insert "(DEVIATION)" after the date of the provision.

AUTHORIZED DEVIATIONS IN PROVISIONS (NOV 2020)

(a) The use in this solicitation of any Federal Acquisition Regulation (48 CFR Chapter 1) provision with an authorized deviation is indicated by the addition of "(DEVIATION)" after the date of the provision.

(b) The use in this solicitation of any _____ *[insert regulation name]*(48 CFR Chapter_____) provision with an authorized deviation is indicated by the addition of "(DEVIATION)" after the name of the regulation.

(End of provision)

52.252-6 Authorized Deviations in Clauses.

As prescribed in 52.107(f), insert the following clause in solicitations and contracts that include any FAR or supplemental clause with an authorized deviation. Whenever any FAR or supplemental clause is used with an authorized deviation, the contracting officer shall identify it by the same number, title, and date assigned to the clause when it is used without deviation, include regulation name for any supplemental clause, except that the contracting officer shall insert "(DEVIATION)" after the date of the clause.

AUTHORIZED DEVIATIONS IN CLAUSES (NOV 2020)

(a) The use in this solicitation or contract of any Federal Acquisition Regulation (48 CFR Chapter 1) clause with an authorized deviation is indicated by the addition of "(DEVIATION)" after the date of the clause.

(b) The use in this solicitation or contract of any _____ *[insert regulation name]* (48 CFR _____) clause with an authorized deviation is indicated by the addition of "(DEVIATION)" after the name of the regulation.

(End of clause)

52.253 [Reserved]

52.253-1 Computer Generated Forms.

As prescribed in 53.111 , insert the following clause:

COMPUTER GENERATED FORMS (DEVIATION DATE)

(a) Any data required to be submitted on a Standard or Optional Form prescribed by the Federal Acquisition Regulation (FAR) may be submitted on a computer generated version of the form, *provided* there is no change to the name, content, or sequence of the data elements on the form, and provided the form carries the Standard or Optional Form number and edition date.

(b) Unless prohibited by agency regulations, any data required to be submitted on an agency unique form prescribed by an agency supplement to the FAR may be submitted on a computer generated version of the form provided there is no change to the name, content, or sequence of the data elements on the form and provided the form carries the agency form number and edition date.

(c) If the Contractor submits a computer generated version of a form that is different than the required form, then the rights and obligations of the parties will be determined based on the content of the required form.

(End of clause)

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Subpart 52.3 - Provision and Clause Matrix

Revolutionary FAR Overhaul (RFO) updates coming soon.

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PART 53 - FORMS

Sec.

53.001 Definition.

Subpart 53.1 - General

53.101 Policy.
53.102 [Reserved]
53.103 [Reserved]
53.104 [Reserved]
53.105 Computer generation.
53.106 [Reserved]
53.107 [Reserved]
53.108 Recommendations concerning forms.
53.109 [Reserved]
53.110 [Reserved]
53.111 Contract clause.

Subpart 53.2 - [Reserved]

Subpart 53.3 - [Reserved]

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53.001 Definition.

As used in this part—

Exception means an approved departure from the established design, content, or conditions for use of any standard form.

Subpart 53.1 - General

53.101 Policy.

(a) *Requirements*. The requirements for using the forms are contained in parts 1 through 52, where the subject matter applicable to each form is addressed.

(b) *Forms list*. A list of the standard forms (SF), optional forms (OF), and agency forms specified by the FAR for use in acquisitions is available at https://acquisition.gov/FARforms. The list identifies the forms' current edition location, FAR part requirement, and prescribing agency.

(c) *Continuation sheets*. SFs prescribed in the FAR may be continued on plain paper of similar specification, or specially constructed continuation sheets (e.g., OF 336). Continuation sheets must include both the reference number of the document being continued and the serial page number in the upper right hand corner.

(d) *Exceptions*. Agencies must obtain an exception from the form's prescribing agency. For SFs prescribed by the FAR, agencies must obtain an exception from the FAR Council.

53.102 [Reserved]

53.103 [Reserved]

53.104 [Reserved]

53.105 Computer generation.

(a) The forms prescribed in the FAR may be computer generated without obtaining an exception (see 53.101(d)), provided that—

(1) There is no change to the name, content, or sequence of the data elements, and the form carries its number and edition date; or

(2) The form is in an electronic format covered by the American National Standards Institute (ANSI) X12 Standards published by the Accredited Standards Committee X12 on Electronic Data Interchange or a format that can be translated into one of those standards.

53.106 [Reserved]

53.107 [Reserved]

53.108 Recommendations concerning forms.

(a) *Public*. FAR users may recommend new forms or revisions, elimination, or consolidation of existing forms identified on the forms list (see 53.101(b)). These recommendations should be submitted to the FAR Secretariat.

(b) *Government*. Recommendations from within an executive agency must be submitted to the cognizant council in accordance with agency procedures.

53.109 [Reserved]

53.110 [Reserved]

53.111 Contract clause.

Insert the clause at 52.253-1, Computer Generated Forms, in solicitations and contracts that require the contractor to submit data on SFs or OFs; and, unless prohibited by agency regulations, forms prescribed by agency supplements.

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Subpart 53.2 - [Reserved]

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Subpart 53.3 - [Reserved]

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FAR Correction(s)

Please complete this form to notify the Regulatory Secretariat of errors, omissions, or inconsistencies in the text of the FAR or FACs and submit via mail or facsimile to:

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